A

DIGESTED INDEX

TO THE

REPORTS OF CASES

DETERMINED IN

The High Court of Chancery, and other Courts of Equity,

IN

ENGLAND AND IRELAND.

FROM

1808 TO 1822;

AND TO THE

REPORTS OF COX, EDEN, AND PHILLIMORE:

WITH A

DIGEST OF THE REPORTED CASES

UPON

EQUITY PRACTICE,

FROM

THE EARLIEST PRINTED REPORTS TO THE PRESENT TIME.



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OF LINCOLN'S INN, BARRISTER AT LAW.

London:

PRINTED FOR S. SWEET, 3, CHANCERY-LANE; R. PHENEY, INNER TEMPLE-LANE; A. MAXWELL, 29, AND R. STEVENS AND SONS, 39, BELL-YARD, LINCOLN'S-INN; AND R. MILLIKEN, DUBLIN.

1823.

W. M'Dowall. Printer, 4, Pemberton-row,
Gough-square.

ADVERTISEMENT.

THE following compilation is intended as an Index to all the Equity Reports which have been published since those comprehended in Mr. Belt's Index to Vesey, and the second edition of Mr. Bridgman's Analytical Digest. The decisions of the Ecclesiastical Courts, being upon subjects often discussed in other Equity Courts, are introduced with the hope of rendering the work more complete. Under the head Practice are included all the published cases of authority upon that subject. from the earliest period; which, it is presumed, will add to the utility of the present publication; more especially as this portion of the reports has been partially, and in some cases altogether, omitted in all the Equity Digests hitherto published.

The arrangements of the principal heads are those which have been adopted in the text books most in use, with such alterations as the nature of the reported cases seemed to require. In the portion of the work relating to Practice, the cases which have been overruled, are omitted; but where the decisions are contradictory, or the practice seems unsettled, all are given in chronological order. The extension of this head was not determined upon until considerable progress had been made in the other parts of the work; but every inconvenience on that account will, it is hoped, be remedied by the frequent references to the other heads.

J. F.

LINCOLN'S INN,

Trinity Term, [illegible]

A

TABLE OF TITLES AND REFERENCES.

The principal Heads or Titles are in large Capitals, and the References in Roman character.

B.

C.

D.

E.

EXPLANATION OF ABBREVIATIONS.

REPORTS.

Abbreviation	Report
Amb.	Ambler.
Anst.	Anstruther.
Atk.	Atkyns.
B. & B.	Ball & Beatty.
Barn.	Barnardiston's Reports in Equity.
Br. C. C.	Brown's Chancery Cases.
Br. P. C.	Brown's Parliamentary Cases (Toml. Ed)
Buck,	Buck's Cases in Bankruptcy.
Bun.	Bunbury.
Cary,	Cary's Reports.
C. C.	Cases in Chancery.
C. R.	Reports in Chancery.
Com.	Comyns.
Coop.	Cooper.
Cox,	Cox's Cases in Chancery.
Dan.	Daniel's Exchequer Reports.
Dick.	Dickens.
Doug.	Douglas.
Dow,	Dow's Reports.
Eden,	Eden's Cases in Chancery.
Eq. Ca. Ab.	Equity Cases Abridged.
For.	Forrester—Cases Temp. Talbot.
For. Ex.	Forrest's Exchequer Reports.
Free.	Freeman's Reports.
G. & J.	Glynn & Jamieson's Cases in Bankruptcy.
Gilb. E. R.	Gilbert's Reports in Equity.
Hard.	Hardres's Reports.
H. Blackst.	Henry Blackstone.
J. & W.	Jacob & Walker.
Kel.	Kelynge.
Mad.	Maddock.
Mer.	Merivale.
Mod.	Modern Reports.
Mos.	Mosley.
Nel.	Nelson.—Reports in Chancery, vol. 4.
P. W.	Peere Williams
Peake,	Peake's Nisi Prius Reports.
Phil.	Phillimore's Reports.
Pre. Ch.	Precedents in Chancery.
Price,	Price's Exchequer Reports.
Rep. T. Finch.	Reports in Chancery, Tempore Finch.
Ridg. T. Hardw.	Ridgeway's Reports, Tempore Hardwicke.
Rose,	Rose's Cases in Bankruptcy.
S. & L.	Schoales & Lefroy.
Salk.	Salkeld.
Sel. C. C.	Select Cases in Chancery.
Show. P. C.	Shower's Cases in Parliament.
Str.	Strange.
Swan.	Swanston.
Toth.	Tothill.
V. & B.	Vesey & Beames.

Vent.	Ventris.
Vern.	Vernon,
Ves.	Vesey.
Ves. J.	Vesey, jun.
Wigh.	Wightwick.

TEXT BOOKS.

Fow. Ex. Prac. ...	Fowler's Practice of the Exchequer.
Hinde...........	Hinde's Chancery Practice.
Mitf.	Mitford on Pleading, 3d Ed.
Prac. Reg.	Practical Register, Wyatt's Ed.
Turn. Prac.	Turner's Chancery Practice.
Vin. Ab.	Viner's Abridgment.

ERRATA.

Page	*Col.*	*Line*		
32	2	11	from the top,	*for* such submission, *r.* no such submission.
65	2	15	————	*for* cannot, *r.* can only,
84	2	18	————	*for* mortgagee, *r.* mortgage.
—	2	21	————	*for* on a bailable, *r.* an available,
85	2	12	from the bottom,	*for* accounts, *r.* estates.
—	2	6	————	*after* "partners," *add* "in discharge of a balance upon the partnership account in their favour."
88	2	4	from the top,	*for* instance, *r.* existence.
89	1	16	from the bottom,	*for* from, *r.* by.
91	1	27	————	*for* number, *r.* member.
169	2	11	————	*for* instruments, *r.* interests.
194	1	23	————	*for* 1 V. & B. 174, *r.* 1 V. & B. 274.

198, in the head line, *for* ESTATE, *r.* EVIDENCE.

209	2	24	from the top,	*for* arrears *r.* arrear.

234, in the head line, *for* JURISDICTION, *r.* INJUNCTION.

299	2	7	from the top,	transfer 1 V. & B. 114 to *ex parte* Hall, the next article.
302	1	7	from the bottom,	*before the word,* "that," *insert* "covenanted with the son."
*388	1	9	————	*for* giving time, *r.* a given time.
392	2	3	from the top,	*for* 358 ante, *r.* 336 ante.
*393	2	11	from the bottom,	*for* Div. XLI, *r.* Div. XL.
*396	1	18	from the top,	*for* the cause, *r.* the body.
*403	1	16	————	*for* except *r.* and.
*416	1	20	————	*for* not, *r.* no.
*417	2	14	from the bottom,	*for* pronounce, *r.* presume.

AN

ANALYTICAL

DIGESTED INDEX

TO THE

EQUITY REPORTS.



ACCOUNT.

I. ACCOUNT, IN WHAT CASES IT WILL OR WILL NOT LIE.

1. Under an agreement to carry on an unlawful game, and a contribution for that purpose, a bill for an account will lie at the suit of the party so contributing; and it being doubtful whether such agreement had been entered into, an issue was directed. *Nash* v. *Ash*, 1 Eden. 378.

2. An account was decreed against a confidential agent, in possession of estates since 1780, without rendering any account to his principal, who resided in Ireland; and inquiries were directed into the circumstances of a lease granted under his direction, and in which he took an interest, and also a reversionary lease to himself. Lady *Ormond* v. *Hutchinson*, 16 Ves. 94.

3. It is not such matter of account between the parties as will operate to give a defendant at law an equity to restrain proceedings for the balance of a previous account, stated and settled, that the plaintiff at law was, at the time of such settlement, and had subsequently become indebted to the plaintiff in equity for business done as his agent. *Hirst* v. *Peirse*, 4 Price, 339.

4. Charges for business done, as attorney or agent, will not raise an account, so as to give such attorney or agent an equity against the holder of his promissory note, as money mutually due on either side will, such demands being rather matter of set off. *Ibid.*

5. Bill lies for an account under a covenant, upon sale of goodwill, not to carry on the same trade, but the usual course is a bill of discovery for the purpose of an action. *Scott* v. *Mackintosh*, 1 V. and B. 503.

6. Under a bill to put a term out of the way, the court, in some cases, will give an account of the past rents. *Ex parte Wilson*, 2 V. and B. 253.

7. Bill for an account will lie by the principal against an agent employed to sell goods for him. *Mackenzie* v. *Johnston*, 4 Mad. 373.

8. An account cannot be decreed against a parish. *Ex parte Fowlser*, 1 Jacob and Walker, 70.

9. Where equitable waste has been committed, which never could have been authorized, the Court has jurisdiction to make the representatives of the party committing such waste accountable; and therefore a demurrer to a bill against the representatives of deceased tenant for life, dispunishable of waste, for an account

of equitable waste committed by him, and for relief, was overruled. Marquis *Lansdowne* v. Marchioness Dowager *Lansdowne*, 1 Mad. 116.

10. But an account against such representatives of dilapidations permitted by him in and about the mansion house, was refused. Marquis *Lansdowne* v. Marchioness *Lansdowne*. 1 Jacob & Walker, 522.

II. How taken.

1. Where an accounting party confounds property for which he is accountable with his own, he shall be charged with the whole, excep. what he can prove to be his own. *Lupton* v. *White*, 15 Ves. 432.

2. Where such confusion of property was in breach of the terms upon which the court dissolved an injunction, the inquiry was directed with costs. *Ibid.*

3. The application of indefinite payments, by the rules of the civil law, giving the first option to the debtor, the second to the creditor, must be expressed at the time of payment; but if there is no express declaration by either, the law presumes an intention in the favour of the debtor, as thereby discharging the most burthensome debt, or if the debts are equal in their nature, then applying the payments according to priority. *Devaynes* v. *Noble*, Clayton's Case, 1 Mer. 605.

4. It is the first duty of an accounting party, whether he be an agent, receiver, trustee, or executor, to be constantly ready with his accounts; and neglect in this is a ground for charging him with interest. *Pearse* v. *Green*, 1 Jacob and Walker, 135.

5. A creditor in possession of his debtor's estate, under a power of attorney, taking an assignment of a mortgage, must account, as agent, and will be allowed receiver's fees so long as the trust imposed by the power requires him to be in possession; after that he must account as mortgagee in possession. Lord *Trimleston* v. *Hamill*, 1 B. & B. 377.

6. Accounts by agent are rendered regularly. *Ibid*, 383.

7. Bankers' accounts with their customers are taken by charging interest on their advances in a separate column, up to the day of a lodgment made, deducting the lodgment from the principal, and so on till the end of the year, when a rest is made; the balance of principal and interest constituting the first item in the next account. Lord *Clancarty* v. *Latouche*, 1 B. & B. 420.

8. And where there had been long acquiescence in the accounts thus furnished, the annual balances were directed to carry interest. *Ibid.*

9. Acquiescence alone in accounts furnished, does not amount to a settlement. *Ibid*, 428.

10. On hearing on report and merits, the court may decide how the account prayed by the bill ought to be taken. *Skirrett* v. *Athy*, 1 B. & B. 433.

11. When a defendant or creditor contests the mode of taking accounts, and fails, knowing a balance to be against him, he is liable to pay costs. *Ibid*, 435.

12. When an account furnished by a party, before any suit instituted, is produced to charge him with the items on the debit side, he is entitled to resort to the credit side in support o his discharge. *Boardman* v. *Jackson*, 2 B. & B. 382.

13. A party charging himself in a schedule to his answer, cannot discharge himself by another schedule stating his disbursements. *Boardman* v. *Jackson*, 2 B. and B. 385.

14. Agent and attorney bound to keep regular accounts. *Morgan* v. *Lewes*, 4 Dow, 52.

III. Vouchers and evidence.

1. Where, from the default of the accounting party having notice of an adverse claim by the proprietor, a strict account cannot be given, the court will refuse a prospective direction to the master, to admit books not legal evidence, but will give the parties liberty to apply upon any question of evidence. *Lupton* v. *White*, 15 Ves. 432.

2. Attorney and agent advances money to his client and principal at different times during five years, taking securities and getting accounts settled: held, upon opening the accounts, that the securities should not be admitted as evidence of the demands, but that the attorney should only be allowed in account the money actually advanced, and proved to be so by other evidence than the securities and settlement of accounts. *Morgan* v. *Lewes*, 4 Dow, 29.

2. Where settled accounts, which remained long unchallenged, were opened, the

oath of party was admitted as to the existence and import of vouchers delivered up or lost. *Morgan* v. *Lewes*,
4 Dow, 38, 45.

3. On an inquiry into very remote transactions, accounts kept by a deceased party at the time, were directed to be taken as *prima facie* evidence, throwing on the other side the onus of impeaching them. *Chalmer* v. *Bradley*,
1 Jacob and Walker, 65.

IV. OPENING OF.

1. A party seeking to open an account, must point out specific errors by his bill, otherwise he will not be permitted to prove them at the hearing. *Taylor* v. *Hayling*, 1 Cox, 435.

2. Account of monies, advanced by an attorney and agent to his client and principal, opened after settlement and five years' acquiescence. *Morgan* v. *Lewes*,
4 Dow, 39.

ACCOUNTS, PUBLIC.

1. Where, in consequence of doubts as to the amount of salary and other terms, on which a public officer of merit continued to perform satisfactorily the duties of the service to which he had been appointed; the public board or office acting in the direction and control of the particular department of Government under whom he was employed, required him, after his accounts were passed, to refund money considered to be over-paid to him, which had been charged by him according to an account framed on what he had long before communicated to the Board, as his understanding of the terms on which he was to be employed, and never contradicted by them; and, on his refusal to re-open the accounts, the Attorney General filed an information against him in this Court, for the purpose of compelling him to do so. The Court refused, the question proving to be *quantum meruit*—or *utrum horum*—to make any such decree; holding that it had no power to fix the value of the services of a public officer, or to compel him to make an election of one of two modes of remuneration. *Attorney General* v. *Hoseason*,
6 Price, 312.

2. But the mere passing of accounts of a public officer, by the auditors of the department under which he has been employed, does not preclude the Court (in a proper case) from decreeing an account in respect of allowances contrary to reason and equity, and not brought to the notice of the Board, when his accounts were passed. Thus, where the public functionary had received *gratuities* and *presents* from foreign agents, on the amount of their commissions, equal to one *per cent.*, he was ordered to refund the whole, notwithstanding that practice was also proved to be the usage of the trade; the custom being contrary to reason and equity, and subservient to fraud; and the fact not having been brought before the Board when the accounts were passed. *Attorney General* v. *Lindegren*,
6 Price, 287.

3. Where the Commissioners for auditing the public accounts have, in the investigation of accounts rendered by a public functionary, disallowed some of the accountant's charges, whereby he seeks to discharge himself of monies received and surcharged him in other respects, this Court has jurisdiction so far as to examine and correct the principle on which that Board has proceeded in such investigation; and in a case of just complaint in that respect, so satisfactorily made out as to authorize their interference to require the auditors to review their allowances, the mode of proceeding is by bill, to be filed against the Attorney General. *Craufurd* v. *the Attorney General*,
7 Price, 1.

4. An accountant, seeking relief in the Court of Exchequer, from the determination of the Board of Commissioners for auditing the public accounts, should proceed by bill, to be filed against the Attorney General. The Court will not interfere on motion upon a petition. *Ex parte Colebrooke*, 7 Price, 87.
Colebrooke, Bart. v. *the Attorney General*,
7 Price, 146.

AGREEMENT.

I. SUBJECT OF.

1. A contract with the proprietors of a theatre, not to write dramatic pieces for any other theatre, or a similar restraint of a performer, is legal, and does not resemble a covenant restraining trade generally. *Morris* v. *Colman*, 18 Ves. 437.

2. Agreements for contribution to the expenses of litigation without a common interest, though not favored, ought not to be treated harshly. *Wild* v. *Hobson*, 2 V. & B. 112.

3. Whether an agreement for the sale of the business of an attorney is in its nature valid? *Quære*. *Bozon* v. *Farlow*, 1 Mer. 459.

4. An agreement between the plaintiff, a citizen of the United States, and the defendant, also a citizen of the United States, and an English subject, for the exportation of goods from England to America, on their joint account in time of war, "provided a peace was not likely to take place between the respective Governments at the time of shipping the goods." On a bill for an account as a set-off against a separate demand, for which the defendant had brought an action against the plaintiff, an injunction which had been obtained on the filing of the bill was dissolved, on the ground of its being an illegal contract, although the goods shipped in pursuance of the contract did not sail till after a peace was made. And although the defendant had not relied on the illegality of the contract as a ground of defence, the Court itself setting up the objection. *Evans* v. *Richardson*, 3 Mer. 469.

5. Expectancy of an heir, either presumptive or apparent, the fee simple being in the ancestor, is not an interest or possibility capable of being made the subject of assignment or contract. *Carleton* v. *Leighton*, 3 Mer. 667.

6. A secret agreement with the proprietors of a public work for compensation, in order to prevent their opposition to a bill in Parliament, to establish a similar public work, is invalid, it being a fraud upon the Legislature, and contrary to principles of public policy. *Vauxhall Bridge Company* v. *Earl Spencer*, 2 Mad. 356.

7. A title to freight may be acquired by assignment, and such assignment is not within the registry acts, but an agreement by three persons to purchase a ship to be registered in the names of two only, and that the three shall share the profits, is illegal, on the ground of public policy, it being a contrivance to escape the provisions of the registry acts. *Battersby* v. *Smyth*, 3 Mad. 110.

8. An equitable interest under a contract of purchase may be the subject of sale. The subcontract converts the original vendee into a trustee of his equitable interest for his vendee, who acquires the same rights which the original vendee had to the benefits to be derived under the primary contract. Such subcontracts are not within the doctrine of champerty and maintenance. *Wood* v. *Griffith*, 1 Swan 56. 1 Wil. 45.

9. The Court will not admit the distinction between *malum prohibitum* and *malum in se*, when applied to a contract to do a thing prohibited by the laws. *Hanington* v. *Du Chastel*, 2 Swan 161 (*n*).

II. CONSTRUCTION OF.

1. An agreement for a lease for seven, fourteen, or twenty-one years gives the option to the lessee alone. *Price* v. *Dyer*, 17 Ves. 363.

2. Construction of a contract that a reference of the expenses was confined to the expense of the conveyance, but the evidence of the attorney was admitted for the defendant to prove the intention of both parties, according to verbal instructions, that the plaintiff, the purchaser, should also pay the expense of making out the defendant's title. *Ramsbottom* v. *Gosden*, 1 V. & B. 165.

3. There are decisions giving different constructions to the words, "be the same more or less," added to a statement of the quantity of an estate; sometimes extending only to cover a small difference, and sometimes leaving the quantity altogether uncertain. *Winch* v. *Winchester*. 1 V. & B. 376.

4. Words in an agreement will be construed so as to have some meaning, rather than be rejected: therefore, where the vendor proposed a price, "clear of all expenses," it was construed, that the purchaser should bear the expense of making out the title; the law imposing upon him the expense of the conveyance. *Stratford* v. *Bosworth*, 2 V. & B. 341.

5. The words "ground rents," in a printed particular of sale, must be construed according to the general acceptation. *Stewart* v. *Allliston*, 1 Mer. 26.

6. Agreement on dissolution of partnership, that the continuing partner should, in consideration of an assignment to him of the partnership property, including a lease of the premises on which the business was carried on, secure to the retiring partner the payment of an annuity, by bond, conditioned to be void on payment of the annuity, on his using his endeavours to get a renewal of the lease; or "in case he should at any time after the expiration of the then existing lease, be dispossessed of, and compelled and obliged to quit the premises, without any collusion, contrivance, consent, act, or default of his own:" the continuing partner obtains a renewal of the lease, and afterwards becomes bankrupt, and the renewed lease passes under the assignment of his estate. This is not such an eviction or dispossession as was contemplated by the agreement, in the event of which the annuity was to cease. *Holyland* v. *De Mendez*, 3 Mer. 184.

7. On the question of executing an agreement, hardship cannot be adverted to, unless it amounts to a degree of inconvenience and absurdity so great, as to afford judicial proof that such could not be the meaning of the parties. *Prebble* v. *Boghurst*, 1 Swanston, 329. 1 Wil. 177.

8. The motives inducing a party to enter into a contract, are not to be considered unless expressed in the contract itself. *Boehm* v. *Wood*, 1 Jacob & Walker, 422.

9. The plain meaning of the words "without reserve," in a particular of sale, is, that no person will be employed to bid on behalf of the vendor, for the purpose of keeping up the price, and where in such case a puffer was employed for the vendor, and actually bid: held the vendor was not entitled to a specific performance against the purchaser. *Meadows* v. *Tanner*, 5 Mad. 34.

10. Equity, in construing the effect of a contract, never departs from what appears on the face of the instrument to be the intention of the parties, unless contrary to some principle of law. *Pentland* v. *Stokes*, 2 B. & B. 73.

11. "Reasonable time," in mercantile transactions, not applicable to cases of contracts, respecting real property. *Jessop* v. *King*, 2 B. & B. 95.

III. WHAT SHALL BE A SIGNATURE WITHIN THE STATUTE OF FRAUDS.

1. The mere circumstance of the name of the party being written by himself, in the body of a memorandum of agreement for a lease, will not constitute a signature within the meaning of the Statute of Frauds. *Stokes* v. *Moore*, 1 Cox, 219.

2. A specific performance of a contract concerning land, will not be decreed on the signature of an agent without authority, and the question as to the agent's authority, when denied by the answer and by his deposition, must be determined by an issue. *Howard* v. *Braithwaite*, 1 V. & B. 202.

3. Whether a note written in third person, "Mr. T. proposes," &c. (making an offer to purchase) being accepted, amounts to a contract in writing signed within the Statute of Frauds.—*Quære*. *Morison* v. *Turnour*, 18 Ves. 175.

4. An agreement to purchase land, &c. by letter, is sufficiently signed within the statute. *Stratford* v. *Bosworth*, 2 V. & B. 341.

5. An agreement evidenced by a memorandum in writing, entered in the book of an authorized agent, signed by the agent's clerk, and afterwards approved of by the agent, is not an agreement signed according to the statute. *Blore* v. *Sutton*, 3 Mer. 237.

6. An agreement to sell land within the Statute of Frauds (s. 4.) by a letter, signed by the vendor, connected with his proposal by a note in the third person, specifying the price. *Western* v. *Russell*, 3 V. & B. 187.

7. An agreement to "the terms first proposed," is a binding agreement, where the correspondence clearly contained the terms; and although the subject matter was left to be ascertained by extrinsic evidence, which is admissible for that purpose, though not to vary the terms; and the vendee's name at the beginning of a letter written in the third person, is a sufficient signature within the statute. *Ogilvie* v. *Foljambe*, 3 Mer. 53.

8. Provided the name be inserted in an instrument in such a manner as to have the effect of authenticating it, the requisition of the statute, with respect to signature, is complied with, and it does not matter in what part of the instrument the name is found. *Ibid*, 62.

9. Specific performance decreed against the purchaser of an estate by an agent, upon the signature of the agent's name by the auctioneer, who is an agent lawfully authorized for that purpose, within

the Statute of Frauds. *Kemeys* v. *Proctor*, 3V&B 57. 1 Jacob &Walker, 350.

10. There is no provision in the Statute of Frauds to prevent the specific execution of an agreement signed only by one of the parties. Lord *Ormond* v. *Anderson*, 2 B. & B. 370.

11. In equity it is the constant practice to enforce contracts signed only by one party. Lord *Ormond* v. *Anderson*. 2 B. & B. 371.

IV. PAROL AGREEMENTS WITHOUT THE STATUTE OF FRAUDS.

1. In case of a parol agreement, that upon plaintiff's procuring a release of a right from a stranger, defendant would convey; and the plaintiff procures the release by paying a valuable consideration, this is not sufficient to entitle the plaintiff to a decree for a specific performance, and the Statute of Frauds may, nevertheless, be pleaded to a suit seeking to enforce such an agreement. *O'Reilly* v. *Thompson*, 2 Cox, 271.

2. Parol agreement for a lease of lands, the rent to be ascertained by arbitration, possession taken by the purchaser, though without express assent of the vendor, yet acquiesced in for eight years, and expenditure permitted. A specific performance of the agreement was decreed according to plaintiff's evidence, against the assertion of a right of resumption by the answer, and one witness, not proving that it had been admitted. *Gregory* v. *Mighell*. 18 Ves. 328.

3. Whether payment of part of the purchase-money is part performance of a parol agreement, taking it out of the Statute of Frauds.—*Quære*, *Aveling* v. *Knipe*, 19 Ves. 446.

4. A., tenant for life, with a power to lease by deed duly executed under her hand and seal, reserving the best yearly rent. Plaintiff enters into possession, and expends money in building, under an agreement for a lease, evidenced only by the memorandum in writing, entered in the book of A.'s authorized agent, and signed by the agent's clerk only, but which had been approved of by the agent according to the usual course of business. A. dies, and a bill for specific performance is brought against the remainder-man. This is not a sufficient agreement in writing, not being signed by an agent properly authorized, and the memorandum not containing some of the material terms of a lease, which were left to be made out by parol evidence; neither can it be established as a parol agreement in part performed, both as it was not the agreement of the principal, nor of the authorized agent, and also because the remainder-man has been guilty of no fraud upon which to charge him with the consequences of the contract. Also the plaintiff is not entitled to compensation from A.'s representatives for money laid out by him on the faith of the alleged agreement. Such compensation being in the nature of damages, and the fault lying in the plaintiff's own negligence. *Blore* v. *Sutton*, 3 Mer. 237.

5. Specific performance of a parol agreement to grant a lease decreed on the testimony of one witness, confirmed by circumstances against the denial in the answer after part-performance by delivery of possession. *Morphett* v. *Jones*, 1 Wil. 100. 1 Swan. 172.

6. A parol agreement, although brought within the principle upon which a Court of Equity would decree a specific performance upon acts of part performance, is not an agreement within the intent of the Stat. 49 Geo. 3, c. 121. s. 19. *Ex parte Sutton*, 2 Rose, 86.

7. In an agreement for a lease for lives the lives must be named, or it must be settled who is afterwards to name them; and lives must be named which were in existence at the time of the agreement; and if without any previous stipulation the tenant names the lives, and the landlord approves, the declaration of approbation, if it operates any thing, is a new agreement, to which, if parol, no antecedent improvements can give effect. *Wheeler* v. *D'Esterre*, 2 Dow, 359.

8. Possession taken, referrible only to a contract of sale, is part performance; and parol evidence may be given of the terms of it. *Savage* v. *Carroll*, 1 B. & B. 282.

9. On a bill for a specific execution, relying on part performance, the agreement must be proved as stated. *Ibid*, 551.

10. Parol agreement proved by one witness corroborated by others, and not denied by the answer, enforced upon the grounds of part performance. *Toole* v. *Medlicott*, 1 B. & B. 393.

11. An agreement in writing for a lease not signed by the party sought to be charged, specifically executed on the

ground of part performance, viz. possession taken and rent paid according to the terms of the agreement. *Kine* v. *Balfe*, 2 B. & B. 343.

12. Parol agreements in part performed, not resting on the agreement only, are in equity excepted out of the statute. *Ibid*, 347.

13. If possession be distinctly referrible to the contract alleged in the pleadings, it is considered as part-performance, *Ibid*, 348.

14. The court of late has inclined against the specific performance of a parol agreement on the admission of the contract by the answer. *Ex parte Whitbread*, 19 Ves. 212. 1 Rose, 300.

V. Waver, or abandonment of.

1. Time as of the essence of a contract waved by a protracted treaty. *Wood* v. *Bernal*, 19 Ves. 220.

2. A party may by his acts and conduct wave a right which he possesses, and this may be done without its being reduced to the shape of a specific contract. *Ogilvie* v. *Foljambe*, 3 Mer. 65.

3. The terms of an agreement may be such as to make time the essence of the contract, but this benefit may be waved by the subsequent conduct of the parties. *Levy* v. *Lindo*, 3 Mer. 81. *Hudson* v. *Bartram*, 3 Mad. 440.

4. A parol waver of a written contract, amounting to a complete abandonment of the contract, and clearly proved, or even parol variations so acted upon that the original agreement could no longer be enforced without injury to one party, would bar a specific performance; but variations verbally agreed upon are not sufficient to prevent the execution of a written agreement, the situation of the parties in all other respects remaining the same.

In this case the variations were all for the advantage of the defendant by gratuitous covenants of the plaintiff. *Price* v. *Dyer*, 17 Ves. 356.

5. The refusal of the tenant, the vendee, to execute a lease as satisfied with, and not repudiating the agreement, is no ground for refusing him subsequently a specific performance. *Gourlay* v. *Duke of Somerset*. 1 V. & P. 68.

6. Bill by vendor for a specific performance of an agreement against the vendee and an assignee of the contract. The plaintiff having delivered the abstract of title to the assignee, received instalments of the purchase-money from him, admitted him into possession, and offering by the bill to convey to him only, was considered as having accepted him as the purchaser, and the bill, as against the original vendee, was dismissed without costs. *Holden* v. *Hayn*. 1 Mer. 47.

Whether if the bill had been filed against the vendee only.—*Quære*. *Ibid*.

6. On a bill by vendor for specific performance, with an allowance to the defendant by way of compensation for a part of the estate to which the plaintiff is unable to make a good title; the defendant having taken possession under the agreement, one of the terms of which was, that immediate possession should be given; and, in the course of disputes, which arose subsequently, as to the title to this part of the estate, having been turned out of the possession so taken: held, that the vendor in so turning him out of possession, had abandoned his right to a specific performance; and the bill was dismissed accordingly; without going into the question as to the materiality of the defective part. *Knatchbull* v. *Grueber*. 1 Mad. 153. 3 Mer. 124.

7. A purchaser cannot abandon an agreement on the ground of the vendor not having perfected the title within a reasonable time, where the former being in possession had been aware, from an early period of the treaty, that there was some objection to the abstract, but had nevertheless continued to negociate, and then suddenly signified his intention to abandon. *Warde* v. *Jeffery*. 4 Price, 294.

8. After bill, answer, and replication, no further steps taken in the cause for a period of more than twenty years: this is not of itself a sufficient reason for refusing a specific performance, where there has been acquiescence on both sides. *Cane* v. Lord *Allen*. 2 Dow, 289.

9. The mere length of time during which a suit has been depending, does not operate as a bar to specific performance. *Ibid*, 298.

10. Bill in 1805 for performance of an agreement made in 1761 for sale of lands, and decreed accordingly below; but the decree reversed in *Dom. Proc.* defendant having been left in possession as owner for a long time, and plaintiff having done acts inconsistent with the notion of his being owner himself, which was considered as amounting to a waver Earl of *Rosse* v. *Sterling*, 4 Dow. 442.

VI. JURISDICTION AS TO SPECIFIC PERFORMANCE.

1. A Court of Equity will exercise its discretion in cases of suits for specific performance, by dismissing them, and with costs; although the same circumstances would not induce the court to make a decree to cancel the agreement on a bill filed for that purpose. *Davis* v. *Symonds*, 1 Cox, 402.

2. There are many cases where the Court of Chancery will not disturb an agreement executed, though it would not have carried it into execution; and where refusing to execute an agreement, it will leave the party at law, or order the agreement to be delivered up. *Willan* v. *Willan*, 16 Ves. 83.

3. Equitable discretion to lend or refuse aid, to execute a contract for a purchase is not arbitrary. *Buckle* v. *Mitchell*, 18 Ves. 111.

4. A bill for a specific performance of an agreement, is an application to the discretion or rather to the extraordinary jurisdiction of the court; which cannot be exercised in favor of persons who have slept on their rights, or have acquiesced for a long time in a title and possession adverse to their title. *Moore* v. *Blake*, 1 B. & B. 69.

5. To obtain a specific performance, the case should be clear of doubt. *Flood* v. *Finlay*, 2 B. & B. 16.

6. The discretion of the court in granting or refusing a specific execution, is regulated by established principles. *Revell* v. *Hussey*, 2 B. & B. 288.

7. Where the equitable title is complete, a legal conveyance will be decreed, though the property may have been much enhanced or depreciated in value. *Ibid*, 287.

8. Equity has jurisdiction to compel the specific performance of a complete contract, but cannot supply any term not agreed on. Lord *Ormond* v. *Anderson*, 2 B. & B. 369.

VII. WHEN A SPECIFIC PERFORMANCE SHALL OR SHALL NOT BE DECREED.

(a) *Annuity.*

1. Specific performance of an agreement for the sale of an annuity, to commence from the date of the agreement, and to continue for three lives, to be named by the grantee, was decreed where the lives had not been named, the delay having been occasioned by the grantor. *Pritchard* v. *Ovey*, 1 Jacob & Walker, 396.

(b) *Arbitration, Reference to.*

1. A bill will not lie to enforce a specific performance of an agreement to refer to arbitration. Under particular circumstances, as in the case of the Opera House or a brewery, where there were many partners, the parties were left to the remedy they had chalked out for themselves; the court refusing all interposition, not acting through the agency of the arbitrators, appointing them to take the accounts, and adopting their decision as the decree. *Gourlay* v. *the Duke of Somerset*, 19 Ves. 431.

(c) *Award.*

1. A parol agreement, entered into in the course of the proceedings before an arbitrator, that the arbitrators shall determine as to a lease to be granted, is within the statute of frauds; and therefore the award cannot be enforced. *Walters* v. *Morgan*, 2 Cox. 369.

2. The circumstance of the K. B. having refused an attachment for contempt, for non-performance of the award, is not ground to prevent this court from decreeing a specific performance; the opinion of that court upon an attachment, being little more than the opinion of their officer. *Wood* v. *Griffith*, 1 Swan. 56. 1 Wil. 45.

3. The specific performance of an award may be compelled in equity, on the principle that the award only ascertains the terms of a previous agreement between the parties; and although the illegality of the acts, of which it directs the execution, will afford a ground for refusing to decree the performance, the court, considering an award as the decision of judges chosen by the parties, will not examine whether it is unreasonable. *Wood* v. *Griffith*, 1 Swan. 43. 1 Wil. 34.

(d) *Bankrupt, Assignees of.*

1. A., lessee of iron works, &c., subject to payment of rent and performance of covenants, assigns to B., as a security for sums advanced and to be advanced, reserving to himself a mere equity of re-

demption. A. becomes bankrupt, and his assignees agree to convey to B. the equity of redemption in the demised premises. The assignees cannot enforce a specific performance of this agreement, by compelling B. to accept an assignment with covenants for indemnifying the bankrupt and his assignees against payment of the rent and performance of the covenants reserved by the original lease. *Wilkins* v. *Fry*, 1 Mer. 244. 2 Rose, 371.

2. A., being tenant for life, with remainder to his children, redeems the land-tax on the estate, with his own money, introducing into the contract for the redemption his own name, and that of another, as trustees for his children, and afterwards becomes bankrupt. On bill by his assignees against a purchaser, under the commission, of the life-estate, and of the land-tax so redeemed, a specific performance was decreed, as being within the statute, 1 Jac. 1. c. 15, s. 5. *Emly* v. *Guy*, 3 Mer. 702.

3. The assignees of a bankrupt are not entitled to the specific execution of a contract for a lease entered into, with a view to the personal accommodation of the bankrupt. *Flood* v. *Finlay*, 2 B. & B. 9.

(e) Consideration, adequate or inadequate.

1. An undertaking contained in a letter from a devisee of real estate, to a legatee, to pay interest upon her legacy, which was charged upon the estate, according to a rate fixed by an order of court, provided such legatee would join in a sale, was held to be upon sufficient consideration for a specific performance; it appearing that several expensive suits, in which the devisee was engaged, would thereby be terminated, and the estate bettered; and such undertaking was not waved, because no notice was taken of it in subsequent articles of agreement to sell. *Griffith* v. *Sheffield*, 1 Eden, 73.

2. Mere inadequacy of price, where it cannot be used as evidence of fraud, is not of itself sufficient to prevent the court from decreeing a specific performance of an agreement for the purchase of land. *Collier* v. *Brown*, 1 Cox, 428.

3. Inadequacy of consideration is not of itself sufficient to set aside a contract. *Merediths* v. *Saunders*, 2 Dow, 514. *Griffith* v. *Spratley*, 1 Cox, 383.

4. But if the price agreed to be given is much beyond the actual value, as where an estate which had been refused by the defendant's father, a few days before, at and £9,000, was agreed to be purchased by the defendant for £6,000 present money, and £14,000 more on the death of a man aged 65; although without any circumstances of fraud or surprise, the court will not decree a specific performance, but, on the other hand, will not rescind the agreement. *Day* v. *Newman*, 2 Cox, 77.

5. The distinction between contract and trust, with reference to the want of consideration, has been acted upon under the same instrument. *Pulvertoft* v. *Pulvertoft*, 18 Ves. 99.

6. Inadequacy of consideration, is not a ground for resisting the execution of a contract to sell; the vendor not being under any incapacity or deficiency of judgment, or led by accident or design into a misapprehension of the value. *Western* v. *Russell*, 3 V. & P. 187.

7. Trustees are not to be compelled to perform an agreement, entered into under mistake, to sell for an inadequate consideration. *Bridger* v. *Rice*, 1 Jacob & Walker, 74.

8. Where the agreement purports to be for valuable consideration, the court cannot say that it is partly for valuable consideration, and partly for natural love and affection, merely because it is made between relations; otherwise, no agreement for valuable consideration between relations could ever be questioned, however inadequate the consideration. *Willan* v. *Willan*, 2 Dow, 274.

(f) Creditors, Composition with.

1. Equity will decree a specific performance of an agreement to pay a composition to creditors of another person in promissory notes. *Lowndes* v. *Collens*, 17 Ves. 27.

(g) Debt, Purchase of.

1 The court will entertain a suit for the specific performance of a contract for the purchase of a debt. It is within the exception to the rule that Courts of Equity will not compel specific performance of contracts for the sale of personal chattels. *Wright* v. *Bell*, 5 Price, 325. 1 Dan. 95.

(h) Executor of Vendee, against.

1. The testator having agreed to purchase

a real estate, the purchase money for which exceeded the amount of his personal estate, by his will, made a few days afterwards, attested by three witnesses, "as to all the worldly goods that it had pleased God to bless him with," gave and bequeathed to his wife and two sons, "all his goods, cattle, chattels, personal estate, and effects, whatsoever;" and in case his sons died without issue, &c., he gave the children's "share of the personal estate and effects" over: and testator died before the purchase could be completed. The agreement was decreed to be specifically performed; and the words of the will being insufficient to comprehend real estate, the estate to be conveyed to the eldest son and his heirs. *Cave* v. *Cave*,

2 Eden, 139.

(*i*) *Family Compromise.*

1. The court will support contracts entered into to preserve the peace of families; and therefore, where a son, upon his marriage, joined with his father in resettling the estate, and by a memorandum executed at the same time, agreed to secure £500 to each of his sisters. Held that there was sufficient consideration for the court to decree a specific performance of this agreement; an attempt to shew that it had been obtained by an undue exercise of parental influence having failed. *Wycherley* v. *Wycherley*, 2 Eden, 175.

2. Specific performance decreed of a parol agreement as to land, the effect of a family compromise of doubtful rights, with part performance by possession and improvements, and acquiescence for nearly nineteen years; the grandfather of the parties being permitted to act upon his conception of their rights, and which was not questioned at the time by the defendant, who cannot object that he acquiesced under expectations from the grandfather, which were in part disappointed. *Stockley* v. *Stockley*, 1 V. & B. 23.

3. Family compromise is favored in a Court of Equity, if reasonable and upon a doubtful right; even in the strongest case, where one party was drunk at the time; but if upon a mere supposition of right, which proves erroneous, *quære*.

Ibid, 30.

4. In an arrangement settling the interests of all the branches of a family, children may contract with each other to give to the parent, who has a power to distribute property among them, some advantage, which the parent, without their contract with each other, cannot have. *Davis* v. *Uphill*, 1 Swan. 136.

5. The Court refused to enforce a deed, executed by the heir and other members of a family, to determine their interests under the will and partial intestacy of an ancestor, on the alleged ground of its being a compromise of doubtful rights, or a family arrangement; where it appeared on the face of the deed that the parties did not understand their rights, or the nature of the transaction, and that the heir surrendered an unimpeachable title, without consideration, and evidence being given of his gross ignorance, habitual intoxication, liability to imposition, and want of professional advice, although there was no direct proof of fraud, or undue influence, and the deed had been acquiesced in for five years. *Dunnage* v. *White*,

1 Wil. 67. 1 Swan. 137.

(*k*) *Goodwill, Sale of.*

1. The Court will not execute a contract for the sale of a goodwill, nor enjoin against any proceeding at law under such agreement. *Baxter* v. *Conolly*,

1 Jacob & Walker, 576.

(*l*) *Inclosure Act, Interest under.*

1. In the case of an inclosure by Act of Parliament, which contained a clause enabling a sale, and declaring the conveyance valid before the award of the Commissioners, a purchaser, with full notice of all the circumstances, will be compelled to a specific performance, notwithstanding the possibility of the commissioners varying the allotments. *Kingsley* v. *Young*,

17 Ves. 468, 18 Ves. 207.

(*m*) *Lease.*

1. An agreement for a lease, with covenant for perpetual renewal at a fixed rent, of premises held under a church lease, renewable upon fines continually increasing, was decreed to be delivered up on the ground not of fraud but surprise, neither party understanding the effect of it.

A single lease for 21 years refused, no terms appearing in the agreement for such an interest; and, under the circum-

stances, permission to try the effect of it at law was refused. *Willan* v. *Willan*, 16 Ves. 72. 2 Dow, 274.

2. Tenant having committed breaches of covenant by waste, treating the land in an unhusbandlike manner, &c. for which the lessor had a right of re-entry, is not entitled to a specific performance of an agreement for a lease. *Hill* v. *Barclay*, 18 Ves. 63.

3. Decree for specific performance of an agreement for a lease, rejecting one term for such conditions, &c. as shall be judged proper by *I. G.*, and substituting a reference to the Master, the agency of *I. G.* not being of the essence of the contract. *Gourlay* v. *Duke of Somerset*, 19 Ves. 429.

4. Bill for a specific performance of a contract to make a lease to the defendant, was dismissed without costs, the plaintiff having, after answer filed, given notice to quit, according to a proviso for determining the lease. *Western* v. *Pim*, 3 V. & B. 197.

5. The specific performance of an agreement for a lease by the plaintiff to the defendant, was refused, where the term had expired before the hearing, and certain acts of waste committed by the intended lessee, while in possession, being so trifling, as to entitle the plaintiff, in an action on the covenants to be inserted in the lease, to merely nominal damages. *Nesbitt* v. *Meyer*, 1 Swan. 223. 1 Wil. 99.

6. Whether a specific performance of an agreement to grant a lease, will in any case be decreed after the expiration of the term, *quære*. *Nesbitt* v. *Meyer*, 1 Swan. 226. 1 Wil. 99.

7. A. conveys or assigns his interest in lands to B., in consideration, among other things, that B. should make or give back a lease to A., of a half, or portion of the lands, and in consideration also of a loan of £200 by B. to A. B. covenants to execute the lease accordingly, subject to the repayment of the £200, for which B. has a judgment. No lease actually made, but A. remains in possession of his portion on his equitable title. B. lends further sums to A., and obtains judgments for these sums, and then conveys the whole lands, and assigns the judgments to C. C. issues writs of *fi. fa.* on the judgments, and in 1781 procures a sale by the sheriff of A.'s interest in the lands, and on ejectment brought on the demises of the purchaser and of C., A. is turned out of possession. A. in 1782 files his bill in Chancery, for relief and execution of a lease to him, according to the agreement, but, from embarrassment in his circumstances, does not further prosecute the suit till 1801. No steps taken in the interval to dismiss. In 1808 the bill dismissed by the Court of Chancery in Ireland. The decree of dismissal reversed in *Dom. Proc.* The right to a suit in equity not being a proper subject of sale by the sheriff under a *fi. fa.* the sale was a nullity, and the delay in prosecuting the suit being well accounted for, and no steps taken by the defendant to dismiss the bill; and at any rate the right to the lease does not rest merely on the landlord's covenant, but is part of the consideration of that conveyance or assignment by which the landlord himself acquired his title. Therefore the principle of delay does not apply, and A. ought still to have his lease executed in terms of the contract, and has his relief in equity without the necessity of resorting to the Court, out of which the *fi. fa.* issued. *Moore* v. *Blake*, 1 B. & B. 62. 4 Dow, 231.

8. A contract for a new lease entered into by tenant for life, and void as against a remainder man, the surrender of the former lease, constituting part of the consideration, will not be specifically executed, being contrary to the leasing power of letting at the best rent. *Ellard* v. Lord *Llandaff*, 1 B. & B. 241.

9. Equity will not direct a lease, void under a power, to be executed; as it would not bind the inheritance, and might embarrass the remainder man. *Ellard* v. Lord *Llandaff*, 1 B. & B. 251.

(n) *Lease for Lives.*

1. Agreement in 1800 for a lease for three lives generally, no particular lives being named, C. purchases the estate from the the lessor, subject to the agreement, and receives the rent from the lessee, who continued to occupy till 1808, when C. refused to perform the agreement, upon the ground of not having seen the terms till 1807. Bill by the lessee for a specific performance, naming three of his own children, decreed in the court below; and the decree, with some variations respecting the previous conditions by the tenant, affirmed in *Dom.*

Proc. under the particular circumstances: for, though the agreement should have been completed, and the lives named at the time of the purchase, yet the parties were clearly going on as if the one side had been entitled to performance, and the other bound to perform, so that there had been mutual default; and notwithstanding the alterations made in the decree as to the conditions to be performed by the tenant, the lessee was allowed £100 costs, the appellant not having called below for the proper provisions as to these conditions, and the tenant having been considerably harassed with expenses in the course of the suit, and with actions for use and occupation. *Kensington* (Lord) v. *Phillips*, 5 Dow, 61.

2. Parol agreement, in 1782, for a lease for three lives not then named, nor any stipulation as to which of the parties should name them, at a rent of £1 : 15*s*. per acre. Tenant enters, and considerable improvements are made; and, in 1784, or 1785, the rent is reduced to £1 : 10*s*. per acre. Tenant names the lives in 1786, one of them not in existence in 1782, when the agreement was made, and evidence that the landlord approved of them, but none of the improvements made after that declaration of approval. On bill for specific performance, Lord Clare decreed execution of a lease for three lives named in 1786, at £1 : 10*s*. per acre, the rent under the supposed agreement of 1782 being £1 : 15*s*., and even that agreement was denied by the answer. Decree afterwards reversed, as to the execution, by Lord Redesdale, who directed further inquiries as to the improvements. Report that the improvements were made at the landlord's expense, and bill dismissed. Held that it ought to have been dismissed in the first instance. 1st. Because no lives were named at the time of the agreement, (1782), and no stipulation made as to which of the parties should name them. 2d. Because one of the lives afterwards named was not in existence in 1782. 3d. That supposing the landlord to have declared his approbation of the lives named in 1786, no antecedent improvements could give effect to such a declaration. 4th. That if a new agreement had been made in 1786, in other respects unobjectionable, it was not that on which the bill was founded. *Wheeler* v. *D'Esterre*, 2 Dow, 359, 366.

3. A lease for lives of lands in Ireland, renewable for ever, is not absolutely forfeited by extinction of all the lives, and neglect to pay the fines for renewal, even after notice from the lessor; and, under particular circumstances, may be enforced after a lapse of twenty years; as where A., the heir of the lessee, having such right, had entered into an agreement with B. respecting an independent lease of the lands held under the renewable lease by the ancestor of A., which independent lease B. had obtained from the landlord when in a state of intoxication, and by circumvention: it was held that the heir of A. and purchasers for valuable consideration, claiming under him, were entitled in equity to the benefit of the agreement between B. and A., and that the heir of the landlord's lessor was entitled to the benefit of the same agreement, so far as B. took an interest. *Butler* v. *Mulvihill*, 1 Bligh, 137.

4. A., by an instrument, demised, or agreed to demise lands to B. for three lives (not named), at a yearly rent, and further agreed that leases should be perfected at the request of either party. As an essential part of the contract the nomination of the lives was wanting, this cannot operate as a lease for three lives; nor as a lease for the life of the tenant, that not being the intention of the grantor; but merely as an executory agreement for a lease.

B. being in possession under the agreement, on his marriage conveyed his interest in the lands to trustees in strict settlement; A. afterwards served an ejectment for non-payment of rent on B., but not on the trustees, or the eldest son of the marriage, and recovered the lands which he then leased to C., and sold the reversion, neither B. nor the trustees ever attempting to recover the possession: a bill, on the death of B. twenty years after, by the eldest son of the marriage, for a specific execution of the agreement, dismissed; as the title of the plaintiff, after such a lapse of time, and from the circumstances, could not be sustained against a *bonâ fide* purchaser of the legal interest, accompanied by twenty years' possession. *Pentland* v. *Stokes*, 2 B. & B. 68.

(*o*) *Letters, Agreement by.*

1. A specific performance of an agreement by letters will not be enforced by

decree unless, upon a fair interpretation, they import a concluded agreement, and not where they are doubtful, or import only a treaty. *Stratford* v. *Bosworth*, 2 V. & B. 341.

2. In order to form a contract by letter, of which the Court will decree a specific performance, nothing more is necessary than a fair understanding on the part of each party, of the amount and nature of the consideration to be paid, together with a reasonable description of the subject of the contract; and that the proposal of one party shall have been so met by the acceptance of the other, as to make it the act of both. It is the clearly and long established doctrine, that the Court will carry into execution an agreement so constituted; it is not necessary to be satisfied that the parties actually meant the same thing, provided a clear assent be given to a certain proposition arising *de facto* out of the terms of the correspondence. *Kennedy* v. *Lee*, 3 Mer. 441.

3. A letter from a mother to her son, beginning "My dear Robert," and concluding "Your affectionate mother," not signed so as to constitute a binding agreement on the part of the mother, within the intent of the Statute of Frauds. It is not enough that the party may be identified: there must be a signing, *i. e.* either an actual signature of the name, or something intended by the writer to be equivalent to an actual signature; such as a mark by a marksman. *Selby* v. *Selby*, 3 Mer. 2.

4. The Court will not decree a specific performance of an agreement for a lease to be collected from letters where there is no definite term expressed, for which the lease was to be granted, nor any reference *aliunde* by which it might be ascertained. But *semble* otherwise if the letters had been more explicit, or had afforded any *criterion* for defining the object of the parties. *Gordon* v. *Trevelyan*, 1 Price, 64.

(*p*) *Literary Composition.*

1. The court cannot specifically perform an agreement, whereby *A* agrees to compose and write Reports of Cases determined in a court of justice, to be printed and published by a particular individual, for a stipulated remuneration, nor interfere by injunction to restrain the party from permitting reports written by him to be published by another person. The remedy, if any, is at law. *Clarke* v. *Price*, 2 Wil. 157.

(*q*) *Misrepresentation and Mistake.*

1. Where it appears that a party purchased an estate under a mistake, he cannot be compelled to a specific performance, at the suit of the party who gave occasion to the mistake, by the ambiguous wording of the particulars and conditions. *Higginson* v. *Clowes*, 15 Ves. 516.

2. To obtain a specific performance of an agreement, the subject of the agreement must be proved to answer the description given of it. *Daniels* v. *Davison*, 16 Ves. 249.

3. Misrepresentation, though in a slight degree, is an objection to a specific performance: distinction upon a bill to rescind the contract. *Cadman* v. *Horner*, 18 Ves. 10.

4. Purchaser, under a particular which gives a false description, will not be bound at law or in equity, nor by any act of his agent, without a fresh authority or subsequent approbation, it being a different agreement, and therefore requiring a fresh authority. *Dewerell* v. Lord *Bolton*, 18 Ves. 509.

5. Misrepresentation of a fact, inducing others to deal for value upon the faith of it, is binding on the persons making it. *Ex parte Carr*, 3 V. & B. 111.

6. In a case where the defendant had sold and conveyed land to the plaintiff in fee simple, and it afterwards appeared that he was not entitled to a part, which was an encroachment from a common, though no eviction had happened or was threatened; held, that a bill lies, on the ground of fraud, to set aside the conveyance, and for a return of the purchase-money, and all expenses and repairs during the possession. *Edwards* v. *M'Leay*, Cooper, 308.

7. Misrepresentation of the value of an estate, is a sufficient ground to resist a specific performance of an agreement to purchase. *Wall* v. *Stubbs*, 1 Mad. 80.

8. A., landlord to B., having distrained for rent in arrear, being a creditor of B. for money lent, as well as for further rent in arrear; upon B.'s representing to him that he is also indebted to C. to the amount of about £900. for which he is in fear of arrest, and about to leave the country, undertakes that, if B. will give up to him the farm, and execute an as-

signment of all his stock, crops, and other property, he will pay C.'s debt, in the first instance, out of the proceeds, and apply the residue in satisfaction of his own demand, and pay the surplus (if any) to B. who executes a bill of sale to A. accordingly, on the faith of such undertaking. Upon the bill of B. and C. this agreement was enforced against A. to the extent, as to C.'s debt, of £900. but no further; the actual debt much exceeding that amount: and the right to a specific performance is not affected, either by the circumstance that B.'s property fell short of the estimated amount, or of B.'s being at the time indebted to other persons besides C. and A., as they formed no part of the consideration for the agreement, although noticed in A.'s undertaking as having been represented otherwise.

The engagement to pay C. in the first instance, not being made directly to C., but through the medium of B. by whom also the consideration was furnished, B. is to be considered as trustee for C.: but whether the plaintiff could recover at law upon this agreement as an undertaking in writing to pay the debt of another person —*Quære*. *Gregory* v. *Williams*, 3 Mer. 582.

9. Where the sale was by public auction, and the representation in the printed particulars of sale complained of, as calculated to mislead, was so vague and indefinite, that its only effect ought to have been to put the purchaser on making a previous inquiry, a specific performance was decreed. *Trower* v. *Newcome*, 3 Mer. 704.

10. Party obtaining an agreement by a partial misrepresentation is not entitled to a specific performance upon waving the part affected by the misrepresentation. *Clermont* v. *Tasburgh*, 1 Jacob and Walker, 112.

11. The effect of partial misrepresentation is not to alter or modify the agreement, *pro tanto*, but to destroy it entirely, and to operate as a personal bar to the party who has practised it. *Ibid.*

12. Specific performance of an agreement for a lease, in consideration of the surrender of a former one, was refused, the tenant having suppressed the fact, when the agreement was signed, that the life on which the old lease depended was *in extremis*; and as the new lease would, under a power of leasing at the highest rent, be void, as against the remainderman, the surrender of the old lease forming part of the consideration. *Ellard* v. Lord *Llandaff*, 1 B. & B. 241.

13. Misapprehension in the party or parties, a ground of refusing specific performance of an agreement. *Hamilton* v. *Grant*, 3 Dow, 46.

(*r*) *Mortgage.*

1. Bill for specific performance of an alleged agreement for a mortgage, entered into by the defendant's testator for securing money advanced to him on the faith of such agreement (and other debts), semble not maintainable under the circumstances stated in this case. *Jackson* v. *Radford*, 4 Price, 274.

(*s*) *Mutuality, want of.*

1. The want of mutuality in a contract a sufficient ground to refuse a specific performance. *Howel* v. *George*, 1 Mad. 12.
Hamilton v. *Grant*, 3 Dow, 43.

(*t*) *Power of Sale.*

1. Equity will compel the specific performance of an agreement to purchase under a power of sale, in a mortgage deed, without the mortgagor joining in the conveyance, though he was under a covenant to the mortgagee to join in a sale. *Corder* v. *Morgan*, 18 Ves. 344.

(*u*) *Settlement, voluntary, Agreement defeating.*

1. A court of equity will not assist a vendor in defeating a prior voluntary settlement made by him. Therefore, a bill for specific performance by such vender was dismissed, and an exception to the master's report, approving the title, allowed. *Smith* v. *Garland*, 2 Mer. 123.

2. But the court will assist a purchaser against a voluntary settlement, notwithstanding he had notice. *Ibid*, 127.
Buckle v. *Mitchell*, 18 Ves. 100., see also *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84.

(*w*) *Ship.*

1. An agreement for sale of a ship is void under the registry acts, where a certificate of registry is not duly recited in the memorandum of sale, although a copy of such certificate is thereto annexed.

The policy of these acts prevents the court from looking on one who has not strictly complied with their provisions in the light of a purchaser. *Brewster* v. *Clarke.* 2 Mer. 75.

(*x*) *Stock, Transfer of.*

Upon a contract for the retransfer of stock, and payment of dividends to become due thereon, the party cannot bargain *ab ante* for interest upon the dividends remaining unpaid, and a warrant of attorney for such interest cannot be enforced in equity. *Downes* v. *Grazebrook,* 3 Mer. 207.

(*y*) *Subcontract.*

1. Specific performance of a contract to purchase, enforced against a subsequent purchaser at an advanced price, with notice; who was decreed to convey on payment to him of the price for which the plaintiff contracted. *Daniels* v. *Davison,* 17 Ves. 433.

2. *A.* agrees verbally to sell an estate to B., he afterwards agrees in writing to sell it to *C.* and then conveys it to B. in pursuance of the first contract, B. having notice of the second; semble *C.* cannot call on B. for a conveyance. *Dawson* v. *Ellis,* 1 Jacob & Walker, 524.

3. A party agreeing to purchase the right and interest of another, under a contract for a lease, with full notice of the nature of it, cannot object to the payment of the consideration, either on the ground that such contract is not binding on the other party to it, or for want of title. *Baxter* v. *Conolly,* 1 Jacob & Walker, 576.

4. When the vendor is entitled only under an agreement, whether the vendee can object to a specific performance on the ground of the statute of 32 Hen. 8. c. 9. —*Quære. Wall* v. *Stubbs,* 1 Mad. 80.

(*z*) *Terms, ambiguous or imperfect.*

1. Upon the terms of a contract, ambiguous as including or excluding the timber, a bill by the purchaser for specific performance was dismissed, and having throughout insisted upon his construction, he was not permitted to compel the vendor to convey upon the terms which the vendor originally offered. *Clowes* v. *Higginson,* 1 V. and B. 524.

2. A bill by vendor for the specific performance of an agreement to purchase the business of an attorney, was dismissed, there being no express stipulations to enable the Court to carry it into effect on the vendor's part, in return for the defendant's purchase money; and there being no conditions generally applicable to such transactions, so as to come within the description of "usual clauses," to be inserted in the instrument to be executed in pursuance of the agreement. *Bozon* v. *Farlow,* 1 Mer. 459.

3. Whether such an agreement, if valid, can be enforced in equity, *quære. Ibid.*

4. Where a material ingredient in the terms of a contract has been omitted, equity, considering it as only resting in treaty, will not decree a specific execution. Therefore, where a tenant in possession under an article impeached by his landlord, proposed to pay an increased rent, a bill by the landlord for a specific execution of the proposal dismissed, the period when the increased rent should commence not being agreed upon. Lord *Ormond* v. *Anderson,* 2 B. & B. 363.

5. When the contract is unreasonable at the time of its being entered into, it will not be enforced. *Revell* v. *Hussey,* 2 B. & B. 287.

Terms to be ascertained by Award.

1. A contract for the sale of an estate at a price to be fixed by arbitrators within a certain time, or, if they should not agree to make their award within the time, by an umpire also within a limited time, the construction of this contract, which requires the delivery of the award in writing to each party, being that, though the consequential acts, as executing the conveyances, &c. might be done by representatives, it was, with reference to the terms to be fixed by the award, personal to the parties; and where one party dies before the award made, equity will not decree a specific performance of the contract. *Blundell* v. *Brettargh,* 17 Ves. 232.

2. If the terms of an agreement are to be ascertained by an award, being so ascertained, the agreement will be specifically performed, if any thing is to be done *in specie:* conveyances, &c.; but not if the acts done towards executing it by an award, are not valid at law, as to the time, manner, or other circumstances,

unless there has been acquiescence, notwithstanding the variation of circumstances or part performance. *Ibid,* 17 Ves. 241.

3. There is no instance where the medium of arbitration for settling the terms of a contract having failed, the Court of Chancery has assumed jurisdiction to determine, that though there is no contract at law there is in equity, and which, though the parties never agreed to it, a Court of Equity will specifically execute. *Ibid,* 17 Ves. 243.

4. The price is of the essence of a contract of sale: if, therefore, it is to be fixed by arbitrators, and they do not fix it, there is no contract, but the court determining that an agreement ought to be executed, does not require foreign aid to carry the details into execution. *Gourlay* v. the Duke of *Somerset,* 19 Ves. 431.

5. Equity cannot decree a specific performance of an agreement to sell at a price to be fixed by arbitrators, already appointed to settle other matters in dispute between the parties, where the defendant (the vendor) refused to execute the arbitration-bond, and it is therefore uncertain that any award will ever be made. *Wilks* v. *Davis,* 3 Mer. 507.

(ab) Third Parties, opposing Interests of.

1. The interest which a third party may have against the specific performance of an agreement, may preclude the execution of it, as between *cestui que* trust and trustee, as in a case where an insolvent tenant made over his lease to another, who treated for a renewal, under a secret agreement, in trust for the original tenant. Equity would not execute such an agreement against the landlord; and the principle, that a trustee shall derive no benefit from his trust, should fall, rather than be executed against a third party so imposed upon; though, except his interest of the landlord, it would have been executed as between the other parties. *Featherstonhaugh* v. *Fenwick,* 17 Ves. 313.

(ac) Time, the Essence of the Contract.

1. An estate was sold by auction, and, by the conditions of sale, the purchase was to be completed within two months. Soon after the sale, the purchaser died, and suits were instituted in the Spiritual Court and the Court of Chancery respecting his affairs. Upon a bill filed by the vendor against the representatives of the purchaser, upwards of four years after the sale, time was held to be so much the essence of the contract, as that the delays of the defendants entitled the plaintiff to have the agreement delivered up, and to deduct his costs out of the deposit-money, he repaying the residue to the defendants with interest upon the whole at 4 per cent. *Mackreth* v. *Marlar,* 1 Cox, 259.

2. Time may be made the essence of a contract, but the conduct of the party may amount to a waver of that part of it; as where, after the time fixed for the completion of an agreement for a lease had elapsed, the lessor demanded rent from the lessee, and thereby treated it as a subsisting contract: a specific performance was decreed. *Hudson* v. *Bartram,* 3 Mad. 440.

3. Merely undertaking to deliver an abstract and possession at a particular period, does not make time of the essence of the contract. *Boehm* v. *Wood,* 1 Jacob & Walker, 419.

4. When time is not of the substance of a contract, a specific performance will be decreed, though the period for its completion have elapsed. *Jessop* v. *King,* 2 B. & B. 94.

(ad) Title, defective or doubtful.

1. A purchaser will not be compelled to a specific performance, where there is a reasonable doubt upon the title. *Stapulton* v. *Scott,* 16 Ves. 272.

2. Defect of title to a considerable portion of the estate, though a good objection to a specific performance on the part of a purchaser, is not so on the part of the vendor. *Western* v. *Russell.* 3 V. & B. 187.

3. Acceptance or non-acceptance of title, the criterion of right to specific performance of contracts in Courts of Equity. *Wyvill* v. *The Bishop of Exeter,* 1 Price, 296.

4. In compelling a purchaser to take a title, the court formerly acted upon its own opinion, but now it will not compel him to take it if the point is doubtful. *Jervoise* v. *Duke of Northumberland,* 1 Jacob & Walker, 569.

5. Where a good title could be made

only by executing a power of sale, introduced by the master to whom it was referred, under a decree for the establishing a will, to approve of a proper settlement, and the insertion of which power the will did not authorize; or by execution of a power by a former settlement, which, if not extinct by the failure of the limitations and the union of the estate for life with the reversion, could not be duly applied to purposes clearly foreign to its original object. This is not such a title as a purchaser will be compelled to accept; and though purchasers are not put to exercise a very nice and critical judgment with regard to the purposes for which powers are created, this could never be intended to refer to a perfectly new set of limitations in a new settlement, at a long subsequent period, under a disposition by the will of the owner of the fee, to be exercised, not for any purpose in the least degree connected with the settlement, but avowedly as an expedient to supply the want of a valid power in that settlement, and enable those whom he had made only tenants for life to dispose of the estate. *Wheate* v. *Hall*, 17 Ves. 80.

(*ac*) *Title Deeds, Non-production of.*

1. Contract for the sale of an existing and a reversionary lease, not specifically performed without a production of the title of the lessors. The objection was held not waved by a premature conditional approbation of the title by the purchaser's counsel, but the expense incurred in making out the title, before this objection was to be taken, repaid. *Deverell* v. Lord *Bolton*, 18 Ves. 505.

2. The reversion of an estate was put up to sale at public auction, and described as leased, with a covenant on the part of the tenant to repair; the counterpart of the lease was not in the possession of the vendors, but was in the hands of a party, under a partition of the estate, made some time before. Equity will not enforce this agreement against the purchaser, unless such counterpart is deposited for the benefit of all parties. *Shore* v. *Collett*, Coop. 234.

(*af*) *Trust to sell, Agreement under.*

1. A trader makes a conveyance of all his real and personal property to trustees, to sell for the benefit of his creditors, under which the trustees contract to sell certain lands to defendant. The contract not being completed, they file a bill against defendant for a specific performance; but, before answer, the trader becomes bankrupt, and his assignees file a supplemental bill to enforce the contract. Held, that although the conveyance to the trustees was an act of bankruptcy, the assignees may compel the performance of the contract made under it. *Goodwin* v. *Lightbody*, 1 Dan. 153.

2. On a contract under a devise to sell, the purchaser is bound, notwithstanding the infancy of the heir at law. *Levy* v. *Lindo*, 3 Mer. 84.

(*ag*) *Unfair or unreasonable Agreements.*

1. Unless it appear that the party seeking a specific execution of an agreement, has acted not only fairly, but in a manner clear of all suspicion, equity will not interfere; for if there be a reasonable doubt upon the transaction, the party will be left to his legal remedy for non-performance of the contract. *O'Rourke* v. *Percival*, 2 B. & B. 62.

2. A bill for specific performance of an agreement for a lease, signed by the grantor only, and contrary to his leasing power, of which the plaintiff had notice, afterwards amended—praying an execution of the agreement, for the life of the grantor, without requiring compensation for the difference of interest, dismissed, the case proved for the plaintiff, creating doubts and suspicions of the fairness of the transaction. *O'Rourke* v. *Percival*, 2 B. & B. 58.

3. Contract, with a penalty in case of failure specifically to perform: equity will consider the option to pay the penalty as of the essence of the contract, when the contract would otherwise be grossly unreasonable. *Margrave* v. *Archbold*, 1 Dow, 109, 110.

4. Specific performance of an agreement refused on the ground of want of specific mutuality, also on the ground of laches, misapprehension in the parties of its nature and effect, inequality, imprudence, &c. *Hamilton* v. *Grant*, 3 Dow, 33.

5. When the contract is unreasonable at the time of its being entered into, it will not be enforced. *Revell* v. *Hussey*, 2 B. & B. 287.

(*ah*) *Vendor out of Possession.*

1. A contract for a present demise by a person out of possession, not enforced in equity.

Therefore, a lessee apprized at the time of the demise, that lessor had no means of putting him in possession, except by a suit, not assisted in equity to obtain the possession; the transaction being considered as a dealing for a suit in equity, and from the situation of the property, the full value could not be obtained. *Bayly* v. *Tyrrell*, 2 B. & B. 358.

(*ai*) *Vendor not having the Interest contracted for.*

1. If a person possessed of a term only, contracts to sell the fee simple, he cannot compel the purchaser to take, but the purchaser can compel him to convey the term, and this court will arrange the equities between the parties. *Wood* v. *Griffith*, 1 Swan. 54. 1 Wil. 44.

2. A. entered into an agreement for the sale of an estate, of which he supposed himself the absolute owner, when in fact it was settled on himself and wife successively for life, remainder to his son in tail, the settlement containing a proviso, that if A. should settle, &c. other lands, &c. in fee simple in possession, of equal or greater value, in some convenient place or places in England, then this settled estate should be his own.

This is not an agreement of which a court of equity will decree a specific performance; as the court cannot compel the vendor to procure his wife and son to join in the conveyance by recovery, and on account of the difficulty and hardship of compelling him to make a title by means of the power given by the proviso in the settlement. *Howell* v. *George*, 1 Mad. 1.

(*ak*) *Vendor, distressed and unadvised.*

1. By marriage settlement, £4000 was to be raised for the portions of younger children, and two private acts of parliament were obtained for reducing such portions in proportion to the other interests in the estate. One of the younger children, being greatly distressed and embarrassed, entered into an agreement in execution of the private acts, thereby consenting to accept of a stated sum in satisfaction, such agreement being inserted by the plaintiff's solicitor in a receipt signed by her on the payment of a small sum of money. This is not an agreement, of which a court of equity will enforce a specific performance. *Kerneys* v. *Hansard*, Coop. 125.

2. A tenant for life, with a remainder-man in tail, both in distress, join in selling their interests for an inadequate consideration. Held, that it could not be considered as the sale of a reversionary interest, and subject to the rules relating to sales of such interests, but that the sale was invalid, on account of the inadequacy of the consideration, coupled with the distress of the vendors, and their want of advice. *Wood* v *Abrey*, 3 Mad. 417.

(*al*) *Voluntary Agreements.*

1. Where the testator had been living with the plaintiff, a married woman but separated from her husband, and, in consideration of the intercourse ceasing, testator had by parol agreed to allow the plaintiff an annuity for life, which was regularly paid till testator's death, a bill will not lie against his executor to enforce this agreement, as, the intercourse being adulterous, there was no good consideration; and it is a clear rule, that equity will not enforce a voluntary agreement. *Matthews* v. *L—e*, 1 Mad. 558.

2. Upon a contract merely voluntary, the Court of Chancery will do nothing; but it takes jurisdiction upon a trust actually created, unless perhaps against a party having a right to put an end to it by his own act, as under a sole power of revocation, by analogy to the cases of a *quasi* estate tail of renewable leases for lives. *Pulvertoft* v. *Pulvertoft*, 18 Ves. 99.

3. A voluntary agreement endorsed on a lease by one not a party to it, but only a remainder-man, not binding. *Dowling* v. *Mill*, 1 Mad. 541.

VIII. How to be performed.

1. A bill against two defendants, for specific performance of an agreement to take a lease; and one defendant had become incapable of doing any act in consequence of a paralytic stroke. It was ordered that one defendant should execute the counterpart, and the other defendant when he should be capable of so doing. *Pegge* v. *Skynner*, 1 Cox, 23.

est from an uncle to a nephew, under circumstances of gross inadequacy of price and alleged fraud, after forty years acquiescence, was held to be supported by the consideration of natural love and affection, inserted in the witnessing part of the deed, although not expressed in the recital. *Whalley* v. *Whalley*, 1 Mer. 436.

10. No part of a fraudulent agreement can be supported in equity, except where a consideration has been given, in consequence of which the parties cannot be replaced in the same situation in which they stood before the transaction took place. *Daubeny* v. *Cockburn*, 1 Mer. 643.

11. An agreement by one of the objects of a power of appointment to return a part, in consideration of an appointment in its favor, is a fraud in the appointee as well as in the appointor, both on the other objects of the power, and on the party who would take, in default of appointment; *secus*, where the appointee is not privy to the corrupt agreement. *Ibid*, 1 Mer. 645.

12. A transaction of many years standing sought to be set aside, on the ground of inadequacy of consideration, the relation between the parties, and the incapacity of the vendor; relief refused, neither of the grounds having been sufficiently made out. *Evans* v. *Brown*, Wigh. 102.

13. The court will set aside a contract where there appears to have been great inadequacy of consideration, at a distance of more than seven years from the date of the deed, on proof of the inadequacy, and that the purchaser had knowledge of the value of the subject matter, and was in the confidence of the vendor, and ought therefore to have protected her by his advice from imposition, rather than have misled her for his own advantage. *Taylor* v. *Obee*, 3 Price, 83.

14. Certain mortgaged estates were sold to pay off mortgage debts under a decree of court, obtained by collusion between the tenant for life and others, to the prejudice of the remainder-men in tail. Part of the estates purchased by one cognizant of the fraud, and part by one not so cognizant, but at the same time having an opportunity of obtaining a knowledge of the fraud and consequent defect in the title, by an examination of the proceedings in the cause, under the decree in which the estates were sold. The bill of foreclosure in 1733, and none of those entitled in remainder (though some were *in esse*), were made parties, sale in 1746. Bill by a remainder-man in tail in 1796, (three months after his title accrued), for setting aside the sale, and for a reconveyance of the estates, was dismissed by Lord Clare. Upon appeal against so much of the decree as related to those claiming under the purchaser, with knowledge of the fraud, the decree so far reversed: Lord Redesdale stating it to be very doubtful whether the decree would not also have been reversed as to the purchase made by one not cognizant of the fraud, but who might have acquired a knowledge of it by an examination of the proceedings in the cause which led to the sale of the estates. *Gore* v. *Stacpoole*, 1 Dow, 18.

15. Agreement between uncle and nephew for a sub-lease to the latter, at a fixed rent, with covenant for perpetual renewal of premises held by the uncle under a church lease, renewable on fines at will of the lessors, set aside, on the ground of surprise or misapprehension of its effects in both parties, the facts being, that the agreement was entered into a few days before the uncle's death, when he was confined to bed of the illness of which he died, and was in such a state of bodily and mental imbecility, as rendered him incapable of transacting business which required deliberation and reflection, the agreement being for valuable consideration, and in that view of it unreasonable. *Willan* v. *Willan*, 16 Ves. 72. 2 Dow, 274.

16. *Dubitante* Lord Redesdale, whether even if there had been no evidence of imbecility, such an agreement, made under such circumstances, would not be set aside on the ground of surprise and misapprehension.

And since it was unfit that an agreement, obtained by surprise, should be acted upon in equity, it was held to be also unfit that it should be acted upon at law, and it was ordered to be delivered up to be cancelled. *Ibid*, 2 Dow, 280, 284.

17. M., in consideration of a loan of £900, grants a valuable lease to D., under a private parol agreement, to be allowed to redeem in two years, on payment of £1300. S., knowing the circumstances, with the consent of M., purchases the interest of D., to whom he pays the £1300. and afterwards purchases the whole interest of M. in the premises, paying what appeared to be a very inadequate consideration. M. endeavoured to impeach the transaction between himself and S., on the

grounds of usury and gross inadequacy of considertion. Held by the Lords, affirming a decree of the Irish Court of Exchequer, that there was no sufficient reason to set aside the agreement. *Meredith* v. *Saunders*, 2 Dow, 514, 515.

18. No contract for a beneficial interest out of mortgaged premises, from the mortgagor to the mortgagee, where the mortgage continues, if impeached within a reasonable time, ought to stand. This is the only proper principle with respect to such a transaction. *Hickes* v. *Cooke*, 4 Dow, 17, 26, 28.

19. A., tenant for life under a marriage settlement, remainder to his first and other sons in tail, with power to lease at the best rent for 31 years, or three lives in possession, without taking fines, &c. makes leases at an under value, taking fines, &c. and grants annuities for lives of the grantees in violation of the power. Suit, in 1772, by incumbrancers, and the usual decree made; the son, remainder-man in tail, being then an infant eleven years of age. Master reports amount of the incumbrances, without stating yearly value of the estates, or the parts proper to be sold, though directed to do so by decree, and no exception taken by A., nor by any person for the infant. Sale before master of part of the lands to B., at an under value, by collusion and management between B. and A., and A.'s agent, each of whom take some advantage from the transaction to the prejudice of the infant entitled to the inheritance; B. being cognizant of the leases and annuities made and granted in violation of the power and of the whole circumstances. A. dies in 1794, when the son was prisoner in France. Bill by the son in 1800 to set aside the sale as fraudulent, as against him, and the above circumstances proved. Bill dismissed in 1808, in Ireland, but the decree reversed by the House of Lords, and the sale set aside, being fraudulent as against the son. *Colclough* v. *Bolger*, 4 Dow, 54, 63.

20. A decree in equity is no protection to a purchase effected under color of such decree, by management of the vendor and the purchaser himself, to the prejudice of an infant remainder-man, entitled to the inheritance, though such remainder man was a party to the suit. *Ibid*, 63.

21. A lease obtained by fraud and circumvention from a person in a state of intoxication, is void in equity. *Butler* v. *Mulvihill*, 1 Bligh, 137.

Equity will relieve against a contract entered into by a child with a parent, for an appointment from him; and a purchaser from the parent, with notice of the fraud, will be affected with it. *Palmer* v. *Wheeler*, 2 B. & B. 30.

22. Very doubtful, whether a purchaser for valuable consideration under a decree of court, fraudulently obtained, though ignorant of the fraud, can protect himself when the fraud appears on the face of the proceedings upon which the decree is founded. *Gore* v. *Stackpoole*, 1 Dow, 18, 30.

(*b*) *On the ground of Mistake.*

1. Where a purchaser buys the interest of a vendor in a remainder in fee, expectant on an estate tail; if at the time of the contract the tenant in tail had actually suffered a recovery, of which both parties were ignorant till after the conveyance had been executed, and an absolute bond given for securing payment of the purchase-money.—This court will interfere to rescind the contract, on the equity that the vendor had no interest in the subject-matter at the time of the sale; and also on the ground of mistake, although there has been no fraud from knowledge or concealment of the fact on the part of the vendor.

And they will not only order such a bond to be delivered up to be cancelled, but that all interest paid on it shall be refunded, but without costs. *Hitchcock* v. *Giddings*, 4 Price, 135.

XI. Relief for non-performance.

1. Where the defendant to a suit for the specific performance of an agreement to sell a house, had sold it to another person for a valuable consideration, without notice, the court referred it to a master, to ascertain what damages the plaintiff had sustained by the non-performance of the agreement, and decreed the defendant to pay such damages, when ascertained, to the plaintiff, with costs. *Denton* v. *Stewart*, 1 Cox. 258.

2. Where satisfaction, by way of damages, is sought by vendor for the non-performance of an agreement, it must be at law, and not in equity by praying an issue or a reference to the master. *Todd* v. *Gee*, 17 Ves. 273.

3. An action on the case would lie declaring specially on an implied agreement, with an averment that plaintiff was always ready to perform his part. *Kimpton* v. *Eve.* 2 V. & B. 353.

XII. Pleading.

1. Bill for specific performance of an agreement to purchase contained in a note, and which was accepted by the plaintiff. Plea, to the relief and discovery except as to the note, &c., of the Statute of Frauds, with an averment that there was no contract in writing signed, &c., unless the note in the bill mentioned could be so considered, and for answer to the excepted part, admitting the note, &c. This plea was overruled, as tendering an immaterial issue. *Morison* v. *Turnour*, 18 Ves. 175.

2. Allegation of the bill that the plaintiff, the tenant, was to pay taxes and do necessary repairs, not proved, is no substantial variation in agreements, where it is an admission against the party himself, and immaterial on account of a tenant's legal liability. *Gregory* v. *Mighell*, 18 Ves. 328.

XIII. Practice.

1. Where a bill for a specific performance of an agreement was made necessary by a trustee refusing to join in the conveyance, the court being of opinion, that the trustee ought to pay all the costs of the suit, the decree was, that the plaintiff should pay the costs of all the other defendants, although he had a decree against them, and recover over the whole costs from the defendant, the trustee. *Jones* v. *Lewis*, 1 Cox, 199.

2. Though a defendant to a bill for specific performance of a contract may have a decree for performance according to his construction, if adopted by the court, without a cross-bill; yet, where the decision was not according to his construction, but only that he had contracted under a mistake created by the plaintiff, the bill was merely dismissed. *Higginson* v. *Clowes*, 15 Ves. 516.

3. Where possession was had, and no objection made to the abstract of title, a performance may be decreed against a purchaser, without a reference as to the title. *Fleetwood* v. *Green*, 15 Ves. 594.

4. The plaintiff, in a suit to compel a specific performance of an agreement to sell, will not be barred by a report against the title in another suit upon a bill against him by the vendors. *Todd* v. *Gee*, 17 Ves. 273.

5. On the report against vendor's title, his bill for specific performance was dismissed with costs on motion. *Walters* v. *Pyman*, 19 Ves. 351.

6. Whether time was originally essential to the contract, and if so, whether it continues to be, are questions depending on evidence, and cannot be determined on a motion for an injunction to restrain the vendee from proceeding at law against the auctioneer to recover the deposit-money. *Levy* v. *Lindo*, 3 Mer. 81.

7. Where the terms of a contract, sought to be carried into execution, are not on the hearing of the cause sufficiently proved, a reference or an issue will not be directed to ascertain them. *Savage* v. *Carroll*, 1 B. & B. 265.

8. The old rule, not specifically to execute an agreement proved by one witness but denied by answer, has been varied when other circumstances support the evidence. *Toole* v. *Medlicott*, 1. B. & B. 402.

9. In a bill for the specific execution of an agreement, the plaintiff may abandon the agreement, and may, by amended bill, seek to have the benefit of an agreement admitted in the answer; and, by charging that the allegations in the original are equally applicable to the agreement in the amended bill, may refer to them without repeating them, and thereby obtain all the benefit of the evidence stated as applicable to the first agreement. *Willis* v. *Evans*, 2 B. & B. 228.

10. The use of inserting in a decree dismissing a bill for a specific execution "without prejudice to the plaintiff's remedy at law," is to prevent an unfavorable impression against the plaintiff on the trial at law. *M'Namara* v. *Arthur*, 2 B. & B. 353.

11. The terms of an agreement sought to be specifically executed must be accurately stated, and the case must be proved as stated on the record. *Lord Ormond* v. *Anderson*, 2 B. & B. 369.

12. A bill for specific performance of an agreement, after an action at law had failed, not multifarious. *M'Namara* v. *Arthur*, 2 B. & B. 353.

13. Bill for specific performance against

several defendants, to one of whom the subject in dispute had been devised by plaintiff's ancestor. This defendant in his answer, and on examination as a witness in the same cause, states himself to be only a trustee for plaintiff; it was declared by the decree of the Court of Exchequer in Ireland, that the beneficial interest was in this defendant. Held, by the Lords, on appeal, that the deposition of the defendant as a witness ought not to have been received, and that the decree was wrong in declaring the beneficial interest to be in a defendant, who admitted that he was trustee for plaintiff. If the beneficial interest had been in the defendant, the plaintiff had no right to file the bill, and the course should have been to dismiss it. *Chadwick* v. *Bradshaw*, 2 Dow. 331, 337.

14. Where a confirmed purchaser of premises under a decree of the court died before any conveyance was made to him, having in the mean time devised his interest therein to trustees, the court ordered that a conveyance should be made to them without the consent of the testator's heir at law, he being an infant. *Rex* v. *Gregory*, 4 Price, 380.

XIV. Costs.

1. Where a suit for a specific performance is made necessary, by a groundless objection to the title taken by the purchaser's conveyancer: held, that the purchaser must pay costs. *Maling* v. *Hill*, 1 Cox. 186.

2. Also where made necessary by the trustee's refusal to join in the conveyance, such trustee shall pay the costs. *Jones* v. *Lewis*, 1 Cox, 199.

3. Costs were ordered to a purchaser, where the vendor established the title before the master, after contest, upon a different ground from that in the abstract delivered. *Fielder* v. *Higginson*, 3 V. & B. 142.

4. Decree for specific performance without costs to the plaintiff (the vendor), where the title, though established before the master, was not clear upon the abstract. ——— v. *Collinge*. 3 V. & B. 143. (*n*)

5. Vendor bringing suit to compel a specific performance but not making a good title, will be ordered to pay costs, and though he is only a trustee to sell. *Edwards* v. *Harvey*, Coop. 40.

6. In a case where the party objecting to title, had been served with a copy of a judgment obtained for a specific performance in a different cause, but in favor of the same title against a similar objection, a specific performance was decreed with costs. *Biscoe* v. *Wilks*, 3 Mer. 456.

7. Where there are two suits, one by the vendors for a specific performance, upon which, after exceptions overruled, it was found that a good title could not be made, and the second by the purchaser, to compel them to bring in the accounts of their testator, upon the result of which it appeared a title could be made subject to a compensation, and which the vendors opposed without success, the court decreed costs of both suits to be paid by the vendors. *Burton* v. *Todd*, 1 Swan. 255.

8. Specific performance of an agreement to purchase, decreed without costs, the abstract delivered not containing a satisfactory title. *Wilson* v. *Clapham*, 1 Jacob & Walker, 36.

9. Specific performance, without costs, the suit having been occasioned by the refusal of the vendor, the plaintiff, to produce documents insisted on by purchaser, some of which were necessary, and others not. *Nouaille* v. *Smith*, 1 Jacob & Walker, 263.

10. A vendor seeking a specific performance should have his title prepared; and therefore, where the abstract delivered is imperfect, he pays the costs of the suit up to the time of the defects being supplied. *Wilson* v. *Allen*, 1 Jacob & Walker, 623.

11. If, in consequence of a party insisting on the completion of a contract for the purchase of an advowson, on a good title being made to it, and who has previously constantly objected to the title tendered, a bill become necessary on the part of the representatives of the party who originally contracted to sell, to ascertain the true claim to the next presentation, (a vacancy having occurred in the mean time, and the right to present being claimed by the purchaser) whereby the right is put in danger of lapse, a decree in favor of the plaintiff will carry costs so far as his claim came in question, although it be part of the decree, that, subject to the next presentation, the defendant be permitted to complete his contract. *Wyvill* v. *The Bishop of Exeter*, 1 Price, 292.

12. If a purchaser makes the suit necessary by frivolous objections to the ti-

tle, he pays the costs; but not where it is reasonable that he should have it fortified by the opinion of the court, although the objection fails, and the principle is the same with respect to suggestions of doubt as to matters of fact. Where the doubt was as to the bankrupt's having executed a power of appointment before the bankruptcy, and an inquiry to that effect was necessary, the court thought it not unreasonable, and refused to make the purchaser pay costs. *Thorpe* v. *Freer*, 4 Mad. 466.

ALIEN.

1. Commerce carried on by a British subject resident in an enemy's country, even as representative of the crown of this country, and although beneficial to this country, yet, if without a licence to reside and trade, it would be illegal, and the property liable to capture and condemnation. *Ex parte Baglehole*, 18 Ves. 528.

2. An alien, carrying on trade in an enemy's country, though resident there also in the character of consul of a neutral state, is considered an alien enemy; and, as well as a British subject so trading, is disabled to sue, and his property liable to confiscation. *Albrecht* v. *Sussmann*, 2 V. & B. 323.

3. An alien, devisee in trust to sell, joins in a conveyance, and afterwards obtains an act of naturalization, by which it is declared that he is "from thenceforth naturalized, and shall be and is enabled to ask, take, have, retain, and enjoy, &c. all lands, which he may or shall have by purchase or gift of any person or persons whatsoever." This act does not operate so as to confirm the conveyance so previously executed. *Fish* v. *Klein*, 2 Mer. 431.

ANNUITY.

1. Jurisdiction.

1. A court of equity has jurisdiction upon objections to the memorial of an annuity. *Dupuis* v. *Edwards*, 18 Ves. 358.

2. By a decree it was referred to the master to inquire, whether an annuity had been properly enrolled, and the master reported against the enrolment: upon a rehearing, the defendant (the annuitant) objected, that the decree had been obtained after two several orders of the court made, in another cause, for payment of the annuity, and after a rule to shew cause, in favor of the annuity, in the Court of King's Bench, had been discharged. This is not a sufficient ground for setting aside the decree, the former cause in which those orders had been obtained not having been instituted for the purpose of setting aside the annuities, and this court having jurisdiction, after the failure of an attempt to set aside an annuity at common law. *Angell* v. *Hadden*, 2 Mer. 164.

3. Though a grantor of an annuity has failed twice at law in his attempts to set it aside, yet the Court of Chancery has jurisdiction to declare the annuity void, and order the securities to be delivered up on the terms of paying the consideration money and interest, deducting the payments of the annuity. *Bromley* v. *Holland*, Coop. 9.

4. The price paid by the grantee, and not that paid by the assignee of the annuity, is to be taken in the account. *Ibid.*

5. If the annuity act is objectionable, it is most so because the summary jurisdiction over property given by the act, is inconsistent with the policy of the law and the constitution of the country. *Ibid*, 20.

6. Where the grantee of an annuity voluntarily destroys his deeds to conceal their defects, and sues upon the memorial at law, a court of equity will take cognizance. *Ibid*, 21.

7. How far, in case of fraud, the provisions of the annuity act might be dispensed with, not as against the grantee, but against his creditors—*Quære.* *Ex parte Wright,* 1 Rose, 308. 19 Ves. 255.

II. Memorial and enrolment of.

1. An equity of redemption is within the exception in the annuity act 17 Geo. 3. c. 26. s. 8. *Tucker* v. *Thurston,* 17 Ves. 131.

2. An annuity, secured on dividends of stock, standing in trust among other things for the grantor for life, is not within the exception in the annuity act, 17 Geo. 3. c. 26. *Dupuis* v. *Edwards,* 18 Ves. 358.

3. The omission in the memorial of an annuity, under the statute 17 Geo. 3. c. 26. (repealed by 53 G. 3. c. 141.) of a proviso for stay of execution under a judgment, one of the securities, until the annuity should be in arrears twenty days, was fatal. *Ibid.*

4. It is not necessary, under stat. 17. Geo. 3. c. 26. to insert, in the memorial of the annuity, a covenant for payment, or any particular remedy of the grantee, except so far as it may create a trust within the act; and there is some doubt as to the necessity of stating the trusts. *Ibid.*

6. In a case of objections under the annuity act, a reference was directed to the master to inquire whether proper memorials were enrolled, and to state the priorities of such as were valid. *Angell* v. *Hadden,* 16 Ves. 202.

6. Grant of an annuity void for want of a memorial registered, being charged on an estate of less value than the annuity. The grantor was the grantee's attorney, preparing the security and depositing the title deeds, but misrepresenting the value of the estate. *Ex parte Wright,* 19 Ves. 255. 1 Rose, 308.

7. Notwithstanding the rigorous exactness that has been required in enrolments under the annuity act, clerical mistakes do not vitiate the memorial. *Wyatt* v. *Barwell,* 19 Ves. 438.

8. Decree for setting aside an annuity for want of a memorial registered, and an account of the consideration, with interest and costs, and of all the annual payments, the balance on either side to be paid, the securities delivered up, and a reconveyance. *Holbrook* v. *Sharpey,* 19 Ves. 131.

9. A lease deposited, as a further security of an annuity, two years after the annuity was granted, was held to be an equitable security; and, as forming no part of the original agreement, was not within the annuity act, and therefore need not be memorialised. *Ex parte Price,* 3 Mad. 132. 1 Buck, 221.

10. Annuity granted in consideration of a reversionary interest in stock, need not be enrolled under stat. 17 Geo. 3. c. 26. *Brown* v. *Douthwaite,* 1 Mad. 446.

III. Valid or void.

1. A grant of an annuity to A. on her marriage by a stranger, who had promised to provide for her, declared to be valid: it being granted in consideration of marriage; and A. was not held to be a volunteer. *Power* v. *Bailey,* 1 B. & B. 49.

IV. Fraudulent.

1. Grant of an annuity fraudulently obtained by a person having a spiritual ascendancy over a woman, who was under a state of religious delusion, set aside upon the ground of public policy, as well as the fraud. *Norton* v. *Relly,* 2 Eden. 286.

V. Equitable relief in favor of.

1. A society for raising an Annuity Fund for the benefit of the members, the rate of subscription being too low, though the subsisting fund was equal to the annuities then payable, and no adequate remedy was pointed out by the articles. Inquiries were directed to ascertain the state of the society, the defect of the plan, &c. and also to provide a remedy by additional

subscription adequate to the object, by paying the arrears and providing for the present and future annuities. *Pearce* v. *Piper*, 17 Ves. 1.

2. Where a trustee of a term of years, upon the usual trusts for securing annuities, has taken possession of the estates under the trusts, the court, although all arrears of the annuities are afterwards paid, will not order possession to be given up to the grantor, except upon such terms as will enable the trustee to resume it, and to receive the rents the moment the annuities are again in arrear. *Jenkins* v. *Milford*, 1 Jacob & Walker, 629.

3. A. covenanted by his marriage settlement to pay to trustees, within four years, a sum of £4000. the dividends whereof and of other funds thereby settled were made payable to himself for life. Afterwards he obtained a pension from government by warrant of the treasury, made payable to him or his assigns by the Treasurer of the Navy, out of a certain fund, during his, the grantee's, life. A. having granted annuities, secured by assignment of his pension and of these dividends, absconded, being indebted to the crown, and not having paid the £4000. due upon the covenant, and his pension by order of council was withdrawn. On a bill by the annuitants against the Treasurer of the Navy and the Attorney General for recovering of what was in the hands of the former on account of the pension, and against the trustee of the settlement for dividends accrued since A's departure: held, as to the first, that this court has no jurisdiction; and as to the second, that the trustees who had no notice of the assignment, were entitled to retain the dividends in satisfaction of the covenant; and the bill was therefore dismissed, against all the defendants *Priddy* v. *Rose*, 3 Mer. 86.

4. A., tenant in fee, mortgaged his estates to a large amount, and appointed a receiver of all his estates, giving him verbal directions to apply the rents in keeping down the interest of the mortgages, and to pay the surplus to himself, the mortgagor. He then mortgaged part of his estate, and by deed appointed the same person receiver of this estate in trust, to pay the interest of this mortgage, and the surplus rents to himself as before. Afterwards, representing his estate as free from incumbrances, he granted several annuities charged upon all his estates, and demised the estates to a trustee, for securing the annuities, and subject thereto to permit the mortgagor to receive the rents for his own benefit. In a suit by the annuitants against the mortgagor and receiver, without making any of the prior incumbrancers parties; the court will restrain the receiver from paying to the mortgagor any of the rents and profits received since the notice from the plaintiffs, and will also appoint a receiver, but without prejudice to the prior mortgagees taking possession. *Dalmer* v. *Dashwood*, 2 Cox, 378.

VI. By will.

1. The arrears of an annuity under a will, ordered to be paid to the widow and executrix, although no report of debts had been made; she stating by her answer, that all debts come to her knowledge, had been paid, and undertaking to refund if necessary: but a direction for future payments was refused. *Skinner* v. *Sweet*, Coop. 54.

2. But where the annuitant, in the character of an executrix, was considerably indebted to the estate, the court directed that the annuity, as it became due, should be applied in payment of the debt due to the estate, with liberty to apply when the debt due to the estate should be discharged. *Skinner* v. *Sweet*, 3 Mad. 244.

3. Where annuities are given out of a residue, and no time of payment is mentioned in the will, whether such annuities commence before the end of one year from the testator's death, *quære:* but where the annuities are expressly directed to commence at the first quarter-day after the testator's death, the annuitants are entitled to a retrospective account of the arrears accrued due since that time. *Storer* v. *Prestage*, 3 Mad. 167.

4. Where the testator authorized his executors to pay an annuity, "unless circumstances should render it unnecessary, inexpedient, and impracticable." It must be meant, unless, in the opinion of his executors, circumstances should so render it: the judgment of the executors in this respect, not controlable by a Court of Equity, unless it appears they act *malâ fide.* But as the answer of the executors stated many mixed motives for their refusal to pay the annuity, and it was plain they had never simply addressed themselves to the sound exercise of the discretion reposed in

them by the testator, they were decreed to pay the annuity according to the words of the will. *French* v. *Davidson*, 3 Mad. 396.

5. Where a testator directed his executors to convert his property and invest it in stock, and thereout to pay a clear annuity of £250. to his widow for her life, and after her death to pay the principal sum that produced the annuity, over; and the property was not, in fact, sold or invested till after the death of the widow, but had since been transferred into the name of the Accountant-general, in trust, in the cause: held, this was a gift of as much stock to be purchased by the property when converted, as would produce an annuity of £250. and the court gave so much stock as would produce by the dividend an annual sum of £250. and if stock had fallen instead of having risen, the particular legatees must have borne the disadvantage. *Borrett* v. *Dealy*, 3 Mad. 449.

6. A bequest of an annuity charged upon the testator's leasehold interest, "during the term of the said lease," extends to and is a charge upon every renewal obtained by the devisee of the leasehold interest. The annuitant must contribute to renewal fines, in proportion to his interest. *Winslow* v. *Tighe*, 2 B. & B. 195.

7. In the distribution of assets, where there is not sufficient for all the legacies and annuities, they shall all abate. An annuity in that case being valued, becomes a legacy of that value, and must abate proportionably. *Ex parte Thistlewood*, 19 Ves. 250. 1 Rose, 295.

8. The ordinary practice in valuing an annuity for the purpose of the distribution of assets, or paying the legacy duty, has gone upon this principle, that the value of the annuity at a time past, is as well evidenced by the price paid upon a transaction of sale, as by any other circumstance. *Ibid.*

APPEAL.

I. Where it lies or does not lie.

1. An appeal on rehearing for costs only, may be allowed under particular circumstances. *Cowper* v. *Scott*, 1 Eden, 17.

2. An order for a cause to stand over, with liberty for the plaintiff to amend his bill by adding parties, is in its nature an order by consent, and therefore cannot be appealed from. If the plaintiff thinks there is no want of parties, he should let his bill be dismissed for this reason, and then appeal. *Beresford* v. *Adair*, 2 Cox, 156.

3. Though a rehearing or appeal does not lie upon the question, whether costs should be given or not, it does upon the question whether the court has applied the proper fund for the payment of them. *Taylor* v. *Popham*, 15 Ves. 78.

4. Where costs are disposed of as a subject of relief, a rehearing or appeal is not open to the objection of an appeal for costs only. *Ibid.*

5. No appeal lies from the Lord Chancellor's jurisdiction in bankruptcy. *Ex parte Bryant.* 1 V. & B. 211. 2 Rose, 4.

6. When a motion for a new trial has been refused at the Rolls, upon an issue directed by his Honor, the Lord Chancellor will not, by way of appeal, entertain a similar application. *Bourke* v. *Rothwell*, 2 B. & B. 56.

7. Though no appeal allowed on a question of costs merely, yet costs may be considered where there is an appeal on other grounds. *Fitzgibbon* v. *Scanlan*, 1 Dow, 270.

II. For whom it lies or does not lie.

1. Whether a party, by consenting to an order consequential on a decree, precludes himself from the right of appeal—*Quære.* *Wood* v. *Griffith*, 1 Mer. 35.

2. Solicitor takes a mortgage of the estate of his client, pending a suit relative to that estate, for money advanced, and costs, but does not make himself a party to the suit. Decree below against the client who refuses to appeal. Whether the solicitor can appeal in the client's name—*Quære.* *Daly* v. *Kelly*, 4 Dow, 417.

III. Staying proceedings during.

1. By a general order of the House of Lords, dated 12th of August, 1807, proceedings in Courts of Equity shall not be staid by appeal, unless by special order of the House, or the Court which is appealed from. 15 Ves. 184.

2. In a suit against a corporation, the court refused to suspend the execution of a decree for foreclosure, until six months after hearing an appeal, but gave until six months after the Master's report, upon the defendant's paying the money into court, consenting to a receiver, and paying interest and costs; plaintiff's undertaking to repay if the decree should be reversed. *Monkhouse* v. *Corporation of Bedford*, 17 Ves. 380.

3. An appeal does not form a ground to stay process for costs previously commenced, *viz.* by *subpœna:* otherwise, where the appeal is before any step taken. *Roberts* v. *Totty*, 9 Ves. 446.

4. Pending an appeal from the Rolls, an application to stay further proceedings, or to stay a final decree, must be made to the Lord Chancellor. *Macnaghten* v. *Boehm*, 1 Jacob & Walker, 48.

5. Pending an appeal from an order overruling a demurrer, the Court will stay proceedings for enforcing an answer, where answering would render the appeal useless. *Wood* v. *Milner*, 1 Jacob & Walker, 636.

6. A motion for an order to suspend the payment of the costs of a bill which had been dismissed, on the ground of an appeal to the Lord Chancellor, was refused. *Tyson* v. *Cox*, 3 Mad. 278.

7. Application to suspend an order of the court till an appeal, of which notice had been given, should be determined, would be more properly made to the court of appeal; particularly where that court has already interfered in the cause: but the court suspended their order for a given period, and to a certain extent, on motion, for the purpose of giving the party an opportunity of applying to the appellate court. Sir *Watkin Lewes* v. *Morgan*, 5 Price, 468.

IV. Practice.

1. On an appeal from the Rolls, the Court will not return the deposit to the appellants, unless the decree has been materially varied by the appeal, *Holworthy* v. *Mortlock*, 1 Cox, 144.

2. An appeal from the Rolls to the Lord Chancellor cannot be reheard. *Fox* v. *Mackreth*, 2 Cox, 158.

3. Where the plaintiff appeals from a decree dismissing the bill, he is entitled to the usual order for the production and inspection of deeds previous to and at the hearing of the appeal. *Church* v. *Barclay*, 16 Ves. 435.

4. Abuse of the right of rehearing an appeal prevented not only by costs, but also by requiring the signature of counsel, that the case is fit to be reheard. *Monkhouse* v. *Corporation of Bedford*, 17 Ves. 381.

5. The object and effect of the order of the House of Lords requiring the parties to appeals to print their cases forthwith, applying generally to all appeals, was to check the abuse of appealing merely for delay and vexation. *Way* v. *Foy*, 18 Ves. 453.

6. The signature of counsel on appeal to the House of Lords is equivalent to the certificate on appeal to the Lord Chancellor. *Ibid.* 18 Ves. 453.

7. On appeals and rehearings additional evidence is permitted in some instances, but subject to costs for not having the evidence at the time it ought to have been read. *White* v. *Fussell*, 1 V. & B. 153.

8. An appeal to the Lord Chancellor from a part of the decree, which had been affirmed on a rehearing at the Rolls; but the other party having previously appealed from another part of the decree, the second appeal was brought up at the first. *Blackburn* v. *Jepson*, 2 V. & B. 359.

9. The resolution of the House of Lords to take causes in their order does not preclude the discretionary power of calling at any time such causes as appear to be brought there merely for the purpose of delay. *Hearn* v. *Cole*, 1 Dow, 463.

10 The contents of the printed cases in the House of Lords are to be considered a judicial representation as much as the speeches of counsel. *Bernal* v. *Marquis Donegal*, 3 Dow, 157.

11. No re-hearing in the House of Lords. *Bernal* v. *Marquis Donegal*, 3 Dow, 157.

12. But counsel may be heard to correct a mistake, which, in drawing up the formal judgment may have been made contrary to the principles of their Lordship's decision. *Ibid.*

13. Where persons were made parties to a Crown information in Equity below, on the suggestion of a defendant in his answer, such defendant is precluded from availing himself on appeal of the objection, that these persons ought not to be parties. *Macklow* v. *Attorney General*, 4 Dow, 9.

14. Where a decision is clearly right, the House of Lords will not remit merely because the ground of decision below has been different from the ground of its own decision. *Young* v. *Leven*, 4 Dow, 138.

15. In a suit by next kin against an administrator, one of the next of kin appeals, the others do not appeal. The administrator lodges a cross appeal, and the cause stands over for defect of parties, till the other next of kin are made parties respondents to both appeals. It seems, from the final judgment, that the next of kin who did not appeal from the decrees below, but who, when called as respondents, prayed the benefit of the original appeal, were held entitled to that benefit. *Stacpoole* v. *Stacpoole*, 4 Dow, 218, 230.

16. An agent was called to the bar of the House of Lords, and censured for printing observations in an appeal cause without signature of counsel. *Eamer* v. *Fisher*, Cited 4 Dow. 223.

17. The Court will not order money, which has been awarded to be paid to a party by an arbitrator, to be paid into Court for the purpose of preventing it getting into the hands of the person who has so become entitled to it (an order of Court having been already made to pay it to him according to the award), on the ground of the pending of an appeal against the refusal of the Court to set aside the award, if the appeal has not been received, although the petition has been signed by counsel. *Lewis* v. *Harber*, 1 Price, 132.

18. But semble *secus*, if the appeal has been received. *Ibid.*

V. COSTS.

1. The costs of a special application to stay proceedings under a decree, during an appeal, will generally, if not universally, follow the judgment, if unfavorable. *Willan* v. *Willan*, 16 Ves. 216. *Waldo* v. *Calcy*, 16 Ves. 206.

2. Where a suit in equity was suffered to sleep for more than twenty years, without any steps having been taken by either party to prosecute, or have it dismissed: This, though no bar to the relief, is a good reason for not giving costs, where otherwise they would have followed the judgment. *Cane* v. Lord *Allen*, 2 Dow, 289, 299.

3. Where administrator retained a sum undistributed, and no effectual suit commenced for twenty years, as the suit, after it had been commenced, was protracted for a considerable time by unfounded demands set up by the administrator: held, that the administrator should pay plaintiff's costs incurred since the original decree. *Stacpoole* v. *Stacpoole*, 4 Dow, 210.

4. Where there was considerable delay in appealing, and the party, who had the judgment below in his favor, had taken several proceedings under it, which an earlier appeal would have prevented, the appellant, though the judgment should be reversed, ought to indemnify the other party against the expense of such proceedings. *Hamilton* v. *Grant*, 3 Dow, 56.

5. Although material alterations were made in Dom. Proc. in a decree appealed from, but affirmed as to the principal matter, yet, as the appellant had not called for these alterations below, and as the respondent had been considerably harassed with actions and expenses, he was allowed £100 costs. Lord *Kensington* v. *Phillips*, 5 Dow, 61.

ARBITRATION AND AWARD.

I. Jurisdiction.

1. Exceptions may be taken to an award, where the original reference was to a master, with a reservation of further directions; and by a subsequent order the arbitrator was substituted in lieu of the master, to take the accounts in the like manner as they had been referred to the master: but not where the reference to the arbitrator is of all matters in difference, and the court had reserved nothing to itself. *Ford* v. *Gartside*, 2 Cox, 368.

2. Generally, an agreement to refer disputes to arbitration, is no objection to a suit in equity; but, from the nature of the subject, the management of the Opera House, and the anxious provision of the parties to settle all disputes by arbitration, the court refused, upon motion, to interfere till after the parties had taken that course. *Waters* v. *Taylor*, 15 Ves. 10.

3. There is no case at law or in equity, that, if an award is not made at the time, and in the manner stipulated, the court have substituted themselves for the arbitrators, and made the award, even when the substantial thing to be done was agreed between the parties, but the time and manner only left to others to prescribe. *Blundell* v. *Brettargh*, 17 Ves. 242.

4. As to the jurisdiction in equity against an award, under a reference made a rule of a court of law, for misconduct of the arbitrator, &c. where the bill was filed before the rule made in the court of law—*Quære.* — v. *Mills*, 17 Ves. 419.

5. If a submission to an arbitration is made a rule of court, the jurisdiction is transferred to the court in which the submission is made a rule, if such submission is acted upon; but if not acted upon, no other court acquires jurisdiction. It is the same as if such submission had been made. *Steff* v. *Andrews*, 2 Mad. 10.

6. A cause having been referred to arbitration, under an order by consent, the court will not make an order on the arbitrators to proceed. *Crawshay* v. *Collins*, 1 Swan, 40. 1 Wil 31.

7. Whether it is competent for either party to withdraw—*Quære.* *Ibid.*

II. Submission.

1. A parol submission to arbitration is not within the statute 9 & 10 Will. & Mary, c. 15. ——— v. *Mills*, 17 Ves. 419.

2. A submission to an award may be made a rule of court after the award is made. *Smith* v. *Symes*, 5 Mad, 74.

3. Revocation of a submission under some circumstances, though good at law, may be bad in equity. *Harcourt* v. *Ramsbottom*, 1 Jacob & Walker, 512.

III. Arbitrators.

(*a*) *Appointment and authority.*

1. Objection to appointment of arbitrator is waved by attending him. *Harcourt* v. *Ramsbottom*, 1 Jacob & Walker, 511.

2. The revocation of the authority of an arbitrator, the submission to whose award has been made a rule of court, is a contempt. *Harcourt* v. *Ramsbottom*, 1 Jacob & Walker, 511.

(*b*) *Power and duty.*

1. One party to an arbitration having ineffectually attempted to revoke his submission, refused to attend: semble the arbitrator may proceed ex parte without

giving him notice. *Harcourt* v. *Ramsbottom*, 1 Jacob & Walker, 512.

2. A purchase by an arbitrator of claims under reference cannot be supported. *Blennerhasset* v. *Day*, 2 B. & B. 116.

IV. Award.

(*a*) *Construction of.*

1. In construing an award it is the duty of the Court to favor that construction which renders the award certain and final. *Wood* v. *Griffith*. 1 Swan. 52. 1 Wil. 43.

(*b*) *Objection to, and equitable Relief against.*

1. Where an award is agreed to be ready to be delivered in writing to the parties by a certain day, it is not a sufficient objection to the award that it has not a deed stamp. *Blundell* v. *Brettargh*, 17 Ves. 232.

2. The declaration of one of the arbitrators, that, had he seen a letter of which, being mislaid at the time, the contents were proved by evidence, he would have acted otherwise, is not a sufficient objection to an award on the ground of mistake admitted by the arbitrators; of which there ought to be clear and distinct evidence, and an affidavit by the arbitrators, in order to induce a court either of law or equity to interpose. *Anderson* v. *Darcey*, 18 Ves. 447.

3. The court will abide by the decision, though erroneous, of judges chosen by the parties to decide a question of law. *Wood* v. *Griffith*. 1 Wil. 44. 1 Swanst. 55.

4. If a point of law be referred to the decision of an arbitrator, the parties are bound by his decision, unless fraud or corruption is imputable. *Steff* v. *Andrews*, 2 Mad. 6.

5. Where legal rights are referred to arbitration, the award must be according to law, otherwise it is not binding. *Blennerhasset* v. *Day*, 2 B. & B. 120.

6. Where an award was made upon an understanding, and an injunction is sought upon a breach of such understood agreement, parol evidence is admissible to show the foundation on which the award was made, and the court will give relief on the ground of fraud; and will not consider such a suit as a suit to carry the award into execution with an addition by parol evidence. *Harrison* v. *Gardner*, 2 Mad. 198.

7. Award made in regard to matters in dispute in Chancery, between husband and wife, pending a suit in Ecclesiastical Court for a divorce. The award assumed there must be a separation, and provided accordingly. Objected to this award, that it assumed the jurisdiction of Ecclesiastical Court, and went beyond the submission in awarding a separation. Judicial answer to this, that the award did not adjudge a separation, but only proceeded upon the assumption that there must be a separation. *Bateman* v *Countess of Ross*, 1 Dow, 245.

8. It is not a good objection to this award, that no regular separation had taken place between husband and wife, and that wife's next friend was not a party to the submission. *Ibid*, 244.

9. Upon an application to set aside this award, the court, without setting aside the award, made an order partly doing away the effects. Whether the regular course would not have been to set aside the award, to preserve consistency in the court's proceedings—*Quære*. *Ibid*, 235.

10. If an arbitrator, a barrister, reject a witness as inadmissible in point of law, the court will not interfere to set aside his award on that ground, although the party applying offer to pay all the previous costs incurred: considering the parties bound by his decision. *Cambell* v. *Twemlow*, 1 Price, 81.

ATTORNEY-GENERAL.

1. The Attorney-General is an officer of the crown, and in that sense only the officer of the public. *Attorney General* v. *Brown*, 1 Swan. 294.

BANKRUPTCY.

BANKRUPTCY.

I. JURISDICTION.

1. The jurisdiction in bankruptcy is both legal and equitable.
Ex parte Dewdney, } 15 Ves. 496.
——— *Seaman,* }
——— *Roffey.* 15 Ves. 469.

2. And such jurisdiction is exercised more by practice than by authority.
Ex parte Roffey. *Ibid.*

3. Jurisdiction to expunge scandal from an affidavit in bankruptcy.
Ex parte Simpson, 15 Ves. 476.
——— *Le Heup,* 18 Ves. 22.

4. Where a bankrupt had not surrendered within the time, but had obtained an order for the commissioners to take his surrender, and was arrested, the Lord Chancellor doubted his jurisdiction to order the discharge of the bankrupt. *Anon,* 15 Ves. 1.

5. Contumacious obstruction of the messenger under a commission of Bankruptcy is treated as a contempt, though the messenger acts under the authority of the commissioners, given by statute, and not under that of the Lord Chancellor in bankruptcy; so in case of the commitment, the Lord Chancellor can do no more than grant a writ of Habeas Corpus by his authority, not in bankruptcy, but as holding the great seal. *Ex parte Page,* 17 Ves. 59.
1 Rose, 1.

6. Equitable relief under a second commission against an uncertificated bankrupt, with suggestion of property acquired in the subsequent trade, and want of notice by subsequent creditors, was refused on petition, but liberty was given to file a bill. *Ex parte Storks,* 3 V. & B. 105.

7. A creditor proving his debt under the commission, gives the court a jurisdiction quite different from that which it is authorized to exercise, where the creditor has not proved. *Ex parte Hilton,* 1 Jacob and Walker, 469.

8. The Courts of Scotland have no jurisdiction to try the validity of an English commission of bankruptcy; but if the Scotch Court of Session were satisfied, that the party subjected to the commission was domiciled in Scotland, and had not been domiciled in England, whether they would be bound to give effect to the commission—*Quære. Royal Bank of Scotland* v. *Cuthbert,*
1 Rose, 462.

9. Assignee under a commission of bankruptcy cannot maintain a petition against a party not claiming under the commission; but the Court exercises jurisdiction against assignees on the petition of persons not claiming under a commission, but claiming specific property against it.—*Ibid. Ex parte Pease,* 19 Ves. 46.
1 Rose, 242.

10. There is jurisdiction in bankruptcy beyond the statutes. *Ex parte Cawkwell,* 19 Ves. 234.

11. There are many cases where the Court has jurisdiction in bankruptcy, merely by consent, and if parties having waved the benefit of the objection afterwards refused obedience to the orders, they would be committed. *Ex parte Hall,*
1 Rose, 13

12. A stranger to the commission, seeking by petition to avail himself of the jurisdiction in bankruptcy, must submit to it in all respects, and the court will enforce its order against him. *Ex parte Pease,* 19 Ves. 48.
1 Rose, 243.

13. A stranger to the commission, applying for an order in bankruptcy, brings himself within the jurisdiction. *Ex parte Laffert,* 1 Rose, 181. 205.
——— *Peyron,* 1 Rose, 368.

14. But whether, if the object of the petition is merely that the commission may be superseded, or the certificate stayed—*Quære. Ex parte Hardenburgh,*
1 Rose, 206.

15. A. obtains money from B. on the security of goods consigned to B.'s,

house in *America*, and shortly after becomes bankrupt: B.'s agent in *America*, ignorant of the advances made, and of the bankruptcy, remits bills for the proceeds of the goods to A.; A. delivers them to a person to get them accepted, who hands them over to B. Petition that A. or the assignees might be directed to endorse them, dismissed with costs; the court not having jurisdiction, except by consent, to order the distribution of the bankrupt's effects, as to those who are strangers to the commission. *Ex parte Hall*, 1 Rose, 13.

16. Whatever it is necessary to decide collaterally to the question of proof, will give jurisdiction in bankruptcy. *Ex parte Rowton*, 17 Ves. 426. 1 Rose, 15.

17. No jurisdiction in bankruptcy to order goods seized by the messenger to be delivered up to a person claiming them as his. *Ex parte Craggs*, 1 Rose, 25.

18. The Court has not jurisdiction to appoint a receiver upon petition in bankruptcy. *Ex parte Tupper*, 1 Rose, 179.

19. If the debtors of a bankrupt in a foreign country, refuse to pay their debts to the assignees, without an assignment or a power of attorney from the bankrupt, and the bankrupt refuses to execute such an instrument, the court has no power to compel him. *Ex parte Blakes*, 1 Cox, 398.

20. No jurisdiction to compel a bankrupt to execute a general power of appointment in fav r of his creditors. *Thorpe* v. *Goodall*, 17 Ves. 288, 460. 1 Rose, 40, 270.

21. The Great Seal has jurisdiction, after the bankrupt has passed his last examination, to compel him to deliver up papers in his possession belonging to the estate, and to attend commissioners. *Ex parte Bradley*, Rose, 202.

22. No jurisdiction in bankruptcy to order an infant heir of a deceased assignee to convey, as an infant trustee, the estates of the bankrupt vested in him by the decease of his ancestor. But in this case the petition was amended, and the order made under the statute 7 Ann. c. 19. *Ex parte Beddam*, 1 Rose, 310.

23. Nor to declare the infant heir of an assignee a trustee of the bankrupt's estate. The case being within the statute of Anne, and the petition must be so entitled. *Ex parte Kirk*, Buck, 478.

24. Jurisdiction to order the trustees in a deed of assignment of the trader's effects, to produce it before the commissioners for the purpose of proving an act of bankruptcy. *Ex parte Cawkwell*, 1 Rose, 313. 19 Ves. 233.

25. Jurisdiction in bankruptcy to order assignee to pay a messenger's bill of fees. *Ex parte Hartopp*, 1 Rose, 449.

26. The court will not (sitting in bankruptcy), on behalf of the sureties of a bankrupt, direct a sale of mortgaged premises for payment of a debt secured by recognizance, or for payment of any other security except a mortgage. *Ex parte Usher*, 1 B. & B. 197. 1 Rose, 366.

27. Under a separate commission against one of two partners, the bankrupt having paid twenty shillings in the pound to all his creditors, obtained an order for the payment of the surplus to him, and the same was accordingly paid to him. Held, that his partner was entitled to apply by petition in the bankruptcy, for an account of such surplus, and for payment of his proportion of it, and that the Court had jurisdiction to make the order required. *Ex parte Langtar*, 1 Rose, 442.

28. The Lord Chancellor has no jurisdiction to indemnity an assignee against the consequences of a supersedeas. *In the matter of Bryant*, 2 Rose, 17.

29 The Vice-Chancellor can certify the propriety of awarding the writ of *procedendo*, in cases where a commission has been superseded upon his certificate. *Ex parte Crump*, Buck, 3.

30. The Lord Chancellor can direct the Vice-Chancellor to hear a petition for a writ of *procedendo* to issue when a commission has been superseded, on the Vice-Chancellor's order, confirmed by the Lord Chancellor: but the Vice-Chancellor cannot hear the petition without such direction. *Ex parte Hurd*, Buck, 45.

31. The jurisdiction in bankruptcy extends to every person fraudulently engaged in issuing a commission. *Ex parte Boyle*, Buck, 247.

32. Where a creditor has proved a debt, and the assignees have a demand against him, which, if determined in their favor, would give them a lien upon the dividends, they may proceed by a petition in the bankruptcy to enforce that demand. *Ex parte Timbrel*, Buck, 305.

33. The Court has jurisdiction in bankruptcy to order the papers deposited by the bankrupt with his attorney in actions

commenced before the bankruptcy, to be delivered up to the assignees, provided they are necessary to the administration of the estate. But where the assignees wanted such papers for the purpose of instituting criminal proceedings against the bankrupt, the petition was dismissed with costs. *Ex parte Innes*, Buck, 337.

34. The court has not jurisdiction in bankruptcy, as between the lessors and assignees of a bankrupt lessee, except in cases under the statute 49 Geo. III. c. 121, s. 19, or where the petition makes a case for an injunction. *Ex parte Warwick*, Buck, 326.

35. The Lord Chancellor's jurisdiction as to acts done in the bankruptcy is not determined by the superseding of the commission. So, after the commission is superseded, a petition will lie on behalf of a purchaser of the estate put up to sale by the assignees for the repayment of the deposit. *Ex parte Fector*, Buck, 428.

36. The court has not jurisdiction in bankruptcy to order the petitioning creditor to pay the solicitor's bill up to the choice of assignees. *Ex parte* ——, Buck, 475.

37. The Lord Chancellor has not authority to compel the commissioners to declare a party against whom a commission has issued, a bankrupt. His authority is limited to ordering them to proceed in their judgment. *Ex parte Perrin*, Buck, 510.

38. The court, in bankruptcy, has a right to look at the proceedings. *Ex parte Scott*, Buck, 280.
Ex parte Gardner, 1 V. & B. 74
——— *Vypond*, 1 Mad. 624
——— *Forster*, 1 Rose, 49.
17 Ves. 414.

39. The Lord Chancellor in bankruptcy holds an even hand between the crown and the creditors. *Ex parte Mayor*, 19 Ves. 541.

40. Where a commission is superseded at the costs of the petitioning creditors, and some of them pay the whole costs, the court has no jurisdiction in bankruptcy, to order the rest of the petitioning creditors to contribute. *Ex parte Wilmshurst*, 1 G. & J. 4.

41. An application to remove a solicitor from being or acting as a master extraordinary, and to strike him off the rolls, although it may very properly be made by reason of his conduct in a matter of bankruptcy, yet should not be made in the bankruptcy, but should be addressed to the general jurisdiction of the court. *Ex parte Lowe*, 1 G. & J. 78.

II. Persons liable to a Commission.

1. An infant cannot be a bankrupt. *Ex parte Adam*, 1 V. & B. 494.

2. But in a case where the bankrupt, an infant, had held himself forth as an adult and *sui juris*, and had traded in that character for two years, the court, upon the petition of the bankrupt, refused to supersede the commission. *Ex parte Watson*, 16 Ves. 265.

III. Trading.

1. A trading to support a commission depends not upon the quantity, but the intention; and it is a question for a jury, whether there is enough to evidence that intention. *Ex parte Magennis*, 1 Rose, 84.

2. Whether or not a trader has ceased his trading, does not depend on the mere discontinuance of it, or the absence of any specific acts of trading, but whether there be an intention to exercise, or resume it; and that is a question for a jury.
Ex parte Paterson, 1 Rose, 402.
——— *Cundy*, 2 Rose, 357.

3. An underwriter, merely in that character, cannot be a bankrupt. *Ex parte Bell*, 15 Ves. 355.

4. Proprietor of a quarry, getting the stone for sale, is not a trader within the bankrupt laws, and the effect of purchases of stone must depend upon the circumstances. *Ex parte Gardner*, 1 V. and B. 45. 1 Rose, 377.

5. Whether trading, as in the instance of an attorney's buying and selling books, is or is not sufficient to support a commission of bankruptcy, depends upon whether the nature of the dealing, however small, is such as to manifest an intention to deal in the article generally, and is a question peculiarly fit for the consideration of a jury. *Ex parte Bryant*, 1 V. & B. 211.

6. A scavenger, contracting with a parish, for valuable consideration, for liberty to take the mud, dust, &c. is

not a trader, within the bankrupt laws. *Ex parte Collins*, 1 V. and B. 217. (*n*). 1 Rose, 373.

7. A farmer making lime from a lime pit, opened and worked before the commencement of his term, and selling the surplus beyond what he required for manure, is not a trader, within the bankrupt laws. *Ex parte Ridge*, 1 V. & B. 360. 1 Rose, 316.

8. Where the commisssion and affidavit of debt described the bankrupt only as a waterman, but with a general statement that he got his living by buying and selling, it was held sufficient to support the commission. *Ex parte Herbert*, 2 V. & B. 399. 2 Rose, 246.

9. Scrivener is one who, with an intention thereby to get a living, receives into his custody other men's money, to be laid out on their account, according to the purpose for which it is deposited. The mode of his remuneration, whether by procuration-fees, by a charge for commission, or otherwise, is a circumstance immaterial. The actual deposit of, and complete control over the money of others till invested, and the intention thereby to get a living, being the essence of this species of trading. *Ex parte Malkin*, 2 V. & B. 31. 2 Rose, 27.

10. Whether or not a person is a trader as a scrivener, does not depend upon his occasionally doing such acts of trading as scriveners were accustomed to do, but upon an intention generally to get his living by so doing. *Ex parte Paterson*, 1 Rose, 402.

11. An attorney, in the common course of his profession, purchasing and selling estates, negotiating loans, &c. not subject to the bankrupt laws as a scrivener. *Ex parte Malkin*, 2 V. & B. 31, 175. 2 Rose, 27.

12. And though the same person may act both as an attorney and scrivener, yet whether he can so act in the same transaction—*Quære*. S. C. 2 V. & B. 35.

13. The strong probability is, that no person can now be the object of a commission as a scrivener. *In the matter of Lewis*, 8 Rose, 59.

14. A fisherman buying fish of other boats at sea, and selling it ashore, is a trader within the bankrupt laws; and if such be the usual practice of a particular class of fishermen, one of them who is proved to have done so once, will be presumed to have continued to carry on his business in the same manner. *Heanny* v. *Birch*, 1 Rose, 356.

15. A farmer buying and selling horses, to an extent unauthorized by his character of farmer, may be a bankrupt as a horse-dealer, although he may have bought and sold without a licence to deal in horses. *Ex parte Gibbs*, 2 Rose, 38.

16. A fisherman who buys occasionally fish, to make up for market a cargo otherwise deficient, is not a trader within the bankrupt laws. *Ex parte Gallimore*, 2 Rose, 424.

17. A man, whether termor or freeholder, who sells bricks made from the produce of his soil, is not a trader within the bankrupt laws; but otherwise, if he purchases the materials of his manufacture. *Ex parte Gallimore*, 2 Rose, 424.

18. Whether the owner of a colliery, borrowing a particular species of coal to render his own marketable, be a trader, is a question for a jury upon the intention. *Ibid.*

19. Owner of a colliery buying articles, and selling them to his own pitmen, not a trader, *Ibid.*

20. One who occupied lands for the purpose of keeping cows, the milk of which he sold, and when they ceased to yield milk, fattened and sold them, and bought others for the like purpose, and who also sold calves, is not a trader within the bankrupt laws. *Carter* v. *Dean*, 1 Wil. 85. 1 Swan. 64.

21. A testator entitled, by leases of unequal duration, to iron-mines and works, by will gave a pecuniary legacy to B., as a capital for him "to become a partner with my executor of one-fourth share in the trade of all those works as long as the lease endures," and all his real and personal estates to H. and his wife, and appointed H. executor. By a codicil he gave to C. three-eighths of the concerns at his iron-works, and of the premises at C.: "so the partnership will stand at my decease, C. three-eighths, H. three-eighths, B. two-eighths." C. H. and B. jointly carried on the works for two years after the testator's death, selling iron manufactured by them, not only from ore procured from the testator's mines, but from ore and old wrought iron which they pur-

chased, and not merely for the purpose of mixing with the produce of the testator's mines for improving the iron. C., at the end of two years, purchased B.'s share, and the business was carried on in the same manner by C. and H., till H. died. There was no written or other agreement for the duration of the partnership. Semble, that this was a trading within the meaning of the bankrupt laws. *Crawshay* v. *Maule*, 1 Wil. 181.
1 Swan. 495.

21. Whether an insurance broker, in that character merely, can be made a bankrupt—*Quære. Ex parte Stevens*,
4 Mad. 256.

IV. Act of Bankruptcy.

(*a*) *Generally.*

1. An act of bankruptcy committed after retiring from trade, will support a commission, where the debts contracted in trade are unpaid.
Ex parte Bamford, 15 Ves. 449.
——— *Dewdney*, 15 Ves. 495.

2. Commission upon an invalid act of bankruptcy may be supported by another act of bankruptcy, antecedent to the commission.
Ex parte Du Frene, 1 V. & B. 52.
1 Rose, 333.
——— *Bourne*, 16 Ves. 148.
——— *Burgess*, Buck, 233.

3. A concerted act of bankruptcy is not available, except by such creditors as are not privy to it. *Ex parte Bourne*,
16 Ves. 145.

3. An act of bankruptcy subsequent to the striking of the docket, but previous to the sealing of the commission (and for that purpose a fraction of a day is admitted), will sustain the commission.
Ex parte Du Frene, 1 Rose, 333.
1 V. & B. 51.

4. The bankrupt agreeing to an act of bankruptcy, unless he concerts it, is no objection to the commission.
Ex parte Oliver, 1 Rose, 67 (*n*).

(*b*) *Departing the Realm.*

1. A departure from the realm, and the consequential delay of creditors, do not constitute an act of bankruptcy, unless at the time of departure there was an intention to delay. The deposition of the witness, proving such act, should state such intention, or circumstances from which the court will necessarily infer it. The departure of a man in embarrassed circumstances is strong, but not conclusive evidence of such intention. *Ex parte Osborne*, 2 V. & B. 177.
1 Rose, 387.

(*c*) *Beginning to keep House.*

1. The denial of a debtor to a servant of the acknowledged agent of a creditor, calling for the debt by the directions of such agent and the appointment of the debtor, is an act of bankruptcy. *Ex parte Bamford.* 15 Ves. 449.

2. Unless a denial to a creditor is in consequence of a direction from the debtor, a subsequent approbation of it by him will not make it an act of bankruptcy. *Ex parte Foster*, 17 Ves. 416.
1 Rose, 50.

3. It is not an act of bankruptcy for a debtor to cause himself to be denied to a creditor, calling, by the debtor's appointment, for payment on a Sunday. *Ex parte Preston*, 2 V. & B. 311.
2 Rose, 21.

4. It is an act of bankruptcy, by beginning to keep house, for a trader to cause himself to be denied to a creditor calling, not for payment of his debt, but in order to cover it by buying goods to the amount. *Ex parte White*,
3 V. & B. 128.
S. C. *Ex parte Harris*, 2 Rose, 67.

5. A denial to a creditor calling not for payment, but for another purpose, is an act of bankruptcy, if made under a conception of the debtor, that the object is to demand payment, but not, if he is aware of the object; the act of bankruptcy depending upon the intention of the debtor, not upon the intention of the creditor. *Ibid.*

6. A trader who is denied, by his own orders, to a creditor in the habit of calling upon him to demand a debt, when he is at dinner, does not commit an act of bankruptcy, if his intent be to avoid interruption at that hour, and not to delay the creditor, although the creditor be thereby delayed. *Smith* v. *Currie*,
1 Rose, 364.

(*d*) *Absenting himself.*

1. Shutting up a banker's shop is not an act of bankruptcy by a partner residing in another place. *Ex parte Mavor*,
12 Ves. 543.

(e) *Departing from Dwelling House.*

1. If a debtor departs his house with intention of delaying his creditors, though upon a groundless apprehension, it is an act of bankruptcy. *Ex parte Bamford,* 15 Ves. 419.

2. Act of bankruptcy by leaving house to avoid a creditor, without collusion, is complete the instant of departure, and therefore not affected by subsequent residence with the petitoning creditor. *Ex parte Gardner,* 1 V. & B. 45.

3. A trader not going into the town near which he lived, or to his counting-house, but sending for his papers to his house, and not going out but for an evening walk in the country, commits an act of bankruptcy. *Ex parte Bourne,* 16 Ves. 150.

(f) *Making fraudulent Conveyance.*

1. The execution of a deed of assignment by partners of all their property in trust for their creditors, with a proviso to be void if all the creditors for above £20 should not execute, or a commission of bankruptcy should issue within a certain time, is an act of bankruptcy: not where the deed being joint, and not several, one partner never executed. *Dutton* v. *Morrison,* 17 Ves. 193. 1 Rose, 213.

2. An assignment of all a trader's property, though made for the satisfaction of all the creditors, is an act of bankruptcy. *Ex parte Bourne.* 16 Ves. 148.
——— *Cawkwell,* 1 Rose, 313.
——— *Kilner,* Buck, 104.

3. Semble, a deed of grant of personal chattels, containing a stipulation for the grantors continuing conditionally in possession, is not an act of bankruptcy, if made upon good consideration and *bonâ fide.* *Hartley.* v. *Smith,* Buck, 368.

(g) *Lying in Prison.*

1. An act of bankruptcy by lying in prison, is complete at the end of two lunar months. The day of arrest is included, unless where the party has been bailed, and then the day of the surrender. The act operates by relation from the first day of the two months.

A commission of bankruptcy supported by such act of bankruptcy, the two months expiring in the interval between the striking the docket and issuing the commission; the affidavit being only to belief of bankruptcy generally, and not to any particular act. *Ex parte Du Frene,* 1 V. & B. 51. 1 Rose, 333.

(h) *Satisfying or securing petitioning creditor's Debt.*

1. Security or satisfaction, taken after a docket struck, not followed by a commission, though it may amount to a contempt, is not within the statute 5 Geo. 2. c. 30. s. 24. *Ex parte Browne,* 15 Ves. 472.

2. The knowledge of two or three individual creditors, does not prevent the effect of that section of the statute.
Ex parte Paxton, 15 Ves. 461.
——— *Brine,* Buck, 19, 108.

(i) *Act of Bankruptcy by a Member of Parliament.*

1. A trader having privilege of Parliament, and who does not pay money under an order of the Court of Chancery, such non-payment, by statute 45 Geo. 3. c. 124., is made an act of bankruptcy.
Read v. *Philips,* 16 Ves. 437.

(k) *Proving Act of Bankruptcy.*

1. A creditor is not a competent witness to prove the act of bankruptcy or trading. *Ex parte Osborne,* 2 V. & B. 177. 1 Rose, 387.

2. The act of bankruptcy created by 4 Geo. 3. c. 33. must be proved by a creditor, so far as that the debt has not been paid, secured, or compounded for, to his satisfaction, he being alone competent to prove that fact: but his testimony cannot be received as to facts, of which evidence can be obtained from other sources. *Ex parte Harcourt,* 2 Rose, 203.

3. It ought to appear upon the deposition as an ingredient of the act of bankruptcy, under 4 Geo. 3. c. 33. that the summons required to be served on the trader M. P., was taken out after the affidavit was filed of record. *Ex parte Harcourt,* 1 Rose, 203.

4. The court will order a trustee of a deed of assignment to produce it before the commissioners, for the purpose of

proving an act of bankruptcy. *Ex parte Cawkwell,* 1 Rose, 313. 19 Ves. 233.

5. If it be once proved that a deed of conveyance, amounting to an act of bankruptcy, has been executed, though it cannot be produced, the commissioners may proceed by parol evidence, as upon any other fact. *Ex parte Cawkwell,* 19 Ves. 234.

6. That a party is a creditor, is not a preliminary objection to his being examined as to the act of bankruptcy; as the result of the examination may establish that he is not a creditor. *In the matter of Gooldie,* 2 Rose, 330.

7. The commissioners, under particular circumstances, were permitted, by order to which there was no opposition, to receive an affidavit of the act of bankruptcy made before a Master extraordinary in the country. *In re Wood.* 1 Rose, 298.

8 But a similar application was subsequently refused, although the person making the affidavit had regularly proved the same act of bankruptcy, under a prior separate commission against the same bankrupt, who had subsequently been included in a joint commission against him and his partners. *Ex parte Roze,* 2 Rose, 339.

9. Although the act of bankruptcy must be committed in this country, yet a letter from a trader, who has gone abroad in the course of his trade, connected with circumstances here, may be sufficient evidence of such act. *Ex parte Hague,* 1 Rose, 150.

V. Petitioning creditor.

1. A British subject residing in an enemy's country for the purpose of a trade, licensed by the government of this country; may sue, or take out a commission of bankruptcy. *Ex parte Baglehole,* 18 Ves. 525. 1 Rose, 271.

2. A petitioning creditor will be allowed his costs of successfully resisting an application to supersede the commission, out of the bankrupt's estate. *Ex parte Bottomly,* 5 Mad. 61.

3. Separate commission of bankruptcy may be sued out by a joint creditor, *Ex parte Dewdney,* 15 Ves. 499.
——— *Taitt,* 16 Ves. 195.

4. In the construction of the statute 5 Geo. 2. c. 30. s. 24. the word "shall" must be understood "may," and the word "privately" must not be so construed, as that the knowledge of one or two individual creditors, would take a case out of that section of the statute. *Ex parte Parton,* 15 Ves. 461.

5. Any person may take out a commission of bankruptcy, therefore it was held no objection to a commission, that it was taken out by an attorney, not a solicitor of the Court of Chancery. *Ex parte Smith,* 19 Ves. 473.

6. A creditor having a valid prior commission, receives the costs of superseding it, unless there has been a breach of faith, or misconduct on his part. *Ex parte Brown,* 1 Rose, 434. 1 V. & B. 65.

7. The statute requiring a solicitor to deliver his bill a month before the bringing an action on it, does not apply to the case of suing out a commission of bankrupt; but it is *quite* of course, after the commission, to refer such bill to the Master to be taxed. *Ex parte Howell,* 1 Rose, 312.

8. Semble, an uncertificate bankrupt may petition for a commission, if his assignees make no claim to the debt. *Ex parte Cartwright,* 2 Rose, 230.

9. Petitioning creditor is pledged to the validity of the commission, and to every act necessary for its preservation. He is therefore responsible for production of a bill of exchange, upon the direct proof of which the petitioning creditor's debt has been established. *Ex parte Glossop,* 2 Rose, 386.

10. The petitioning creditor is bound to give every information in his power, upon every subject which comes within his knowledge as petitioning creditor. *Ex parte Graves,* 1 G. & J. 86.

11. Whether a petitioning creditor to a commission superseded under statute 5 Geo. 2. c. 30. s. 24., will be permitted to sue out a new commission—*Quære. Ex parte Brine,* Buck, 19.

12 An executor who sues out a commission, and afterwards, but before the adjudication of the commissioners, obtains probate of the will, is a good petitioning creditor. *Ex parte Paddy,* 3 Mad. 241. Buck, 235.

13. An act of bankruptcy by an assignment of all the bankrupt's estate and effects, cannot be taken advantage of by parties, or privies to the deed. So where A. assigns all his estate to trustees, for

the benefit of his creditors, and B. also makes a like assignment to trustees, two of whom are the trustees under A.'s assignment, a commission against B. sued out by A. at the instance of his trustees, the act of bankruptcy being B.'s assignment, cannot be supported. *Ex parte Kilner*, Buck, 104.

14. In case of an assignment of all the trader's effects, if the petitioning creditor has acted under the deed, although he may not have executed it, he cannot avail himself of it as an act of bankruptcy, and will be liable for the costs of the commission sued out upon it. *Ex parte Cawkwell*, 1 Rose, 313. 19 Ves. 233. *Ex parte Shaw*, 1 Mad. 598.

15. If a creditor sign a deed of composition, he cannot take advantage of it as an act of bankruptcy.
Ex parte Battier, Buck, 426.
——— *Burgess*, Buck, 233.

16. And where an equitable creditor signed the deed of composition, and then prevailed on his trustee to sue out a commission, the court, upon the petition of the bankrupt, superseded such commission, with costs. *Ex parte Battier*, Buck, 426.

VI. Petitoning Creditor's Debt.

1. An attorney who has not delivered in his bill according to the statute Geo. 2, though he cannot bring an action, may take out a commission of bankruptcy; but his bill must be afterwards examined.
Ex parte Bourne. 16 Ves. 166.
——— *Howell*, 1 Rose, 312.

2. Where a commission is taken out upon a debt due to a solicitor for costs, any creditor may have the bill of costs taxed, if the bankrupt, at the time of his bankruptcy, was not concluded. *Ex parte Prideaux*, 1 G. & J. 28.

3. A judgment for damages, in an action for a breach of promise of marriage, by relation to the time of the verdict, does not form a debt which will support a commission of bankruptcy, where the commission issues, and the act of bankruptcy is committed in the interval between the verdict and the judgment. *Ex parte Charles*, 16 Ves. 256.
1 Rose, 372. S. C. 14 East, 197.

4. General order, by Lord Thurlow, 6th December, 1788, that a petitioning creditor who has neglected to prosecute a commission of bankruptcy, shall not have another without special leave. *Ex parte Masterman*, 18 Ves. 298.

5. There is a difficulty from the decision (*Crispe* v. *Perritt*) that a separate commission of bankruptcy may issue upon a joint debt, as to what is to become of the demand with reference to the other partners. *Ex parte Brown*, 1 V. & B. 65.

6. A commission of bankruptcy may be supported upon a debt for which a judgment has been obtained, pending the two months' imprisonment, which constitutes the act of bankruptcy. There may be a distinction as to a bond taken, which would be void by relation to the commencement of the period of imprisonment. *Ex parte Bryant*,
1 V. & B. 211. S. C. 3 Rose, 1.

7. Equitable debt may be proved in bankruptcy; though it cannot be the foundation of the commission, as the petitioning creditor's debt. *Ex parte Yonge*, 3 V. & B. 40.
S. C. 2 Rose, 40.

8. A debt, payable at a future day, will not, unless upon a written security, support a commission of bankruptcy.
Ex parte White, 3 V. & B. 130.

9. Sugar sold, payable for, by the custom of the trade, two months after the sale, does not create a debt to support a commission, until the time of credit has elapsed. *Ex parte Roberts*, ——— *Wells*, } 1 Mad. 72.

10. Where a party makes a charge against his debtor of felony, by embezzlement of money, this does not preclude him from insisting upon his civil rights for the recovery of the debt; and therefore it may, nevertheless, be a good petitioning creditor's debt, upon which to found a commission of bankruptcy.
Ex parte Shaw, 1 Mad. 598.

11. A. purchases coals of B., and agrees to give a bill of exchange for part of the purchase money, payable at two months. Afterwards A. sends to B. a paper purporting to be a bill accepted by him, with a blank left for the name of B. as the drawer. B. keeps the paper, but does not fill up the blank, till after he had sued out a commission against A. Held that the bill did not constitute a valid petitioning creditor's debt, and that B., having elected to keep the bill, could not prove his debt, as petitioning creditor, for goods sold and delivered. *Ex parte Farenden*, Buck, 34.

12. A commission cannot be supported upon a petitioning creditor's debt, made up of debts due to several persons, if one of them is an infant, and a separate creditor of the trader. *Ex parte Morton*, Buck, 42.

13. If a bill of exchange do not carry interest upon the face of it, a debt made up of the principal sum secured by the bill, and the interest up to the act of bankruptcy, though the bill be noted and protested according to the 9th and 10th of William 3. c. 17., is not a good petitioning creditor's debt. *Ex parte Greenway*, Buck, 412.

14. If a petitioning creditor do not proceed to issue the commission till after a month has elapsed from the striking of the docket, he must make an affidavit, that the debt has not been satisfied, before the commission can issue. *Ex parte Buckley*, Buck, 367.

15. The husband alone may sue out a commission upon a promissory note given to the wife *dum sola*. *Ex parte Barber*, 1 G. & J. 1.

16. A., before the act of bankruptcy, accepts, for the accommodation of the bankrupt, a bill of exchange drawn by him; and after the act of bankruptcy pays the amount of the bill to a third person, to whom it had been negotiated; held that such payment did not constitute a good petitioning creditor's debt. *Ex parte Holding*, 1 G. & J. 97.

17. By deed of the 10th of June, 1780, made on the marriage of the bankrupt, his estate was limited to himself for life, remainder to his wife for life, remainder to T. G. for 500 years, in trust, in case the wife should die in the life time of her husband, without issue between them, to raise by sale or mortgage, after the death of the husband, £300, and pay the same as the wife should by deed or will appoint. In June, 1809, the bankrupt borrowed £500, and for securing the same, he and his wife, after levying a fine, together with T. G., executed a mortgage of the estate, and the bankrupt gave T. G. his promissory note for £200, payable on demand, as part of the sum of £300 secured by the settlement. Held, that the promissory note was not a good petitioning creditor's bill. *Ex parte Page*, 1 G. & J. 100.

VII. Commission.

(a) *Issuing.*

1. A commission of bankrupt is the right of the subject.
Ex parte Brown, 1 V. & B. 65.
——— *Cridland*, 3 V. & B. 98; 1 Rose, 167.
——— *Downes*, ——— *Ansley*, 1 Rose, 398.

2. But it must be the *bonâ fide* commission of the creditor.
Ex parte Downes, ——— *Ansley*, 1 Rose, 398.

3. By construction of Lord Rosslyn's order, 26th June, 1793, in a country commission the party is not entitled to twenty-eight days, and as much more time as may be necessary for the post. *Ex parte Henderson.* Coop. 227. 2 Rose, 190.

4. Order for a commission of bankruptcy against "I. Stevenson, otherwise Stephenson," in an urgent case. *Stevenson's Case*, 19 Ves. 277.

5. Commission of bankruptcy for the mere purpose of certificate, a conspiracy liable to indictment or information. *Ex parte Cawthorne*, 19 Ves. 260.

6. Commissions of bankruptcy, especially against country bankers, to be executed immediately, without waiting the time allowed by the general order of 1793. *Ex parte Mavor*, 19 Ves. 542.

7. Unless there be a competition for a town or country commission, the Court will not interfere to direct one or the other. *Ex parte Bowdler*, 1 Rose, 48.

8. Where there is such a competition, and application is made to the Court; notice should be given to the opposite party. *Ibid.*

9. If there is a *bonâ fide* intention to prosecute a commission, an advertisement in the Gazette of the adjudication of the commissioners may be dispensed with: as where notice of the adjudication in a country commission was given at the bankrupt office on the 28th day, in order to obtain a certificate for the purpose of inserting the adjudication in the Gazette, it was held to be sufficient to support the commission. *Ex parte Sappit*, Buck, 81.

10. If it appear that persons have conspired together in the issuing of a frau-

dulent commission, the Lord Chancellor will direct the necessary documents to be laid before the Attorney General, with a view to the institution of criminal proceedings against the parties. *Ex parte Emery*, Buck, 422.

(*b*) *Striking the Docket.*

1. It would be eminently useful, that the existence of the petitioning creditor's debt, at the time of the bankruptcy, should appear on the deposition. *Ex parte Foster*, 17 Ves. 415. 1 Rose, 50.

2. Joint commission of bankruptcy, on affidavit of debt and bond, sworn and executed by one partner on behalf of all. *Ex parte Hodgkinson*, 19 Ves. 291. 1 Rose, 172. Coop. 99.

3. Where partners are petitioning creditors, the practice is for one of them to make the affidavit of the debt, and the partner making the affidavit alone enters into the bond to the great seal.
Ex parte Peele, Buck, 457.
——— *Morton*, Buck, 44.

4. The object of Lord Erskine's general order in bankruptcy, 29th December, 1806, is to prevent dealing with a docket for the purpose not of taking out a commission, but of another arrangement, a practice to be discountenanced; and therefore those who swear to their belief, that an act of bankruptcy has been committed, should be able to assign some solid reason for such belief. *Ex parte Bourne*, 16 Ves. 145.

5. Practice of striking a docket for the purpose, not of a commission of bankruptcy, but of compelling a composition, disapproved and not aided. *Ex parte Bourne*, 16 Ves. 150.
Ex parte Masterman, 18 Ves. 298.

6. The omission in the affidavit of debt, upon taking out a commission of bankruptcy, to state a judgment obtained for the debt originally by specialty or simple contract, forms no objection to the commission; as a bond taken after an act of bankruptcy is void, and does not merge the debt by simple contract. *Ex parte Bryant*, 1 V. & B. 211.
In the matter of Bryant, 1 Rose, 288.

7. It is the practice at the office to allow a second docket to be struck against the same person, upon a variation of a letter in the name: but when the solicitor who applied for the second docket must have known the party to be the same, the second commission was superseded at the costs of the solicitor who took it out. *Ex parte Ward*, 1 Rose, 314.

8. A solicitor having struck a docket within the regular time, gave in commissioners' names, and ordered the commission to be sealed; but through some mistake the fees were not left, and the direction was not complied with. Another solicitor then struck a docket against the same bankrupt. The Lord Chancellor held, that it would be construing the general order of the 29th December, 1806, too strictly, not to let the first commission issue, but directed the other solicitor to be paid his expenses. *Ex parte Evans*, 1 Rose, 162.

9. Where there is a *bonâ fide* intention to prosecute a commission, the general order, 26th June, 1793, may be dispensed with upon accident, sickness of commissioners or witnesses, or adjudication too late for the Gazette; but strict proof is required of a *bonâ fide* intention to prosecute the commission. *Ex parte Freeman*, 1 Rose, 380. 1 V. & B. 34.

10. Where, from hurry of business, the clerk at the bankrupt office omitted to make the entry of an application for a docket, according to the directions of the general order, previously to the application of another solicitor for the same purpose, the first solicitor was held, nevertheless, to be entitled to the commission. *Anon.* 2 Rose, 323.

11. Where a docket was struck on the 10th, but the commission was not bespoken till the 15th of the same month, on which day another creditor applied to strike a docket, but after the first commission was bespoken: held, that the first creditor's right to have his commission issue was preferable to that of the second. *In the matter of Graham*, Buck, 529.

12. The drawing of lots, as directed in the order in bankruptcy, of the 29th December, 1806, only applies to those cases where both parties are at the time prepared to issue a commission forthwith. Where one party, therefore, was not prepared to certify respecting the intended commissioners, as required by the order of the 25th July, 1817, the other was held entitled to the commission. *Ex parte Hardman*, 1 Jacob & Walker, 293.

13. By general order, 15th August, 1821, affidavits made in support of applications for the direction of commissions

of bankrupts, to be executed in the country, to five attorneys, instead of two barristers, as quorum commissioners, and three attorneys; in addition to the circumstances of there not being two barristers resident within twenty miles of the place at which it is intended the commission should be executed, or not two barristers within twenty miles, who, as the deponent verily believes, will be willing to attend, must state, "That the deponent verily believes there are not two barristers who will be willing to attend at [specifying the place at which it is intended the commission shall be executed] or at any convenient place in the neighbourhood thereof, to act under the said commission for the fees allowed by the statute;" and the secretary of bankrupts is authorized to prepare fiats accordingly, on affidavits, distinctly stating such particulars, being filed; without any other application being made to the court. 1 G. & J. 106.

(*c*) *Sealing.*

1. By construction of the general order, 29th Dec. 1806, the commission must be sealed at the first public seal after application within four days after the docket, though such seal day is within less than seven days. *Ex parte Hynes*, 19 Ves. 61.

2. The general order, 29th December, 1806, directing commissions to be sealed at the next public seal within seven days, means the next immediate general seal, without any discretion on the part of the bankrupt office to defer it till another seal within the seven days. *In the matter of Lambert*, 1 Rose, 258.

3. A commission is considered as sealed from the delivery only, but the delivery to the messenger is in effect a delivery to the party. *Ex parte Freeman*, 1 V. & B. 39. 1 Rose, 380.

4. It is not sufficient, upon an application to seal a commission, as a country commission, for the affidavit to state that the major part in value of the creditors do not live within fifty miles of London, and that the major part of the creditors reside at a certain town in the country. *In the matter of Child*, Buck, 425.

(*d*) *Amending the Commission.*

1. A commission of bankruptcy cannot be altered, although it is evident, that there has been a clerical error in the office. *Ex parte Lee*, 1 Cox, 393.

2. A commission of bankruptcy may be resealed to correct a mistake in a name, but not for the purpose of admitting the proof of an act of bankruptcy committed subsequently to the date of the commission. *Ex parte Cheesewright*, 18 Ves. 480. 1 Rose, 228.

3. Where the bankrupt had been described in the commission by a wrong Christian name, the court, on motion, ordered it to be resealed, directed a new docket, and that the affidavit should be resworn, and a new bond given. *Ex parte Sutton*, 1 Rose, 85.

4. A commission which has not been proceeded upon, may be ordered to be resealed, to supply a defect in form, as the wrong spelling of the bankrupt's name; but if the affidavit of the petitioning creditor contains a similar error, which is not discovered till after the commission has issued upon it, the error cannot be corrected, there must be a new docket struck. *In the matter of Rutledge*, 2 Rose, 369.

5. Where a commission of bankrupt issued against a person, describing him as a cattle-dealer, but without the words, "dealer and chapman;" and on the trial of an action of trespass by the bankrupt evidence was received of a dealing in hops, and a verdict found for the defendant, which afterwards was set aside, and a new trial granted, on the ground that the evidence ought to have been rejected, a petition to have the words, "dealer and chapman," inserted in the commission, or to supersede it, and grant another of the same date, was dismissed. *Ex parte Small*, 2 Wil. 85.

(*e*) *Effect of the Commission.*

1. A commission of bankruptcy is an action and execution in the first instance. *Ex parte Hamper*, 17 Ves. 408.

2. The expression, "*quasi* execution," applied to a commission of bankruptcy, means no more than that it is a process for all creditors, legal and equitable. *Ex parte Storks*, 3 V. & B. 107.

3. How far a landlord's issuing a commission may effect his interest in competition with the creditors—*Quære Ex parte Gallimore*, 2 Rose. 424.

4. The issuing a commission is a dis-

affirmance of the petitioning creditor's right to retain, against the assignees, payments made by the bankrupt after the act of bankruptcy. *Ex parte Miller,* Buck. 386.

(*f*) *Suspending Proceedings under.*

1. Where a bankrupt dies before surrender, the commission may nevertheless proceed. *Ex parte Dewdney,* — *Seaman,* } 15 Ves. 494.

2. A commission of bankruptcy cannot proceed after the death of the party against whom it issued, but who had not been declared a bankrupt before his death. *Ex parte Beale,* 2 V. & B. 29.

3. Commissions of bankruptcy have been supported pending analogous proceedings in another country, as the *cessio bonorum* in Holland, a similar proceeding in Russia, and, until lately, a sequestration in Scotland. *Ex parte Crilland,* 3 V. & B. 97.

4. Advertisement of bankruptcy in the Gazette suspended on the ground that a sufficient act of bankruptcy did not appear upon the proceedings. *Ex parte Foster,* 17 Ves. 414. 1 Rose, 49.

5. The Lord Chancellor refused to stay proceedings under a commission of bankruptcy, which had not been opened, upon the allegation, that there was no petitioning creditor's debt, the commission and adjudication being matter of right under the act of parliament. *Ex parte Lanchester,* 17 Ves. 512. 1 Rose, 220.

6. Insertion of bankruptcy in the Gazette is suspended only where, on inspection of the proceedings, no bankruptcy appears proved, or, under a country commission, to give the opportunity of producing the evidence. In this case an issue was directed to try the bankruptcy, which had not appeared in the Gazette, all proceedings under the commission being stayed. *Ex parte Tarleton,* 19 Ves. 464.

7. The insertion in the Gazette of the declaration of bankruptcy, restrained by order, under circumstances, until the proceedings should be laid before the Lord Chancellor for his inspection. But the commission, in other respects, ordered to proceed. *Ex parte Fletcher,* 1 V. & B. 350. 1 Rose, 336.

8. Advertisement in the Gazette suspended upon affidavit that the bankrupt had more than sufficient to pay all his debts, and that he had not committed any act of bankruptcy. *Ex parte Proston,* 1 Rose, 259.

9. Where the court itself directs an action to try the validity of a commission, it will, in the mean time, consistently with that direction, stay the proceedings under it. But if the action establishes the commission, the court will not, without special ground, allow a longer suspension. Nor is it in itself a sufficient ground for such suspension, that the bankrupt is about to bring a second action, and therein to put his objection to the commission upon the record, in order to carry it by writ of error to the House of Lords. *Ex parte Bryant,* 2 Rose, 1. 1 V. & B. 211, 506.

10. The payment of the creditors under the commission, as it would be sufficient to induce a supersedeas, is a ground for staying the proceedings; but the funds proposed for the purpose must be fully and immediately applicable: and where an inquiry was directed relative to an estate offered by the bankrupt for that purpose, the court directed the commission to proceed in the usual course. *Ibid.*

11. The Lord Chancellor refused to stay the progress of a commission upon an offer to pay into the name of the Accountant General, a fund alleged to be sufficient for the payment of the creditors. *Ex parte Kemp,* 2 Rose, 5.

12. Although the Lord Chancellor will stop the progress of a commission against one undoubtedly not the object of it, and although the strong probability is, that no person can now be the object of a commission, as a scrivener, yet that probability is not in itself a sufficient ground for such interference. *In the matter of Lewis,* 2 Rose, 59.

(*g*) *Joint Commission.*

1. In the case of a dormant partner, by a share of the profits, but the property belonging, by agreement, exclusively to the other partner, a joint commission cannot be supported, as the joint property would not be liable to execution, under an action against the dormant partner. *Ex parte Hamper,* 17 Ves. 403.

2. Whether joint commission can include a dormant partner—*quære;* a creditor, though he may, not being com-

pelled to sue him. *Ex parte Mathews,* 3 V. & B. 126.

(*h*) *Separate commission.*

1. A commission of bankrupt against A., describing him to be partner with B., is a separate commission. *Ex parte Woodman.* 1 Cox, 308.

(*i*) *Coexisting, which shall be preferred.*

1. A separate commission of bankruptcy superseded, in order to give effect to a joint commission taken out afterwards. *Ex parte Hardcastle.* 1 Cox, 397.

2. Where three were engaged as partners, two of whom were also partners in another concern, and commissions of bankrupt were issued against both firms, the Lord Chancellor said, that ultimately only one commission ought to proceed, but in the mean time, it would be proper to see which would best answer the convenience of the case. *Ex parte Hargreaves,* 1 Cox, 440.

3. In the case of joint and separate commissions, if the joint commission is valid, it will be sustained, and the assignees can, at law, recover both joint and separate estates. *Ex parte Martin,* 15 Ves. 114.

4. In case of different commissions of bankruptcy, the settled rule is to support that, which will do the most ample justice, cutting down all the rest.
Ex parte Rawson, } 1 V. & B. 163.
——— *Mason,* } 1 Rose, 423.

5. A second commission against an uncertificated bankrupt, is void; therefore in the case of a joint commission issuing after a separate commission taken out by a joint and several creditor, the separate commission can be superseded only for the benefit of the creditors, with costs to the petitioning creditor, if acting with good faith, and securing all his right as a joint and several creditor, to prove and elect between joint and separate estates. *Ex parte Brown,* 1 V. & B. 60. 1 Rose, 433.

6. The existence of a prior separate commission invalidates a subsequent joint one. But for the convenience of administering the joint property, the court will, by superseding the separate commission, give effect to the joint one, unless there be a strong reason against the court so interfering; and it is not a sufficient reason, that, by such interference, a separate creditor to a great amount will be divested of this right of voting in the choice of assignees. *Ex parte Pachelor,* 2 Rose, 26.

7. On application to supersede a commission of bankruptcy, and issue another, the act of bankruptcy being subsequent to the date of the commission, the solicitor was required to state, by affidavit, why he took out a commission which he could not support. Pending that, the time having expired, another creditor obtained a supersedeas and a commission, under the apprehension of immediate extents. The bankruptcy was afterwards declared under the first commission upon acts of bankruptcy found previous to its date; but the latter commission was preferred. *Ex parte Mavor,* 19 Ves. 539.

8. Formerly the practice was to support both joint and separate commissions at the same time; but now, the joint commission alone is supported: and in the case of five partners forming also among themselves other distinct partnerships, and separate commissions issued, and a joint commission, the joint commission was supported, keeping distinct accounts.
Ex parte Rawson, } 1 V. & B. 163.
——— *Mason,* } 1 Rose, 426.

9. As to the ground of the modern practice of superseding one commission, or making regulation of supporting either according to justice—*Quære.* *Ex parte Cridland,* 3 V. & B. 98. 2 Rose, 168.

10. Although a second commission, where a former one is in operation against any of the same parties, is void, yet where the convenience of administering a partnership fund requires it, and it can be done without prejudice to transactions which have taken place under the first commission, the court will so dispose of the first commission, as to prevent its being any impediment to the prosecution, or validity of the second. So, where there were four partners, and two carrying on together a distinct trade; first, a joint commission against the two, then a joint commission against the four, and afterwards separate commissions against the two who were not objects of the first commission, the court ordered the

separate commissions to be superseded, and sustained the commission against the four as the operative commission, without superseding that against the two, there having been proceedings under it, but ordered the latter commission, or the proceedings under it should not be produced for any purpose whatever, without the consent of the commissioners under the commission against the four.
Ex parte Mason, 1 V. & B. 160.
——— *Rawson,* 1 Rose, 423.

(*k*) *Second commission.*

1. A commission of bankruptcy against an uncertificated bankrupt is void. *Ex parte Brown,* 1 V. & B. 60.

2. Where such second commission is against two partners, and void as to one not having obtained his certificate, it cannot be maintained against the other.
Ex parte Martin, 15 Ves. 114.
——— *Crew,* 16 Ves. 237.

3. Although a second commission against an uncertificated bankrupt is strictly void, yet it may be the subject of arrangement in Court, under which either commission may be superseded, as best answers the ends of justice. *Ex parte Crew,* 16 Ves. 236.

4. Liability of bankrupt's property, notwithstanding certificate under a second commission, not having paid 15*s.* in the pound, only by judgment in an action, not to be taken by the assignee under the commission. *Ex parte Hodgkinson,* 19 Ves. 291. 2 Rose, 172. Coop. 99.

5. No second commission of bankruptcy to be sent to the Lord Chancellor without a note of what has past in the first. *Ex parte Freeman,* 1 V. & B. 41.

6. Second commission against an uncertificated bankrupt, is strictly a nullity, though supported in practice. *Ex parte Cridland,* 3 V. & B. 99. 2 Rose 168.

7. A first commission to render void a second, must be a commission in legal operation. *Ex parte Bullen,*
1 Rose, 134.

8. Although a commission has become supersedeable for non-prosecution, according to the general order of the 26*th* of *June,* 1793, and has been actually superseded, yet a second commission is not, as a matter of absolute right, to be granted to another solicitor; but, under circumstances, the first commission may revive. *Ex parte Freeman,*
1 Rose, 380. 1 V. & B. 34.

(*l*) *Auxiliary Commission.*

1. Where a commission of bankruptcy against a distant country bank is executed in London, and there are a great number of small notes in the country, an order may be obtained on petition for another commission to issue, directed to commissioners in the country, for the purpose only of receiving proof of debts there, the proofs so taken to be received under the London commission. *Ex parte Upham,*
17 Ves. 212.

2. Where a commission is taken out in London against country bankers, the Court will issue auxiliary commissions, directed to the place of their bank, to take the proof of their small notes. *Ex parte Perry,* 1 Rose, 12.

3. But the court will not give leave to examine the bankrupts under them, as such examination would be nugatory.
Ex parte Scott, *Ibid.*

4. Auxiliary commissions are never granted for the purpose of examining the bankrupt. *In the matter of* ———
Buck, 523.

(*m*) *Renewed Commission.*

1. A commission was renewed on the petition of a creditor, in a case where the bankrupt, the commissioners, and the assignees, were dead. *Ex parte Hebbe,*
Buck, 134.

2. There cannot be a renewed commission where all the creditors have been paid the full amount of their debts. *Twogood v. Hankey.* Buck, 65.

(*n*) *Expenses of issuing commission.*

1. The rule as to the taxation of a solicitor's bill holds in bankruptcy, and is applied to the bill taxed by the commissioners; and if such bill is reduced by taxation above a sixth, the solicitor pays the costs. *Ex parte Westall,*
3 V. & B. 141.

2. The statute 5 Geo. 2. c. 30, s. 46, was held to be imperative, though the solicitor's bill had been examined and approved of by the Commissioners, and allowed in the assignees accounts: but, if the solicitor had done business as general agent by contract, and not as solicitor, the master could have no authority to take the account, or tax it as a solicitor's bill. *Ex parte Gregson,* 3 Mad. 49.

3. A petition by a creditor to refer to the master the solicitor's bill of costs up to the choice of assignees, which had

been taxed by the Commissioners, is not of course; there must be a particular statement of objections to the bill: but where the solicitor had refused to give the creditor a copy of his bill, to enable him to state specific objections, the court made an order of reference. *Ex parte Sutton,* 4 Mad. 395.

4. A petition for an order to tax a solicitor's bill of costs, in bankruptcy up to the choice of assignees, after it has been taxed by the Commissioners, will not be granted, unless specific errors are stated. *Ex parte Brereton,* 4 Mad. 479.

5. A petition by the petitioning creditor, praying that the assignees may, out of funds in their hands, pay the solicitor's bill upon the choice of assignees, and which had been taxed by the Commissioners; such an order is not of course: and it is a sufficient objection, that the Commissioners have allowed charges in the bill which clearly ought to be expunged. *Ex parte Thelwall,* 1 Rose, 397.

6. The solicitor to the commission, after an order obtained against him to account for monies received on account of the estate, and to deliver his bill to be taxed, obtained a promissory note from the bankrupt, for his bill of costs in procuring his certificate. The money for which the solicitor had to account being so great, that the share coming to the bankrupt, in respect of debts purchased by him of his creditors, would exceed the amount of the promissory note, the Court, on the petition of the assignees and the bankrupt, restrained the solicitor from negotiating or proceeding at law upon the note, he having credit given for the amount in his account. *Ex parte Harding,* Buck, 24.

7. It is the duty of the solicitor to the commission to protect the estate even against his own demands. *Ex parte Story,* Buck, 74.

8. The Court sitting in bankruptcy has no discretion to relax the rule as to payment of the costs of taxation of a solicitor's bill: so, where the bill was reduced by the taxation more than one sixth of the amount, by reason of the disallowance of extra fees paid to the commissioners for travelling expenses, the solicitor was ordered to pay the costs of axation. *Ex parte Inman,* Buck, 129.

9. It is a contempt of the great seal for a petitioning creditor to strike a docket at the instance of a solicitor who undertakes to prove the act of bankruptcy, and to guarantee him against any expenses he may be put to by issuing the commission; and the Court therefore will not, upon the petition of such a creditor, tax the solicitor's bill of costs. *Ex parte Wilson,* Buck, 306.

10. It is of course, upon an *ex parte* application, to order a solicitor's bill to be taxed. If the solicitor wish to modify, or discharge the order, he must make special application to the Court for that purpose. *Ex parte Hewitt,* Buck, 388.

11. Where the account of a solicitor's bill up to the choice of assignees is *prima facie* exorbitant, it is of course to refer it to the Master to be taxed. *Ex parte Emery,* Buck, 422.

12. Where the solicitor's bill to the choice of assignees amounted to £109, the court ordered it to be taxed, notwithstanding the death of the assignee who had paid it. *Ex parte Neale,* Buck, 111.

13. Order for payment, by assignees, having assets, of solicitor's bill as taxed by the commissioners. The provision in the statute 5 Geo. 2, c. 30, s. 25, for taxation of the petitioner's costs on the day appointed for the choice, is merely directory. *Ex parte Haynes,* 1 G. & J. 35.

(o) Maliciously sued out, Remedies for.

1. A party against whom a commission of bankruptcy has been maliciously obtained, and to whom, after superseding the commission, the Lord Chancellor had assigned the petitioning creditor's bond, having afterwards brought an action on the case against the petitioning creditor, and a rule of court having been made by consent, referring the matters in dispute (except the bond assigned) to the award of an arbitrator; and an award having been made, with an exception of the bond, an action cannot be maintained on the bond. An action on the case is a waver of a right of action on the bond; even if the jury gave less damages than the penalty, the remedy on the bond is barred; and to restore that right, the agreement of the parties must be unequivocal. *Holmes v. Wainewright,* 1 Swan. 20.

2. The assignment of the petitioning creditor's bond, by the Lord Chancellor, is conclusive evidence of malice. *Ibid,* 2C.

3. The words "party or parties" in the statute 5. Geo. 2. c. 30, s. 23, mean

the party or parties improperly made bankrupt; and therefore creditors aggrieved by the issuing of a fraudulent commission, cannot, under such section, call for an assignment of the petitioning creditor's bond. *Ex parte Bumford*, 2 Mad. 1.

4. The court is not in the habit of assigning the bond, that being conclusive at law against the defendant, and the injured party having a better redress by action on the case. *Ex parte Fletcher*, 1 Rose, 454.

(*p*) *Opening Commission.*

1. The ground of Lord Rosslyn's general order that the petitioning creditor shall attend in person at the opening of a commission, is to record evidence in the commencement of the proceedings, sufficient in all shapes to support the commission. *Ex parte Foster*, 1 Rose, 49. 17 Ves. 415.

2. Attendance of the petitioning creditor at the opening of the commission, cannot be dispensed with on the ground of inconvenience to himself. *Ex parte Williamson*, 1 Jacob & Walker, 240.

3. A petitioning creditor to a subsisting separate commission cannot be compelled to attend commissioners, to give evidence in support of a subsequent joint commission against the bankrupt and his copartner. *Ex parte Stones*, 1 G. & J. 7.

4. Order may be obtained for compelling the attendance of witnesses, upon opening a commission of bankruptcy, to prove some specific fact, but not upon loose suggestion. *Ex parte Freeman*, 1 V. & B. 41.

5. A commission of bankruptcy was ordered to be opened nearly four months after its date, the delay arising from the bankrupt, and not from the petitioning creditor. *Harrison's case*, 3 V. & B. 174.

6. The words "dealer and chapman" with the general statement that the bankrupt got his living by "buying and selling," will admit the finding of any particular trading.

Ex parte Herbert, 2 Rose, 248. 2 V. & B. 399.
——— *Small*, 2 Wilson, 85.

(*q*) *Impounding Commission.*

1. Where sales had taken place under a separate commission, the court, in preference to superseding it, yet, in order to give effect to a subsequent joint one, directed it to be impounded in the office of the secretary of bankrupts. *Ex parte Rowlandson*, 1 Rose, 416. S. C. 2 V. & B. 172.

2. And where a second commission was supported, and sales had taken place under a prior commission, the first commission was ordered to be impounded. *Ex parte Rawson*, 1 V. & B. 160. 1 Rose 423.

3. Where superseding a commission would destroy the certificate of the bankrupt, the court ordered the commission to be impounded in the office of the secretary of bankrupts, and not to be produced without an order of court. *Ex parte Tobin*, 2 V. & B. 308.

VIII. Commissioners.

(*a*) *Who may act as.*

1. An evasion of Lord Rosslyn's order, requiring the names of barristers in a country commission, will be a ground for superseding it. *Ex parte Harbin*, 1 Rose, 58.

2. A barrister who cannot attend for the twenty shillings allowed by 5 Geo. 2. c. 30, s. 42, is not within the order. *Ibid.*

3. Creditors will not be permitted to act as commissioners under their debtor's commissions.

Ex parte Prosser, 2 Rose, 370.
——— *Story*, Buck, 73.

4. By general order, July 25, 1817, solicitors applying for commissions are to certify that none of the persons to whom the commission is requested to be directed, are creditors of the bankrupt. Buck 108.

5. The office of commissioner, and that of assignee ought to be distinct; the one being intended as a control upon the other. And where a creditor was named commissioner without his consent, and declined to act as commissioner, but was chosen assignee, he was, upon petition, restrained from acting as commissioner. *Ex parte Crundwell*, 2 Mad. 292.

(*b*) *Power and Duties of.*

1. Commissioners of bankrupt may direct the sale of the bankrupt's estate to be where they please, and therefore no order is necessary to enable them to direct the sale of a mortgaged estate in the country. *Ex parte Coming*, 2 Cox, 225.

1. The messenger in bankruptcy is to enter and seize, at his own hazard, the property of the bankrupt; but if he enters the house, and seizes the property of another, acting under authority, he cannot be turned out; but the party must take his remedy by law: and contemptuous language, or force opposed to him is a contempt of the great seal.
Ex parte Page, 17 Ves. 59. 1 Rose, 1.

3. Whether, after execution of the warrant of seizure of commissioners in bankruptcy, the messenger, having given up possession, can again seize without another warrant—*Quære*. *Ibid.*

4. Commissioners of bankruptcy, particularly with reference to the certificate, have, in a sense, an independent judicial character, operating sometimes to the prejudice, sometimes in favor of the bankrupt. *Ex parte Bangley*,
17 Ves. 118.

5. Commissioners of bankruptcy, as they cannot issue subpœnas, must, upon questions of fact coming before them collaterally, proceed by affidavit. *Ex parte Thistlewood*, 19 Ves. 250.

6. Commissioners have a power to adjourn the choice of assignees from the day publicly appointed for that purpose, although all the creditors present concur in an election. *Ex parte Garland*, 1 Mad. 318, 2 Rose, 361.

7. The court, in bankruptcy, will itself decide on the validity of an equitable mortgage, without a reference to the commissioners; but when the equitable mortgage is established, a reference may be made to the commissioners, to ascertain what is due upon it, that being a matter of account. *Ex parte Jennings*,
1 Mad. 331.

8. A commissioner, though he may not have acted, cannot become a purchaser of the bankrupt's estate, without the consent of the creditors at a general meeting. *Ex parte Harrison*,
Buck, 17.

9. The court will not restrain commissioners in their examinations upon an allegation, that the objects of the examinations is to procure evidence against the parties examined as to penalties incurred by gaming. *Ex parte Burlton*,
1 G. & J. 30.

(c) *Power over Witnesses.*

1. A warrant of commissioners of bankrupt, to arrest a witness, may issue at once on disobedience to their summons, and does not require a second summons.
16 Ves. 235. (*n*)

2. A witness summoned by commissioner is bound to attend, although his expenses may not have been tendered to him; but he is entitled to his reasonable costs and charges, to be settled by the commissioner: but his showing that he had not the means to enable him to attend, would be an answer to an application for an attachment. *Ex parte Benson*,
2 Rose, 75.

3. If a solicitor, not being the bankrupt's solicitor, has in his custody a deed of assignment, executed by the bankrupt, he must produce it, if required so to do by the commissioners. *Ex parte Law*,
Buck, 110.

4. The commissioners under the statute, 1 Jac. 1. c. 15, s. 10, have authority to examine persons charged with having or detaining part of the bankrupt's estate, although such persons do not claim to be interested therein. *Ex parte Anderson*,
Buck, 397.

(d) *Where aided by the Order of Court.*

1. An order may be obtained, on petition, to compel a witness to attend the commissioners, to prove the act of bankruptcy. *Ex parte Jones*,
17 Ves. 379.

2. Separate commissions of bankruptcy against partners, were taken out by a joint creditor, on the same debt, and the same day, immediately after dissolution of the partnership, and no separate creditor appeared.

A joint commission having issued, and the petitioning creditor under the separate commissions refusing to disclose the person who proved the act of bankruptcy, the Lord Chancellor inspecting the proceedings under the separate commissions, ordered that person to attend the commissioners under the joint commission, at the peril of costs. *Ex parte Gardner*, 1 V. & B. 74.

3. A witness is not bound, upon the commissioners' summons for that purpose, to attend and prove the act of bankruptcy, or the trading; but the Chancellor, upon an application to him, will order the attendance. *Ex parte Jones*,
1 Rose, 39, & (*n*).

4. A witness cannot be compelled to attend commissioners upon motion; the

application must be by petition. *In the matter of Morgan,* 1 Rose, 192.

5. Persons ordered to attend commissioners to prove the act of bankruptcy, having refused obedience to the warrant of the commissioners, upon the ground that they were creditors, and therefore incompetent as witnesses. *In the matter of Gooldie,* 2 Rose, 330.

6. A person having a deed in his possession, which in effect amounted to an act of bankruptcy by one of the parties, was ordered to attend the commissioners with it, but without prejudice to any objection being taken before them as to disclosure of confidential communications. *Ex parte Treacher,* Buck, 17.

7. Witness who had been before summoned, ordered to attend the commissioners, to be examined touching the act of bankruptcy. *Ex parte Bowler,* Buck, 258.

8. Leaving the order for the attendance of a witness at the place where the witness resided, when served with the commissioners' summons, was ordered to be good service. *Ibid.*

(e) Witnesses attending, Protection of.

1. Commissioners of bankruptcy considered a court of justice, for the purpose of protecting witnesses before them. *Ex parte Russell,* 19 Ves. 165. 1 Rose, 278.

2. A person attending commissioners of bankruptcy, without a summons, but swearing that he was a material witness, which was not contradicted, will be protected from arrest, while remaining, though he had left the room by order for the purpose of separate examination, and while returning; but whether he will be so protected going, and without a summons—*Quære.* In this case the party so arrested was ordered to be discharged immediately by the party in the first instance; and if disobeyed, the order to be extended to the officer, and to be discharged with costs. *Ex parte Byne,* 1 V. & B. 316. 1 Rose, 451.

4. Application at the bar, upon affidavit, without a petition, is the proper form in such a case, and time to answer the affidavit will be refused. S. C. 1 V. & B. 316.

5. Persons attending commissioners of bankruptcy, for the purpose of aiding them in the administration of justice, are protected from arrest, *eundo, morando, et redeundo,* not from having a summons, but upon principle, applying to a witness or party. S. C. 1 V. & B. 319.

(f) Witnesses attending, Costs of.

1. A witness summoned by the commissioners is entitled to reasonable costs, to be settled by the commissioners. *Ex parte Benson,* 2 Rose, 75.

2. A party attending commissioners, for the purpose of being examined as to the bankrupt's property, is not entitled to have his expenses paid or ascertained till his examination is concluded. *Ex parte Roscoe,* 2 Rose, 345. 1 Mer. 188.

(g) Discharge of Persons committed by.

1. It seems doubtful, whether a person committed by commissioners of bankruptcy can be discharged by the Lord Chancellor on petition, without a *habeas corpus:* but the case is sometimes sent back to the commissioners to be reviewed, the Lord Chancellor not dealing directly with the commitment. *Ex parte Hiams,* 18 Ves. 237.

2. The court has, in several instances, on petition, ordered the discharge of persons committed by the commissioners; sometimes ordering the commissioners to discharge them, sometimes the gaoler, passing over the commissioners. *Crowley's Case,* 2 Swan. 30.

3. The commissioners can give no directions which will protect an officer from the legal consequences of discharging his prisoner. *Ex parte Ross,* 1 Rose, 260.

(h) Fees and Expenses.

1. Costs will be given to commissioners in bankruptcy, made parties to a petition without sufficient ground, as for refusing to admit the affidavits of an absent creditor proceeding at law; not permitting the examination of the petitioning creditor by a person who had not proved a debt; and admitting the full proof of a creditor claiming a lien on papers in his hands, as agent in town for the bankrupt, an attorney. *Ex parte Steel,* 16 Ves. 161.

2. Petition to restrain an action by commissioners of bankruptcy against the assignees, for costs of defending an action against the commissioners and messenger

for false imprisonment, in which the plaintiff was nonsuited; or for a contribution among the creditors, dismissed, though the assignees had not received sufficient to pay the expenses of the commission. *Ex parte Linthwaite*,
16 Ves. 235.

3. No distinction exonerating creditors who were absent; but, by proving their debts, they adopt all the proceedings.
Ibid.

4. Commissioners' fees, under a commission of bankruptcy, are payable by the attorney to the commission; and, if not paid, he will, on petition, be ordered to pay them. *Ex parte Griffith*,
1 Mad. 56.
2 Rose, 342.

IX. Assignment.

(a) *Provisional Assignment.*

1. A provisional assignment is not matter of course, and the expense of such an assignment will not be allowed in the taxation of the solicitor's bill, unless it is shewn to have been necessary: and the Vice-Chancellor expressed his disapprobation of the practice in the North, of considering a provisional assignment as very much a matter of course. *Ex parte M'Williams*, 1 Mad. 141, 642. (*n*).

(b) *Real Estate.*

1. Expectancy of an heir, either presumptive or apparent, the fee simple being in the ancestor, is not an interest or possibility capable of being made the subject of contract, and therefore does not pass under the usual bargain and sale to the commissioners in bankruptcy. *Carleton* v. *Leighton*, 3 Mer. 667.

2. Estate descended after the bargain and sale of the commissioners, and before certificate, is the property of the bankrupt, and does not vest in the assignees, except by a subsequent assignment.— *Carleton* v. *Leighton*, 3 Mer. 667.

3. Judgment creditors have no lien on lands articled to be sold before bankruptcy, the conveyance to which remains unexecuted at the bankruptcy. *Sharpe* v. *Roahde*, 2 Rose, 192.

4. The commissioners may except the copyhold estates of the bankrupt out of the bargain and sale to the assignees, and convey them directly to purchasers.
Ex parte Harvey, Buck, 493.
——— *Holland*, 4 Mad. 483.

(c) *Personal Estate.*

1. Certificates of the East-India Company, on payment of money into their treasury in India, and a Navy bill were remitted, endorsed by the testator to his agent in England, who was at the time a creditor; the agent became bankrupt, and both parties died. It was held, that if these securities did not pass at law by the endorsement, they did not pass in Equity; the inference from the absence of evidence of a specific appropriation being against the assignees, who had obtained possession of all the letters relating to the affairs of the testator. *Williamson* v. *Thomson*, 16 Ves. 443.

2. Compensation under the London Docks Act to the proprietors of ancient privileged quays, is an interest which passes under a commission of bankruptcy. *Crutwell* v. *Lye*, 17 Ves. 343.

3. Trust by will that the dividends should from time to time be paid into the proper hands of A., or on his proper order or receipt subscribed with his own hand, to the intent the same should not be grantable, transferable, or otherwise assignable by way of anticipation of any unreceived payment, or any part thereof; and, upon his decease, the principal, with the dividends, &c. to be paid to such persons as in a course of administration would become entitled to his personal estate, and as if it had been personal estate belonging to him, and he had died intestate. This gives an interest for life to A. in the dividends assignable under a commission of bankruptcy, with a limitation over of the principal to those entitled under the statute of distributions. *Brandon* v. *Robinson*,
18 Ves. 429. 1 Rose, 197.

4. Legacy falling to a bankrupt before the allowance of his certificate, by the testator's death, pending an unfounded petition to stay it, goes to his assignees, unless such petition was presented with that object. *Ex parte Ansell*,
19 Ves. 208.

5. Bankruptcy cannot have the effect of a voluntary transfer of stock under a covenant in a marriage settlement. *Ex parte Alcock*, 1 V. & B. 179. 1 Rose 323.

6. The transfer of a ship at sea, if all the requisites of the registry acts have been duly complied with at the time of the transfer, vests the property in the vendee, subject only to be

divested upon the neglect of the vendor to make the endorsement on the certificate of registry within ten days after the return of the ship into port.

If a bankruptcy of the vendor intervenes before the arrival of the ship, the endorsement, being only an act of duty on the part of the vendor, and passing no interest, may be performed by the bankrupt himself; and if the vendor has given a power of attorney to perform this act of duty previous to the bankruptcy, his attorney may carry it into effect, notwithstanding the act of bankruptcy has intermediately occurred. *Dixon* v. *Ewart*, 3 Mer. 322. Buck, 94.

(*d*) *Effect of.*

1. Assignment under a commission of bankruptcy passes all legal and equitable terests of the bankrupt. *Whitworth* v. *Davis*, 1 V. & B. 547.

2. The effect of the assignment under a separate commission of bankruptcy, is to pass all interest of the bankrupt, both in joint and separate estate, to the assignees; but the distribution of the joint estate is confined, by order, to the joint creditors. *Ex parte Cridland*, 3 V. & B. 98. 1 Rose, 168.

3. Property may be limited to a man until he shall become bankrupt, and then over; but while his property, it must be subject to the incidents of property, and therefore to debts. *Brandon* v. *Robinson*, 18 Ves. 429.

(*e*) *Foreign Property.*

1. A commission of bankrupt vests, in the assignees under it, all the personal or moveable property of the bankrupt, wherever situate, precluding creditors in Scotland, where the bankrupt has also resided and traded, from attaching by legal process, the personal or moveable property of the bankrupt in that country, or from administering it in a course of distribution under a sequestration. *The Royal Bank of Scotland* v. *Cuthbert*, 1 Rose, 462. *Selkrig* v. *Davies*, 2 Rose, 291. 2 Dow, 230.

2. *Semble*, that the converse of the proposition applies to the case of a sequestration in Scotland, and that it would preclude English creditors from suing out or sustaining a commission against a debtor who was the subject of an antecedent and operative sequestration. *Royal Bank of Scotland* v. *Cuthbert*, 1 Rose, 462. *Ex parte Cridland*, 3 V. & B. 100.

3. Whether the commission or the sequestration is to be preferred, as the mode of administering the debtor's effects, depends upon their priorities. *Royal Bank of Scotland* v. *Cuthbert*, *Ibid.*

4. So, where four traders carried on business in copartnership, having a house of business in London, and another in Edinburgh; and two of the partners, till the bankruptcy, resided in Edinburgh, and severally carried on trade there, distinct from the copartnership; and the rest of the partners resided in London: a commission of bankrupt against the partnership was held, by the Court of Session, to be a complete bar to a sequestration, either against the property of the partnership in Edinburgh, or the personal or real property of the separate and resident traders. *Ibid.*

5. *Dubitante* Lord Bannatyne, whether the sequestration ought not to be awarded, *quoad* the separate estates of the two traders resident in Edinburgh. *Ibid.*

6. *Sentiente* Lord Cragie, that the sequestration ought to have been awarded by the Lord Ordinary, in the first instance, reserving the effect of it for after consideration. Lord Justice Clerk expressed a similar doubt. *Ibid.*

6. The Scotch acts of sequestration, many of which passed since the union, support the general principle of passing all the property of a bankrupt to his assignees. *Ex parte Cridland*, 3 V. & B. 100.

7. But the commission of bankruptcy does not in itself operate upon heritable or real property of the bankrupt in Scotland. Nor is there any legal obligation on the bankrupt to convey his heritable property to his assignees, further than what the creditors are indirectly enabled to enforce by the power which they have of granting or withholding his certificate. *Selkrig* v. *Davies*, 2 Rose, 291. 2 Dow, 230.

8. A partner in two houses of trade originating in the West Indies, where the other partners continue to carry on the business, but being himself resident in London, receiving and disposing of consignments from, and shipping cargoes to his partners abroad, becomes bankrupt. His assignees file a bill against a creditor

of the two firms, who has attached in the West Indies property belonging to both, for an account of what he had received by means of his attachments; the defendant is entitled to retain what he had received, to the extent of satisfying his joint debts, and to account only for the overplus. This is different from the cases where the bankrupt was the sole debtor, and where the trade was in England only, and the attachments laid in London.
Brickwood v. *Miller*, 3 Mer. 279.

(*f*) *Effect on property so left in possession of Bankrupt as reputed Owner.*

1. The bankrupt, by deed, assigns the cargoes of two Virginia ships to B. and C., but has no charter-party, or bill of lading to deliver to them, it being the custom in the Virginia trade, not to send bills of lading, otherwise than by the vessels themselves. On the arrival of one of the ships he assigns to another person, and afterwards commits an act of bankruptcy: held, that B. and C. not having been ready to take possession of the ship on her arrival, had thereby permitted the bankrupt to continue reputed owner, under the statute of 21 Jac. 1. c. 19.
Philpot v. *Williams*, 2 Eden, 231.

2. The assignment under a commission of bankruptcy, will prevail over an extent for general acceptances not due at the time of the bankruptcy. *Ex parte Rowton*, 17 Ves. 431. 1 Rose, 18.

3. There is a great distinction where acceptances for the money of the crown are specifically remitted, and where they are not. *Ibid.*

4. Stock was invested in the public funds in the names of the bankrupt and others, on trust; the bankrupt, being one of the *cestuis que* trust, agreed to assign his interest therein as a security for advance of money: the equitable interest of the bankrupt is not within the statute, 21 James 1. c. 19, s. 11; and therefore, not being capable of actual transfer, passed by the agreement. *Ex parte Kensington*, 2 V. & B. 79.

5. The bankrupt, before the bankruptcy being pressed to discharge a debt, gave to the creditor a draft on the executor of one of his debtors, which draft the executor promised to discharge on receiving assets: this is a good equitable assignment of the debt, as against the assignees, and the executor is bound to pay it when in possession of sufficient assets. *Ex parte Alderson*, 1 Mad. 53.

6. When a testator directed that, in case his son should carry on the testator's trade, for the benefit of himself and his mother, his lease and furniture should not be sold, but that the trustee should permit the widow and children to reside therein, and have the use of it; and the widow and son carried on the trade and became bankrupt. Held that the furniture, &c. was not in the order and disposition of the bankrupts. *Ex parte Martin*, 2 Rose, 331. 19 Ves. 491.

7. Whether property left by a dormant partner, in the possession of the ostensible co-partner, is within the statute of James—*Quære.*
Ex parte Barrow, 2 Rose, 252.
——— *Dyster*, 2 Rose, 256.
——— *Wilson*, Buck, 48.

8. Agreement to pay into a bank of four partners, bills of exchange endorsed, and to take in return their promissory notes. Three of the four became bankrupts, bills are then paid in, and their notes taken, and then the fourth becomes bankrupt: held that the assignees were not entitled to retain the bills so paid in. *Ex parte M'Gae*, 2 Rose, 376. 19 Ves. 607.

9. A retiring partner, by an agreement in writing, assigns and sells all the stock, debts, &c. to the continuing partner, who agrees to pay a debt owing by the retiring partner, and also to pay him an annuity of £100 *per annum:* for the due payment of which, the agreement recited, that the father of the continuing partner, who was not a party thereto, would be security. Held to be an executory agreement; and the father refusing to become security, the partnership stock, &c. was not thereby transferred to the continuing partner, so as to bring it within the statute, 21 Jac. 1. c. 19. *Ex parte Wheeler*, Buck, 25.

10. Notice in the Gazette is not alone sufficient to put debts in the ordering and disposition of the person to whom the notice directs them to be paid. *Ex parte Wheeler*, Buck, 30.

12. Where, on entering into partnership, it was agreed, that the manufactory and utensils in trade, should be the separate property of one partner, and

that the other should pay a rent in proportion to his share of the business, and being insured in name of the owner, were destroyed by fire before the bankruptcy: held that the insurance money formed part of the separate estate; for though this was a visible possession, under the statute 21 James 1. c. 19. yet as such possession did not continue until the bankruptcy, the statute did not operate. Property may be withdrawn at any time before the bankruptcy, provided it is done *bonâ fide*. *Ex parte Smith*, 3 Mad. 63. Buck, 149.

13. Where a bond debt was assigned by the obligee, and the bond delivered to the assignee, but no notice of the assignment was given to the obligor previously to the bankruptcy of the obligee: held, that the debt remained in the ordering and disposition of the bankrupt, within the statute 21 Jac. 1. c. 19. *Ex parte Monro*, Buck, 300.

14. A trustee for the sale of a brewhouse and plant (the *cestuis que* trust being infants) contracts to sell them, and lets the purchaser into possession: Held that this is a possession under the statute of 21 Jac. 1. c. 19. and therefore the plant, upon the vendee becoming bankrupt, passed to his assignees, without being subject to the lien for the purchase-money. *Ex parte Dale*, Buck, 365.

15. A possession to be within the statute 21 Jac. 1. c. 19, s. 10, 11. must be a possession with the consent and permission of the true owner; therefore, where stock standing in the Accountant General's name was mortgaged to secure a debt, and the Accountant General, without the privity of the mortgagee, transferred the stock to the mortgagor, and the mortgagor then became bankrupt: it was held that the stock could not be claimed by the assignees, under the 21 Jac. 1. c. 19. s. 10, 11. *Ex parte Richardson*, Buck, 480.

16. Shares in the Vauxhall-bridge Company, who are seized of real estate, not within the statute of 21. Jac. 1. c. 19, s. 11. *Ex parte the Vauxhall-bridge Company*, 1 G. & J. 101.

17. Property in the possession and disposal of a bankrupt passes to the general creditors, by statute 21 Jac. 1. c. 19, s. 11. against his assignment. *Ex parte Smith*, 1 V. & B. 518. 2 Rose, 63.

18. If one partner puts another into the sole possession of the partnership estate and effects, and leaves them in his sole order and disposition, giving him title under an instrument upon the face of it giving title, such retiring partner will have a lien upon the partnership property for the consideration money, as against the continuing partner, but not as against his separate creditors. *Ex parte Rowlandson*, 1 Rose, 419. 2 V. & B. 173.

19. Furniture, &c. in possession of a bankrupt under a trust, does not pass to the assignees, under stat. 21 Jac. 1, c. 19. *Ex parte Martin*, 19 Ves. 491.

(g) *Effect on Property left in Possession of Bankrupt as Factor or Agent.*

1. Short bills in the hands of a banker, are specifically the property of the remitter, subject to a lien for the balance of the account, and the estate to be indemnified against outstanding acceptances.

Ex parte Rowton, 17 Ves. 431. 1 Rose, 15.
——— *Pease*, 19 Ves. 25. 1 Rose, 232.
——— *the Wakefield Bank*, 1 Rose, 243. 19 Ves. 43.
——— *Buchanan*, 19 Ves. 201. 1 Rose, 280.

2. The right to have short bills, in the hands of bankrupt at the time of the bankruptcy, delivered up upon indemnifying the bankrupt's estate, is indisputable. *Ex parte the Burton Bank*, 2 Rose, 162.

3. A. and B., bankers in London, have, at the time of their bankruptcy, cash and short bills belonging to D. and C., bankers in the country. The cash was the Excise duties received and remitted by the country to the *London* bankers, and against which they had given to the commissioners the acceptances of the London bankers: in respect of these an extent had issued. The crown has a right to elect against what funds it will go; but on the consent of the *Attorney General*, the short bills were ordered to be delivered up. *Ex parte Rowton*, 1 Rose, 15. 17 Ves. 431.

4. Where endorsed bills of exchange are deposited by a customer with a banker, the latter has the absolute power of disposing of them; and in the event of his bankruptcy, though the customer might have recovered such bills as remained in specie, subject to the banker's lien for the balance of his account, yet he cannot

follow their proceeds, if they have been converted. Such absolute property, however, may be qualified by circumstances, as where the banker is agent for his country correspondent, to receive and pay bills for him, with commission for so doing, or where, in an annual account stated between them, the banker has entered the bills as the property of the correspondent, in the one case considering him as a factor, and the bills remitted for a particular purpose, viz. to be received and carried to account as cash, when due, and his power over them limited to that object; in the second case, raising an express declaration of trust. Nor will it extend the power so restricted to agency, nor defeat such declaration of trust, that the banker entered in his books the bills as cash, or that he so considered them, his own books not being evidence for him, though they might be against him. *Ex parte Pease,*
19 Ves. 25. 1 Rose, 232.

5. Short bills in the hands of a banker upon a bankruptcy, are to be delivered up, subject to the banker's lien, and indemnifying the estate against the engagement, on account of the party claiming them: whether they are to be considered short or not, does not depend upon the particular mode of entering them in the banker's books; but upon the habits of dealing between the parties, and all the circumstances together. The mode of entering them is only evidence. *Ibid.*

6. The statute 21 Jac. 1. c. 19. s. 11. not applicable to bills in the hands of a banker written short, or sent for a particular purpose, (the trust accounting for the possession) being considered as goods in the hands of a factor, with the single distinction that he cannot pledge. But if the bills are dealt with before bankruptcy, the money cannot be followed, as it may, if dealt with afterwards. *Ibid.*

7. So where there was no statement in the accounts between the parties, raising an express declaration of trust, but the agency was paid as such; the bankrupts having express permission to discount in some cases to a certain amount; their having pointed out, on another occasion, a mode of increasing the cash balance, by discounting through a third person; their not having noticed in their account handed to the petitioners, bills which they had discounted without express permission: these circumstances were held sufficient to raise a trust by implication, and to rebut their general authority so to do.
Ex parte the Wakefield Bank,
1 Rose, 243.
——— *Pease, &c.* 19 Ves. 43.

8. Some of the bills having been deposited by the bankrupt with a third party, such bills were held to be subject in such third party's hands to answer the amount of his lien. *Ibid.*

9. Order on a provisional assignee to deliver up short bills, leaving a sufficient amount to answer acceptances on the account of the petitioners, and indemnifying the bankrupt's estate against any possible loss upon them: an extent being otherwise satisfied. *Ex parte Buchanan,* 19 Ves. 201. 1 Rose, 280.

10. The proceeds of short bills were ordered to be returned, unless upon an inquiry it should appear, that with the consent of the party depositing them, or from the habits of dealing between the parties, they could be considered as cash. The *onus* of that proof lies on the banker. *Ex parte Sargeant,* 1 Rose, 153.

11. A similar order was made where the bill was dishonored when it became due, but afterwards paid to the provisional assignee. *Ex parte Sollers,*
18 Ves. 229. 1 Rose, 155.

12. Permission to discount, for the purpose of reducing the cash balance, when the banker shall be in advance, is a circumstance controlling his absolute authority over the endorsed bills of his customer. *Ex parte the Leeds Bank,*
19 Ves. 58. 1 Rose, 254.

13. [illegible] remitted endorsed merely to enable [illegible] person receiving it to raise money [illegible] future advances, is, while retained, a mere deposit applicable to the demand of the remitter, subject to the right under the endorsement of constituting a third person creditor, by negotiating it, who, in case of bankruptcy, will prove. *Ex parte Twogood,* 19 Ves. 232.

14. If bills of exchange are deposited with a banker for a specific purpose, he must so apply them, or express his dissent; and if not so appropriated, they may be claimed by the party depositing them, upon the banker's bankruptcy. *Ex parte Aiken,* 2 Mad. 192.

15. Whether bills in the possession of a bankrupt, not due at the time of the bankruptcy, pass to the assignees, or remain the property of the remitter, always depends upon the question of agency.

So where a foreign mercantile house remitted bills to a London house, with a request "to do the needful with them, and place the amount to my credit when in cash:" it was held that the London house acted as agents to procure payments for the foreign house; and, being fixed with the trust, that the bills did not pass to the assignees. *Ex parte Smith,* Buck, 355.

(*h*) *Effect, on the Estate or Property of the wife.*

1. A Jew covenants upon his marriage, (according to the custom of the Jews) that, in consideration of £3000, his wife's fortune, his executors &c. should within six months after his decease replace that sum with 50 per cent. profit; and that, if during the marriage he should receive or become entitled to any further sums of money in right of his wife, his executors &c. should within six months restore them with like profit. The husband afterwards becomes bankrupt.

The wife has no equity against the assignees of the husband or their vendee, she having by the settlement consented to rest on her husband's covenant, which had not been broken, he being living. *Basevi* v. *Serra.* 3 Mer. 674.

2. A wife may enforce her equity as against the assignees of a bankrupt husband, but in determining the quantum of the property to be settled, the court exercises a discretion without tying itself down to any precise rule: but there is no case in which the whole property has been settled upon the wife and children; and the master in this case having directed the whole property to be settled, was directed to review his report. *Beresford* v. *Hobson.* 1 Mad. 362.

3. Upon the marriage of the bankrupt in 1802, the estate of the wife consisting of freehold, copyhold, and leasehold lands, was conveyed to the use of the bankrupt and his heirs, who covenanted with the trustees within six months after the marriage, to pay to them £4000 upon the trusts of the settlement. The trustees never demanded payment. In 1806 the bankrupt sold part of the freehold premises, and he and his wife levied a fine of the whole, declaring the uses of that part which was sold to the purchaser, but without making any declaration as to the remainder. In 1812 the bankrupt conveyed all his estates to trustees for the benefit of his creditors; and in 1813 covenanted that he and his wife would levy a fine to the uses declared in the deed of 1812; which was levied accordingly. The wife never surrendered the copyhold premises pursuant to the marriage settlement. In 1814 the commission issued, and the husband was declared a bankrupt, his execution of the trust deed of 1812 being the act of bankruptcy. The trustees of the settlement proved the £4000 under the commission, and signed the bankrupt's certificate. Held, that the trustee on behalf of the wife and children of the bankrupt, had a lien on both the freehold and copyhold estates, thereby conveyed and remaining unsold by the bankrupt, to the amount of the £4000. *Ex parte Dicken.* Buck, 115.

4. Devise of copyhold estates to the wife of A. to be disposed of as she should appoint; and a bequest of 200 guineas to pay the fines of her admission, the surplus to herself. She is not admitted, but appoints to her husband, who is the residuary legatee, and gives her credit for the 200 guineas in account. He becomes bankrupt. Held, that the 200 guineas not having been applied for the purpose of admission, fell into the residue; and that the credit in account was a mere declaration of trust without consideration, and not binding upon his creditors. *Ex parte Smith,* 1 Rose, 208.

5. A trader cannot on marriage secure a provision out of his own property for his wife, in the event of bankruptcy, as against his creditors. *Higginson* v. *Kelly.* 1 B. & B. 255.

6. Marriage settlement of a trader securing a provision in the event of his bankruptcy for his wife, is good to the extent of her property. *Ibid.* 1 B. & B. 256.

7. The equity of the wife to a provision out of her property, attaches for the benefit of herself and children on the filing of the bill, which gives the court jurisdiction as to that property, whether the bill is filed by the wife or others; but she may wave it even after a decree for a settlement before its execution. The children held to be entitled to the benefit of that equity attaching upon bill filed by an executor, though the wife died before answer. *Steinmetz* v. *Halthin.* 1 G. & J. 64.

8. A trader by settlement on marriage,

in consideration of £1000, the wife's fortune, conveyed his house to trustees to his own use till death or bankruptcy; then in either event if the wife be alive to raise £1000 for her separate use. This is a fair and valid settlement in the nature of a mortgage to secure the wife's fortune. *Higginson* v. *Kelly*. 1 B. & B. 252.

(i) Effect, on Conveyance or Gift to Bankrupt's Wife or Children.

1. A covenant by a trustee to indemnify a husband against his wife's debts, is a sufficient valuable consideration within the statute, 1 Jac. 1. c. 15, s. 5. even though the husband lives apart from his wife, and a separate maintenance is provided for her. *Worrall* v. *Jacob*. 3 Mer. 269.

2. By deed of separation, the husband (a trader liable to the bankrupt laws) covenants with a trustee for the wife, in consideration of being indemnified from all debts and engagements, which might be contracted by her during the separation, and from any demand for alimony, to release his remainder in fee in certain estates, (originally the property of the wife, and which by marriage settlement were limited to the husband and wife successively for life, remainder to the issue of the marriage, and in default of issue to the survivor of the husband and wife in fee,) to such uses &c. as the wife should by deed or will appoint, with power of revocation and new appointment. The covenant, although entered into on occasion of a separation between husband and wife, was yet binding in equity, being made to a third party; and may be supported against creditors under the statute of 1 Jac. 1. c. 15, s. 5., by the consideration of indemnity against the wife's debts and engagements, and her claim for alimony. *Ibid.* 3 Mer. 268.

3. A father mortgages his estate for a debt due from his son; this is a good consideration, and the mortgage is not a voluntary conveyance within the statute, 1 Jac. 1. c. 16, s. 5. The consideration in law is equal whether a man pledges his estate for his own debt or the debt of another. *Ex parte Hearn*, Buck, 165.

4. Stock purchased by a father, afterwards a bankrupt, in the names of his son, a minor, and of a trustee for him, is within the provisions of the 1 Jac. 1. c. 15, s. 5. *Brown* v. *Bellaris*, 5 Mad. 53.

(k) Bargain and Sale Vacating.

1. Where an assignee had absconded, the bargain and sale ordered to be vacated from the date of the order. *Ex parte Corry*. Buck, 314.

2. The bargain and sale cannot be partially vacated. *In the matter of Goodchild*. Buck, 322. (*n*).

3. But semble that vacating the bargain and sale, would not disturb conveyances actually executed. *In the matter of Goodchild*. Buck, 322. (*n*). *Ex parte Harris*, 3 Mad. 474.

4. Where the assignment was executed by the commissioners to three assignees, and the bargain and sale to two only, the other refusing to act, and the purchasers under the commission required the three to join in the conveyances: the assignment, and bargain and sale, were ordered to be vacated, and a new assignment, and bargain and sale, to be executed to the acting assignees. *Ex parte Kersley*. Buck, 477.

5. One of two assignees having quitted the country, it was ordered, on petition of the remaining assignee, that the bargain and sale to the two assignees should be vacated, a choice be made of a new assignee in the stead of the one abroad; that a new assignment, and bargain and sale should be executed to the petitioner and the new assignee when chosen; and that service of the petition at the last place of residence of the assignee abroad, should be deemed good service. *Ex parte Bonbonous*. 3 Mad. 23.

6. The great seal has power to vacate the bargain and sale from the date of its order, leaving unaffected all prior acts of disposition of the bankrupt's estate: so where an assignee had absconded, the bargain and sale was on petition ordered to be vacated without prejudice to any thing done under it, and a new assignee chosen. *Ex parte Corry*. Buck, 314. 3 Mad. 474. (*n*).

X. Assignees.

(a) Choice of.

1. The choice of assignee is with the creditors entitled to prove under the act of parliament, and not with those who go in under a special order, as separate creditors under a joint commission, who now

go in under a general order, 8th March, 1794. *Ex parte Parr,* 18 Ves. 70.
1 Rose, 76.
——— *Longman,* 18 Ves. 71.

2. Joint creditors are not permitted to vote in the choice of assignees under a separate commission. *Ex parte Parr,*
18 Ves. 70. 1 Rose, 78.
Ex parte Longman, 18 Ves. 71.
1 Rose, 304.
——— *Wilson,* 18 Ves. 442.
——— *Laycock,* 1 Rose, 32.
S. C. ——— *Jones,* 18 Ves. 283.
——— *Basarro,* 1 Rose, 266.
——— *Simpson,* 2 Rose, 337.
1 Mer. 38.
——— *Mills,* 3 V. & B. 140.

3. Nor even if there is only one separate creditor; but an arrangement will be made for the joint creditors by order. *Ex parte Parr,* 18 Ves. 70.

4. Nor although the petitioning creditor, whose debt would have carried the choice, consented. *Ex parte Simpson,*
1 Mer. 38. 2 Rose, 337.

5. Separate creditors are not entitled to vote in the choice of assignees under a joint commission.
Ex parte Parr, 18 Ves. 65. 1 Rose, 76.
——— *Hamer,* 1 Rose, 321.
——— *Jepson,* 19 Ves. 224.

6. Where the assignees, under a joint commission, were chosen by the votes of separate creditors, a new choice was directed: but the Lord Chancellor will not interfere in the choice of assignees, merely on account of a mistake by the commissioners excluding one creditor, if in the fair exercise of their discretion. *Ex parte Parr,* 18 Ves. 65. 1 Rose, 78.

7. In a case where the debt of the only separate creditor did not exceed £4. joint creditors were permitted to vote in the choice of assignees, the petitioning creditor consenting.
Ex parte Jones, 18 Ves. 283.
S. C. ——— *Laycock,* 1 Rose, 32.

8. Also where the petitioning creditor's debt overbalanced the separate debts, the petitioning creditor consenting to the application. *Ex parte Taylor,*
18 Ves. 284.

9. It is a general rule in bankruptcy, that an assignee having interest adverse to those of the general creditors, will be removed on an arrangement made to prevent his office as assignee interfering with the due investigation of his claims. But the court will not prevent such an adverse creditor from electing himself assignee in the first instance, if the amount of his proof will enable him so to do.
Ex parte De Tasted, } 1 Rose, 325.
——— *Martel* } 1 V. & B. 280.

10. A bankrupt, whether certificated or not, cannot be assignee under his own commission. *Ex parte Jackson,*
Cooper, 286.
2 Rose, 221.

11. Commissioners have the power to adjourn the choice of assignees from the day publicly appointed for that purpose, although the creditors present concur in an election. *Ex parte Garland,*
1 Mad, 318. 2 Rose, 361.

12. The election of assignees must be made by those creditors, however few, who are in a condition to vote. The commission must not be impeded, because those creditors who are not in that condition might make a different choice. *Ex parte Butterfill,* 1 Rose, 192.

13. It is not a ground for the removal of assignees, that the commissioners have improperly rejected the proof of a debt that would have turned the choice, unless the rejection was fraudulent. *Ex parte Durent,* Buck, 201.

14. But in a special case, where the commissioners had improperly rejected the petitioner's proof to a large amount, whereby two creditors, for comparatively trifling sums, were enabled to choose the assignees, a new choice was directed, the petitioner indemnifying the estate against all the costs. *Ex parte Edwards,*
Buck, 411.

15. Where, through the error of the commissioners, the great body of the creditors were prevented from proving their debts, and voting in the choice of assignees, a new choice was directed. *Ex parte Hawkins,* Buck, 520.

16. Corporations may vote in the choice of assignees by a person authorized by a special power of attorney under their common seal. *Ex parte the Bank of England,* 1 Wil. 295. 1 Swan. 10.

17. One partner on behalf of all may vote for assignees. *Ex parte Hodgkinson,* 19 Ves. 293.
Coop. 99. 2 Rose, 172.

18. There are exceptions to the general rule, that the choice of assignees will not be disturbed on account of the mere error of the commissioners in the rejection of debts, but the party complaining must use reasonable diligence, and a petition, after

a delay of six months, was dismissed as too late. *Ex parte Scholey*, 1 G. & J. 2.

(b) Nature and Duties of their Trust.

1. Assignee desirous of becoming a purchaser of the estate of the bankrupt, must first obtain the consent of the creditors at a meeting called for the purpose, and then petition, and serve the other assignees with the petition, and also the bankrupt. *Ex parte Bage*, 4 Mad 459.

2. An assignee having purchased goods at a sale under the commission, becomes bankrupt: it was ordered, that such of the goods as remained in specie should be redelivered, and that what he had resold should be proved as a debt under the commission. *Ex parte Spong*, 1 Rose, 133.

3. Assignees are not under 5th Geo. 2. c. 30. entitled to detain from the bankrupt any part of his wearing apparel, on the ground of its being unnecessary, he himself being the party to determine that at the risk of an indictment. Nor can they refuse the bankrupt the inspection of his books previously to his last examination, on the ground that the object of such inspection is fraudulent. *Ex parte Ross*, 17 Ves. 374. 1 Rose, 33.

4. The court will order the assignees to pay the messenger's bill of fees. *Ex parte Hartopp*, 1 Rose, 449.

5. An assignee who has proved his debt, and against whom, upon petition in the bankruptcy, an action is directed to be brought to try his right to property of the bankrupt alleged to have been fraudulently delivered to him, cannot dispute the validity of the commission, except at the hazard of his proof. *Ex parte Jecks*, 1 Rose, 393.

6. An assignee must consider the commission under which he derives his authority to be valid, and act under it at his own risk and responsibility. The Lord Chancellor, not having jurisdiction to indemnify him against the consequences of a supersedeas. *In the matter of Bryant*, 2 Rose, 17.

7. A court of law will hold to bail, upon a balance sworn to positively by a bankrupt, and to belief by his assignees. *Howden* v. *Rogers*, 1 V. & B. 133.

8. They hold to bail at law in bankruptcy, on oath of the assignee, where the bankrupt will not make an affidavit. *Stewart* v. *Graham*, 19 Ves. 316.

9. Whenever two of three assignees agree to change the solicitor, the third has a right to know whether the change will be beneficial. *Ex parte* ——, 1 Rose, 207.

10. And where the third assignee refused to concur in the change, and unsuccessfully opposed the application for that purpose, he was ordered to pay the costs. *Ex parte Scruby*, 1 Rose, 207 (*n*).

11. The majority of the assignees regulates the removal or the continuance of the solicitor. *Ex parte Tomlinson*, 2 Rose, 66.

12. A declaration made at a public meeting of all the creditors under the commission, will sanction a transaction which otherwise would be bad, if carried on in a private manner. *Ex parte Brine*, Buck, 23.

13. Assignees ordered to endorse a bill, which the bankrupt, before his bankruptcy, had transferred, without endorsement, to the petitioner, for a valuable consideration, the endorsement to be special, so as to secure the assignees from personal liability. *Ex parte Mowbray*, 1 Jacob & Walker, 428.

14. Where it is merely a question of convenience, it will be left to the assignee to choose whether mortgage accounts shall be taken before the commissioners or a master. *Ex parte Ansley*, Buck, 292.

15. Assignees are not permitted to bid in their private character, at a sale of the bankrupt's premises. *Ex parte Hodgson*, 1 G. & J. 12.

16. Assignees being accountants, not permitted to charge the estate for business done as accountants. *Ex parte Read*, 1 G. & J. 77.

17. It is the first duty of assignees to satisfy themselves that the commission is well founded. *Ex parte Graves*, 1 G. & J. 86.

18. Though generally assignees under a separate commission against a partner cannot engage in new adventures, yet they can with the consent of the creditors and bankrupt. *Crawshay* v. *Collins*, 15 Ves. 228.

(c) Their interest under the Assignment.

1. The title of the assignees by assignment under a commission of bankrupt, does not, like an assignment by an individual, or upon particular contract, require intimation; the former being recognized as a transfer of a public nature,

taking effect by operation of law, as a transfer by marriage. *Selkrig* v. *Davies.* 2 Rose, 291. 2 Dow, 230.

2. To complete a title by assignation, it is not necessary that the intimation should be notarial or formal. Ordinary notice, or circumstances of conduct, from which a claim under the assignation is to be inferred, is considered as equivalent to solemn intimation. *Ibid.*

3. Assignees are subject to the same equities as the bankrupt. *Grant* v. *Mills,* 2 V. & B. 309.

4. Where the settlement of a trader does not secure the wife's fortune in the event of his bankruptcy, the intention appearing to be so, it will be amended accordingly. *Higginson* v. *Kelly,* 1 B. & B. 252. 1 Rose, 368.
Ex parte Verner, 1 B. & B. 260.

5. The owners of a ship are not interested in it as joint tenants, but as tenants in common upon a bankruptcy; therefore the bankrupt's share passes to the creditors under the bankruptcy, without being liable specifically to the claims of the other part owners in respect of their disbursements and liabilities for the ship. *Ex parte Harrison,* 2 Rose, 76.

(*d*) *Collecting and Disposal of Bankrupt's Property.*

1. A reasonable commission, 2s. 6d. per cent. will be allowed to a country banker on discounts, though for a person resident in London, and paid through a banker there, if not colorable. *Ex parte Jones,* 17 Ves. 332. 1 Rose, 29.

2. A bankrupt, seized for life, with a general power of appointment, with remainder, in default of appointment, to the heirs of his body, cannot be compelled in equity to execute the power for the benefit of his creditors. *Thorpe* v. *Goodall,* 17 Ves. 388. 1 Rose, 40, 270.

3. Order for payment out of a bankrupt's estate of the principal sum of £25,000, with interest to the time of payment, in preference to all other creditors, with costs, under statute 51 Geo. III. c. 15, s. 48. for an issue of Exchequer Bills to relieve commercial credit. *Ex parte Holden,* 18 Ves. 436. 1 Rose, 173.

4. A bankrupt cannot be compelled to join his assignees in conveyance of real property. *Waugh* v. *Land,* Coop. 134.
Ex parte Crowder, 2 Rose, 327.
Selkrig v. *Davies,* 2 Rose, 312. 2 Dow, 245.
Ex parte Cridland, 3 V. & B. 100. 2 Rose, 166.

5. Mortgagee of a bankrupt's estate will be allowed, on petition, to bid for the same, on a sale of the mortgaged estate. *Ex parte Marsh,* 1 Mad. 148.

6. A sole trader having agreed, in consideration of a sum, payable by instalments, to take two persons into partnership with him for a period of eighteen years, and having become bankrupt five months after the commencement of the partnership, when only one instalment was due, his assignees are nevertheless entitled, at the respective periods, to receive the remaining instalments: the contract had been performed by the admission into the partnership, and the consideration therefore must be paid, there being no fraud in the transaction. *Akhurst* v. *Jackson,* 1 Wil. 47. 1 Swan. 85.

7. Articles of partnership having provided, that, on dissolution by death, notice, or misconduct of a partner, the remaining partners should have the option of taking his share at a valuation, payable by yearly instalments, in the course of seven years; and that on the bankruptcy, or insolvency of a partner, the partnership should be immediately void as to him; by a deed, four years subsequent, the partners declared, after a recital, that such was their intention in the articles, that, in the event of bankruptcy or insolvency, the same arrangement should be practised as on dissolution by death, notice, or misconduct. One of the partners having become bankrupt within a few months after the execution of the latter deed, the court held that his assignees were not bound by it, the deed having been evidently made in contemplation of bankruptcy; and as the partnership was dissolved by the bankruptcy, the effects must be distributed as in the ordinary case of bankruptcy, without any special provision. *Wilson* v. *Greenwood,* 1 Swan. 471. 1 Wil. 223.

8. The assignees under A.'s bankruptcy paid a sum of money by mistake

to the assignees under B.'s bankruptcy, who applied the same in distribution. A.'s assignees are entitled to be paid such sum of money out of the future effects under B.'s bankruptcy, after satisfying a dividend already declared of B.'s estate. *Ex parte Bignold,* 2 Mad. 470.

9. Where funds have been transferred to the commissioners for the reduction of the national debt under the 56th Geo. 3. c. 60, the provision in that act entitling the owner to a retransfer, means the owner who appears such in the books of the Bank, the person in whose name the stock stands, or his representative; and where the stock is trust fund the *cestuis que* trust are not entitled to have them retransferred; and if such owner, being merely trustee, is a bankrupt, his assignees cannot stand in his place so as to claim a retransfer; and where it appeared doubtful whether the bankrupt was or not trustee of the fund, it was referred to the Master to inquire: the stock ordered to be transferred into the name of the Accountant-General, and the costs of all parties, up to such reference, to be paid out of the fund. *Ex parte Gillett,* ——— *Bacon,* 3 Mad. 28.

10. Joint creditors under a separate commission are not entitled to have the expenses of a solicitor, employed by them to conduct examinations before the commissioners, paid out of the joint fund. *Ex parte Longman,* 1 Rose, 303.

11. It is no objection to an application, by a messenger, that the assignees may be directed to pay him his bill of fees, that he has neglected to make a demand upon them till after final dividend. They must be presumed to have known of his having such a claim, and ought not to have distributed the funds without reserving sufficient to satisfy it. *Ex parte Hartop,* 1 Rose, 449.

12. A reference to arbitration of all matters in dispute by assignees of a bankrupt, and a consequent award to pay a sum of money, is conclusive upon them as to assets. *Robson,* v. ———, 2 Rose, 50.

13. There is nothing in the statutes to prevent assignees selling by private contract, and such sale, with the consent of the creditors, would be unobjectionable. But selling by private contract is a circumstance of evidence, upon a complaint that the property by a different mode of sale, might have been rendered more productive. *Ex parte Dunman,* 2 Rose 66.

14. Where title deeds cannot be delivered, attested copies of them must be given by assignees as by other vendors; but their covenant for the production of the title deeds should be confined to the time of their continuance as assignees. *Ex parte Stuart,* 2 Rose, 215.

15. Assignees ordered to apply the proceeds of one bill of exchange in satisfaction of another, upon circumstances of specific appropriation or substitution. *Ex parte Peyron.* 2 Rose, 366.

16. Creditors who wish to have the accounts of the assignees taken, must first apply to the commissioners for that purpose; and if they miscarry in their judgment, or refuse to act, the creditors may then petition the court to have the accounts taken. *Ex parte Brocksopp,* Buck, 304.

17. In bankruptcy, application to open biddings, after deed executed, and the purchaser put into possession, too late. *Ex parte Partington,* 1 B. & B. 209; 1 Rose, 367.

18. When a sufficient advance is offered, and the application is recently made, biddings in bankruptcy may be opened. *Ibid.* 1 B. & B. 210.

19. The court will not order a consolidation of bankrupt's estates without a reference, though in pursuance of a resolution of creditors at a meeting called for that purpose. *Ex parte Strutt,* 1 G. & J. 29.

20. Real property of the bankrupt put up to sale by auction in two lots, and bought in by the assignee without the authority of the creditors: upon a re-sale there is loss on one lot and gain on the other. Though the balance is in favor of the bankrupt's estate, assignee charged with the loss on the lot undersold. *Ex parte Lewis,* 1 G. & J. 69.

21. Injunction *ex parte* to restrain the assignees from selling the bankrupts' effects. *Ex parte Figes,* 1 G. & J. 122.

22. The court has no jurisdiction, under the 49th Geo. 3. c. 121, s. 19. where the assignees have either accepted or declined to accept the lease, but only where they suspend their decision; and though the act does not in words extend to cases where the lease is in the hands of a third party, as a security for a debt, yet upon an equitable construction of the act, which was intended for the benefit of landlords, the court has jurisdiction, and will order the assignees to deliver up the premises to the landlord, and execute to him an assign-

ment or surrender of the bankrupt's benefit in the lease. *Ex parte Clunes,* 1 Mad. 76.

23. Assignees of a bankrupt lessee, though by accepting the lease they discharge the bankrupt from any claim upon him for rent, may assign the lease to an insolvent person to exonerate themselves from future claims for rent. *Onslow* v. *Corrie,* 2 Mad. 330.

24. Where there were two commissions against the same bankrupt, and distinct assignees under each: upon a petition, that they might elect either to take or reject a lease, an order was made upon both, subject to the question as to which commission should be sustained. *Ex parte Pomeroy,* 1 Rose, 57.

25. A landlord, being assignee, cannot resume possession and relet, but for the benefit of the estate. *Ex parte Wright,* 2 Rose, 244.

26. A separate commission against one partner dissolves the partnership, and the assignees are entitled to the interest of the bankrupt in the joint estate; but they do not become partners, and have no right to exclude the solvent partners from the possession: where, therefore, the solvent partner offered to account for the share of the bankrupt partner, the court, by injunction, restrained the assignees from selling the joint property. *Allen* v. *Kilbre,* 4 Mad. 464.

27. Where, upon a petition that the assignees might elec to accept or reject a lease, and the assignees craved time to consider what would be most beneficial for the creditors, the Lord Chancellor allowed them ten days for that purpose. *Ex parte Scott,* 1 Rose, 446, (*n*).

28. The court in bankruptcy has jurisdiction to determine a lease between landlord and tenant, if it is "meet and just in all the circumstances of the case." *Ex parte Nixon,* 1 Rose, 445. Buck, 85.

29. Covenant in a lease, that the lessee should, at the end, or sooner determination of the term, leave, upon the demised premises, the hay, straw, fodder, &c.; upon the determination of the lease by the court, the assignees are not entitled to carry off or be paid for the hay, straw, fodder, &c. then upon the premises. *Ex parte Nixon,* 1 Rose, 445. Buck, 85.

30. If a lease, containing a covenant, that the lessee, "at the expiration, or other sooner determination of the term," shall take the off-going crop, is determined by the order of the Lord Chancellor in bankruptcy, under the 49th Geo. 3. c. 121, s. 19. the assignees are entitled to the off-going crop. *Ex parte Maundrell,* Buck, 83. 2 Mad. 315.

31. A determination of a lease by an order of the Lord Chancellor, upon a petition in bankruptcy, falls within the expression "or sooner determination of the term" in the statute 49 Geo. 3. c. 121, s. 19. *Ex parte Maundrell,* Buck, 84.

32. The statute 49th Geo. 3. c. 121, s. 19. does not empower the court to determine whether the assignees have elected; it cannot call upon them to elect and settle the terms to be imposed upon them, subsequent to such election. *Ex parte Quantock,* Buck, 190.

33. Where a lease is determinable upon notice, at the will of the lessor or lessee, and the lessee covenants to leave, at quitting, the hay, straw, &c. on the premises; the bankruptcy of the lessee, and the election of his assignees to abandon the lease have the same effect with reference to the covenant, as though the lessee had quitted upon notice. *Ex parte Whittington,* Buck, 87.

(*f*) *Liabilities.*

1. Where the assignee of a bankrupt kept money belonging to the estate at his own bankers' many years, by which it became necessary for the creditors to institute a suit, he was charged with interest at £5 per cent. and all costs, including those arising from the inquiry before the Master subsequently to the decree. *Treves* v. *Townsend,* 1 Cox, 50.

2. But an assignee is never to be charged with interest for money retained in his hands, at a higher rate than £4 *per cent.* unless a special case is made for it. *Ex parte Strutt,* 1. Cox, 439. *Treves* v. *Townsend,* 1 Cox, 53.

3. An assignee who (before the statute of 49 Geo. 3. c. 121, s. 4,) paid money into his own bankers, and used it as his own property, was removed, and charged with interest at £5 *per cent.* *Ex parte Townsend,* 15 Ves. 470.

4. Assignee in bankruptcy was charged with interest, not as partner in the bank into which the money was paid by direction of the creditors, but for keeping it there three years without any satisfactory reason. *Ex parte Baker,* 18 Ves. 246.

5. The act is imperative, that an assignee shall be charged £20 *per cent.* for money wilfully retained in his hands, although he acted meritoriously, in so doing. *Ex parte Bray*, 1 Rose, 144.

6. The creditors of a bankrupt appoint the Bank of England as the place where the estate shall be deposited. A dividend is declared. Two of three assignees sign drafts for the dividends, which they forward to the other assignee for his signature. He also signs them and receives the money, which he applies to his own purposes. Upon his death a creditor's suit is instituted for the administration of his assets. Held 1st. That under the covenant which the assignees entered into with the commissioners, the misapplied dividends were a special contract debt due from the estate of the assignee who had misapplied them, to the estate of the bankrupt. 2d. That the estate of the assignee was liable, under the 49 Geo. 3. c. 121, s. 4, to pay £20 *per cent.* upon the funds misapplied. 3d. That the £20 *per cent.* was not a specialty, but a simple contract debt, and was part of the general estate of the bankrupt, and did not belong to the creditors entitled to the misapplied dividends. *Wackerbarth* v. *Powell.* Buck, 495.

7. The assignees give checks upon the banker of the estate to an agent, to enable him to purchase Exchequer bills for the benefit of the estate. The agent receives the money at the bank, and converts it to his own use; but afterwards replaced the money in the bank. Held that the assignees, are not under the 49 Geo. 3. c. 121, s. 4, chargeable with £20 *per cent.* upon the monies so misapplied by their agent. *Ex parte Wilkinson*, Buck, 197.

8. Contributions may be enforced among assignees in bankruptcy to reimburse a payment by one under an order of the Court of Chancery, for a loss occasioned by their joint act. And the objection that the defendants acted for conformity only, upon the representation and advice of the plaintiff, will not prevail. *Lingard* v. *Bromley.* 1 V. & B. 114.

9. But such contribution will not be enforced between wrong doers upon entire damages for a tort. *Ibid.*

10. Assignees of a bankrupt paying debts contracted after bankruptcy, but before the commission, under orders of the court and of the commissioners, not liable to repay the amount to the prior creditors. *O'Brien* v. *Grierson*, 2 B. & B. 323.

(g) *Agent or Inspector in favor of a particular class of Creditors.*

1. Although joint creditors have no right to vote in the choice of assignees, under a separate commission, yet the court will, in some cases, appoint persons, in the nature of assignees, to take care of the interest of the joint creditors, and to use the name of the assignees, indemnifying them.
Ex parte Basarro, 1 Rose, 266.
——— *Mills*, 3 V. & B. 140.

2. Where the interest of any particular class of creditors is not sufficiently represented and protected by the assignees under the commission, the court will appoint an agent or inspector on their behalf, giving him authority and indemnity, in point of expense, as fully as if he were actually an assignee.
Ex parte Miles, 2 Rose, 68.
S. C ——— *Mills*, 3 V. & B. 139.

3. An application that a trustee or inspector may be appointed to protect the interests of a class of creditors, is premature, until after the choice of the assignees. *Ex parte Simpson*, Mer. 38. 2 Rose, 337.

4. And where a creditor, having an interest adverse to those of the general creditors, chose himself assignee, he was suffered so to remain; but a creditor was appointed to act solely in the investigation of the claims of the assignee so chosen, and for that purpose to bring actions, and institute suits, the assignee not setting up his title as assignee.
Ex parte Martell, 1 Rose, 329.
S. C. ——— *De Tasted*, 1 V. & B. 280.

(h) *Effect of Bankruptcy upon Suits, Powers, &c.*

1. By the bankruptcy of the plaintiff, the suit becomes defective, if not abated, and an order may be obtained, that the assignees be made parties in a limited time, or the bill be dismissed. *Mumford* v. *Randall*, 1 Rose, 196.
S. C. *Randall* v. *Mumford*, 18 Ves. 424.

2. In the practice of the Court of Exchequer, the bankruptcy of the plaintiff is no abatement of the suit, and therefore a bill will be dismissed with costs, for want of prosecution, not allowing the bankrupt to speed the cause. *Ibid*, 426.

3. Upon the bankruptcy of the plaintiff in an injunction bill the assignees must come in as parties, or the injunction be dissolved. *Ibid*, 427.

4. Plaintiff becoming bankrupt, a special motion must be made, and notice served on the assignees, that the assignees may file a supplemental bill, in the nature of a bill of revivor, within a given time, or that the bill may stand dismissed. In this case a fortnight's time was given. *Porter* v. *Cox*, 5 Mad. 80. Buck, 469.

5. Assignees who are brought before the court by a supplemental bill, may be made liable to the costs of the whole suit where they improperly resist the plaintiff's demand. *Whitcomb* v. *Minchin*, 5 Mad. 91.

6. Bankruptcy and sale, by assignees, of the good will and interest of the bankrupt's trade, does not preclude him from setting it up again, if he does not hold himself forth as carrying on the trade, which was the subject of purchase. *Crutwell* v. *Lye*, 17 Ves. 335. 1 Rose, 123.

7. A bill of foreclosure against the assignees of a bankrupt mortgagor, before the execution of the bargain and sale by the commissioners, will not be dismissed, on the ground that the assignees have not any interest that can be the subject of a foreclosure. *Bainbridge* v. *Pinkorn*, Buck, 135.

8. In the case of the sale of a ship at sea, if a bankruptcy of the vendor intervenes before the arrival of the ship, the endorsement on the certificate of the ship's registry, being only an act of duty on the part of the vendor, and passing no interest, may be performed by the bankrupt himself; and if the vendor has given a power of attorney to perform this act of duty previously to the bankruptcy, his attorney may carry it into effect, notwithstanding the act of bankruptcy has intermediately occurred. *Dixon* v. *Ewart*, 3 Mer. 322. Buck, 94.

9. Equitable mortgagees, under a deposit of title-deeds by way of pledge, cannot effect a valid assignment of the premises comprised therein, in the event of the person so pledging them becoming bankrupt, unless the assignees of the bankrupt join in the conveyance, although a power of sale be given by the agreement entered into at the time of the deposit, on notice to repay the money intended to be secured, if no such notice has been given. *Hawkins* v. *Ramsbottom*, 1 Price, 138.

10. A London house guaranteed certain payments to be made by a Paris house. The solvency of the Paris house becoming doubtful, the London house duly authorised the creditor to act according to the best of his discretion in the settlement of the affairs. The creditor accordingly went to Paris, and entered into a composition for the debt with the Paris house. After the departure of the creditor from England, and previous to the composition, a commission of bankrupt issued against the London house, of which fact the parties to the composition were ignorant: held, that the bankruptcy did not determine the authority. *Ex parte M'Donnell*, Buck, 399.

11. Where a power of attorney was sent out to India, acts done there by the attorney, after the death of the principal, but without notice of his death, were supported. Buck, 405.

12. Bankruptcy is not a forfeiture under a clause in a will against alienation. *Wilkinson* v. *Wilkinson*, Coop. 259.

(*i*) *Actions by or against.*

1. In an action brought by the bankrupt against his assignees, they must, independently of the notice under the 49 Geo. 3. c. 121, s. 10, be presumed to know that the bankruptcy is disputed, and ought to be prepared with evidence to support it. *Ex parte Dick*, 1 Rose, 51.

2. The court will restrain a bankrupt, controverting his bankruptcy, from vexatiously bringing actions against his assignees; but will not so interfere, upon the ground that the bankrupt has failed upon the trial of one action and the application for a new trial, and was about to bring a second action. *Ex parte Bryant*, 1 V. & B. 215, 506. 2 Rose, 1.

3. An assignee sustaining a litigated commission, is entitled to his costs out of the estate, as between attorney and client. S. C. 2 Rose, 1. 1 V. & B. 211.

4. And where the assignees in possession had mismanaged a farm, and then elected not to accept the lease, an issue of *quantum damnificatus* was directed. *Ex parte Quantock*, Buck, 190.

5. The court refused to restrain assignees from bringing a second action, they having been nonsuited in the first, for the recovery of certain sums from a creditor, who had given credit for them in his account,

and had proved for the balance. *Ex parte Hilton*, 1 Jacob & Walker, 467.

6. The general rule, however, is, that they must proceed by petition, if the creditor has proved. *Ibid.*

(*k*) *Suits by and against.*

1. Bill by assignees of bankrupt claiming a debt, which had been paid to his partner, as paid after notice of dissolution of partnership, that partner retiring and the other continuing the business, will be dismissed, unless they can clearly make out the agreement between the partners at the dissolution, so as to establish the equitable right of the bankrupt against the legal right of the other partner. *Duff* v. *East India Company*,

2. A bill by a bankrupt, who had taken the benefit of an insolvent debtor's act, and his assignees under that act, against the assignees under his commission, stating improper conduct a d collusion, and that all or most of the creditors were satisfied, and praying an account: a demurrer was allowed, the proper mode of proceeding being by petition in bankruptcy. *Saxton* v. *Davis*, 1 Rose, 79. 18 Ves. 72.

3. Injunction was ordered upon an interpleading bill, filed by a debtor against the bankrupt and his assignees: but the court will not suffer a bankrupt, by means of such a bill, to try the validity of his commission. *Lowndes* v. *Cornford*, 1 Rose, 180. 18 Ves. 299.

4. Defendant allowed to withdraw his plea, and to replead after giving notice of his intention to dispute the petitioning creditor's debt, &c. *Rudmore* v. *Gould*, 1 Rose, 122. Wightwick, 80.

5. Order obtained, after several witnesses had been examined, to withdraw rejoinder and rejoin *de novo*, for the purpose of giving notice, under statute 49 Geo. 3, c. 121, s. 11, of the intention to dispute act of bankruptcy and petitioning creditor's debt; but upon the terms of undertaking to pay such costs as the court might afterwards direct. *Brickwood* v. *Miller*, Coop. 270. 2 Rose, 216.

6. But the liberty given by the order, being a mere act of indulgence, will not be extended to a case where the negligence of the party obtaining it has put it out of the power of the other party to establish the fact it is intended to prove: so on motion to discharge the order so obtained, on the ground that the witness proving the act of bankruptcy was dead, the court retained it only upon the defendant consenting to admit, as evidence, the depositions of the deceased witness. *Brickwood* v. *Miller*, 1 Mer. 4. 2 Rose, 340.

7. Where the solicitor in the cause neglected to give notice of the intention to dispute the act of bankruptcy, under the statute 49 Geo. 3, c. 121, an order was granted on motion to withdraw rejoinder, and rejoin *de novo*, for the purpose of giving such notice, by analogy to the practice at law to permit a plea to be withdrawn; but the court required an affidavit stating the deponent's information and belief, that it was essential to the justice of the case. *Berks* v. *Wigan*, 1 V. & B. 220.

8. To a suit instituted by assignees on behalf of a bankrupt, in the object of which the creditors have no interest, the assent of the creditors is not necessary, under the statute 5 Geo. 2, c. 30, s. 38, and one of two or more assignees may institute such a suit without the others joining. *Wilkins* v. *Fry*, 1 Mer. 244. 2 Rose, 371.

9. To a bill by the executor of a deceased partner against the surviving partners, who were bankrupts, and their assignees questioning the validity of the commission, and praying an account, or, if the commission was legal, for leave to prove what should appear to be due under the bankruptcy, a general demurrer by the bankrupt was allowed: the proper mode of questioning the validity of the commission being by petition in the bankruptcy. *Bailey* v. *Vincent*, 5 Mad. 48.

10. Upon a suit by the assignees of a bankrupt, to set aside a settlement made after marriage, the court held that the infant defendants could not be concluded, as to the question of bankruptcy, by the production of the commission, &c. under the statute of 49 Geo. 3, c. 121, s. 11, although no notice had been given on their part, of an intention to dispute the commission; and an inquiry was therefore directed before the Master, whether a commission had been duly issued. *Bell* v. *Tinney*, 4 Mad. 372.

11. A debtor of the bankrupt cannot support an interpleading bill against the bankrupt and his assignees. *Harlum* v. *Crowley*, Buck, 273.

12. On the bankruptcy of the husband, the trustees will not be restrained by injunction, on the application of the assignees, from proceeding to recover the possession. *Higginson* v. *Kelly*, 1 B. & B. 252.

(l) Retiring.

1. An assignee will be permitted to retire upon his petition, upon paying the costs of the meeting for a new choice, and the costs of his application to retire; and if the new assignee do not continue any legal proceeding already commenced, the retiring assignee must pay the costs incurred by them, unless the Master report such costs properly incurred. The retiring assignee must permit his name to be used in any legal proceedings already commenced, he being indemnified by the new assignee. The indemnity to be settled by the Master. *Ex parte Thorley, in the matter of Roberts*, 3 Mad. 273. Buck, 231, 465.

(m) Deceased or Absconding.

1. Where five assignees paid part of the bankrupt's estate into the Bank, and afterwards one died, and another went to reside abroad; the court, upon petition, ordered the Bank to pay the money to the three remaining assignees. *Ex parte Collins*, 2 Cox, 427.

2. Money deposited in the Bank in the names of three assignees, ordered to be paid to the checks of two, the third having absconded. *Ex parte Hunter*, 1 Mer. 408. 2 Rose, 363.

3. An assignee having absconded, another appointed in his place.
Ex parte Corry, Buck, 314.
——— *Higgins*, 1 Rose, 367. 1 B. & B. 218.

4. Where an assignee had quitted the country, a new assignee was appointed. *Ex parte Bonbonous*, 3 Mad. 23.

5. The representatives of a surviving assignee of an estate that had paid 20s. in the pound, all the commissioners being dead, and sales having taken place under the commission, were ordered to execute a power of attorney to a receiver appointed under a decree of the court, in a cause in which the surviving assignee was a defendant, to collect and get in the said estate, they being indemnified. *Twogood* v. *Hankey*, Buck, 65.

(n) Removal.

1. Where an assignee is removed for the convenience of the estate, as in case of infirmity, he does not pay the costs, as he does where he retires for his own convenience. *Anon*, 5 Mad. 76.

2. Petition to remove a bankrupt assignee was dismissed with costs; the general order, 5th March, 1794, making such an application unnecessary, *Ex parte Watts*, 1 Rose, 436.

3. The court refused to disturb the choice of assignees under a separate commission, upon the ground that they had been elected by joint creditors, who had been admitted on the proceedings as separate creditors. *Secus*, if they had been admitted, and voted as joint creditors. *Ex parte Jeffery*, 1 Rose, 315.

4. Till the debt is set aside, the court will not remove a creditor from his office as assignee, upon suspicion of its unfairness. *Ex parte Miles*, 2 Rose, 68.
S. C. ——— *Mills*, 3 V. & B. 140.

5. The Lord Chancellor has jurisdiction to control the choice of assignees in bankruptcy, and where the assignees chosen have an interest adverse to the general creditors; if the question can be fairly tried without removal, such jurisdiction is exercised by appointing a person to act as assignee, to investigate the suspicious circumstances, the costs depending upon the result. *Ibid.*

6. The rule, that an assignee's having an interest adverse to the other creditors, raising a *primâ facie* case for removal, has been modified, by limiting and controlling the exercise of his power, where sales or other important transactions have taken place; so in case where one of two assignees had an adverse interest, the other assignee was ordered to bring an action against him. The defendant in the action admitting the plaintiff to be sole assignee. *Ex parte De Tastet*, 1 V. & B. 288. 1 Rose, 327.

7. It is not a ground for the removal of assignees, that the commissioners have improperly rejected the proof of a debt that would have turned the choice, unless the rejection was fraudulent, with a view to influence the choice.
Ex parte Durent, Buck, 201.
——— *Thompson*, *Ibid*, (*n*).

XI. Relation to the Act of Bankruptcy.

1. The court refused to interpose, though under very suspicious circumstances, against creditors who had received goods after a secret act of bankruptcy, there being no actual proof of their having had notice of it. *Fisher* v. *Touchett*. 1 Eden, 158.

2. The interest of each partner is his share of the surplus, subject to all the partnership accounts, and that interest only is liable to the execution of a separate creditor. The interest of a partner vests by his bankruptcy in his assignees, by relation to the act of bankruptcy. Therefore joint creditors under judgment in foreign attachment, of the same date with the separate commission, but subsequent to the act of bankruptcy, cannot have execution against the joint property, which must be applied among all the joint creditors. *Dutton* v. *Morrison*. 17 Ves. 193. 1 Rose. 213.

3. The relation to the act of bankruptcy, is confined to an act subsequent to the petitioning creditor's debt. *Ex parte Birkett.* 2 Rose. 71.

4. A London house guaranteed certain payments to be made by a Paris house. The solvency of the Paris house becoming doubtful, the London house duly authorized the creditor to act according to the best of his discretion in the settlement of the affairs. The creditor accordingly went to Paris, and entered into a composition for the debt with the Paris house. After the departure of the creditor from England, and previous to the composition, a commission of bankrupt issued against the London house, of which fact the parties to the composition were ignorant. Held that the bankruptcy did not determine the authority so given to the creditor. *Ex parte M'Donnell*, Buck. 399.

XII. Set Off.

1. The costs of a superseded commission ordered to be paid, but not taxed till after after a new commission issues, cannot be a set off against a debt due by the bankrupt before the bankruptcy. *Ex parte Rhodes*, 15 Ves. 539.

2. A., entering into partnership with B., applies to his bankers for a loan to constitute his capital; they consent upon condition that B. shall join in a security for the repayment of the loan; which is complied with. The partnership open an account with the bankers, who also continue the private bankers of A. On the bankruptcy of the bankers, the balance on the joint account arising from this loan is against A. and B.; but A.'s private account is in his favor: A. and B. allowed to set off this private balance against the joint debt; it being but a security for the separate. A. and B., soon after the partnership commenced, took in another partner; but it was understood that the account with the bankers was to continue as before. This partner drew checks in the partnership name, and paid them into his private account. The assignees held not entitled to charge the checks so transferred against the partnership account. *Ex parte Hanson*, 18 Ves. 232. 1 Rose, 156.

3. A debt from a bankrupt to a married woman *dum sola* cannot be set off against a debt from her husband to the bankrupt. *Ex parte Blagden*, 19 Ves. 465. 2 Rose, 249.

4. Where a loss attaches upon a policy of insurance after a bankruptcy of the insured, it constitutes a cause of action in the assignees, not an interest in the bankrupt admitting a set off. *Ibid.*

5. Distinction between set off in equity and at law. In equity it prevailed long before the statute. S. C. 19 Ves. 467.

6. A debtor by bond to the separate estate of a deceased partner, is not allowed in equity to set off his bond-debt, in respect of acceptances for which he has become liable to the partnership estate, and which he had proved under a joint commission of bankruptcy. *Addis* v. *Knight*, 2 Mer. 117.

7. A joint debt cannot be set off against a separate debt at law, but may in equity, under particular circumstances: as where there is a clear series of transactions in which joint credit has been given. *Vulliamy* v. *Noble*, 3 Mer. 618.

8. A creditor of a partnership having made farther advances on the security of a bill of exchange deposited with him for that purpose by the partners, and having undertaken to receive the amount when due and return the surplus; the bill having been dishonored and remaining in his hands unpaid; is not entitled, on the bankruptcy of the partners, to set off his prior advances against a [illegible] by the

assignees for the bill. *Ex parte Flint,* 1 Swan. 30.

9. The doctrine of set off and mutual credit under the statute, is the same at law and in equity. *Ibid,* 1 Swan. 33.

10. V., a customer of the banking-house of D. & Co. transfers to N., a partner in the firm, a sum of stock by way of security for money borrowed of them, and for the amount of which he had given them notes, payable on the stock being retransferred to him. He pays off these notes, and afterwards borrows a further sum on the joint note of himself and his son, without calling for a re-transfer. The stock so transferred having been blended with other stock, of which N. was in like manner possessed, by way of security for other customers, is sold by the partnership, and the produce applied to the use of the partnership, except a small balance still remaining in the name of N. D. (another of the partners), afterwards dies, and the partnership is carried on without any alteration of firm till the surviving partners become bankrupt. The other creditors, in respect of stock transferred, having been satisfied their demands, V. is entitled to the stock remaining in the name of N., as being sufficiently appropriated, to set off, against the joint note of himself and son, so much of the money received by the partnership from the sale of the other part of the stock as was equal to the amount of such joint note, to prove the residue as a debt against the estate of the bankrupts, and to receive from D.'s estate the amount of the deficiency. *Vulliamy* v. *Noble,* 3 Mer. 593.

11. Petitioners were bankers, and also partners as bankers in two other firms: at the time of the bankruptcy the three firms were in possession of notes of the bankrupts' house to the amount of £276, and the bankrupts in possession of their notes to the amount of £189. Just before the commission issued, a clerk of the bankrupts absconded with the notes of the different firms and other property of the bankrupts to the amount of £450, but the assignees afterwards compromised with the clerk for £100. It was ordered, that the petitioners should be allowed so much of the £100 received from the clerk as the proportion of their debt of £189 bore to the whole £450, for which the £100 was a compromise; and that the three firms should make a joint proof for the residue of their claim of £276. *Ex parte Huckey,* 1 Mad. 577.

12. Legacy of £1000 to wife of J. A. who was largely indebted to the testatrix. J. A. becomes bankrupt, and his wife afterwards dies without having asserted any claim in respect of the legacy: held, that the executors of the testatrix were entitled, as against the assignees of J. A., to retain the legacy in part discharge of the debt due to the testatrix. *Ranking* v. *Barnard,* 5 Mad. 32.

13. A. purchases an annuity of £200, for £2000, to be paid after her death. The grantor becomes bankrupt, and is indebted, upon other accounts, to the annuitant to the amount of £2275 : 5 : 9. The annuitant is not entitled to set off the £2000 against the £2275 : 5 : 9; for as she could not be compelled to pay in advance, the bankrupt ought not to be compelled to receive in advance. *Ex parte Whitaker,* 1 Rose, 301.

14. The drawer of a bill of exchange discounts it with his banker, who becomes bankrupt before the maturity of the bill, having a cash balance of the drawer in his hands. Petition by the drawer and acceptor, that the assignees might be restrained from proceeding at law on the bill, upon payment to them of the difference between the cash balance and the bill, was dismissed. *Ex parte Burton,* 1 Rose, 320.

15. A debt due to a partnership cannot be set off against a joint debt, for which one of the partners has made himself separately liable. *Ex parte Ross,* Buck, 125.

16. If a party neglect to plead a legal set off to an action, he is not entitled to the assistance of a court of equity to give him the benefit of the set off. *Ibid.*

17. By a marriage settlement, monies belonging to the wife were vested in trustees in trust to assign £1000 stock to the husband, and to invest the remainder in government securities; and in case the husband should survive the wife, and there should be no issue of the marriage, to transfer one moiety of the trust stock to the husband, and to transfer the other moiety to the nearest and next of kin of the wife, in equal shares amongst them. The husband covenanted, that if his wife should die in his life-time, without having issue to survive her thirty days, he would, within three months after her de-

cease, transfer £500 Bank annuities to the trustees "for the sole use and property of the nearest and next of kin" of the wife. The husband having become bankrupt in his wife's life-time, held, that his moiety of the trust stock could not be retained or set off in satisfaction of his covenant. *Brandon* v. *Brandon*, 2 Wil. 14.

XIII. Proof of Debts.

(a) *Proof in general.*

1. In an appeal from the decisions of the commissioners as to the proof of debts, the petitioners ought to state to the court, in the first instance, the grounds upon which the commissioners refused to admit the proof. *Ex parte Wilson*, 1 Cox, 308.

2. A debt, barred by the statute of limitations at law, and in equity by analogy to that statute, cannot be proved under a commission of bankruptcy. *Ex parte Dewdney*, 15 Ves. 479. S. C. *on Rehearing*. *Ex parte Roffey*, 2 Rose, 245. 19 Ves. 468.

3. Where two commissions of bankruptcy have issued, and one has been superseded, the proofs taken under the superseded commission may be ordered to be received under the other. *Ex parte Upham*, 17 Ves. 212.

4. General order in bankruptcy, 8th March, 1794, was not intended to alter the rights of joint and separate creditors with regard to each other. *Ex parte Longman*, 18 Ves. 71.

5. There is no inference of fraud from debts proved by relations of the bankrupt. *Ex parte Gardner*, 1 V. & B. 45. 1 Rose, 377.

6. An application to the Lord Chancellor in bankruptcy, before the decision of the commissioners as to receiving or rejecting the proof of a debt, with a view to the choice of assignees, is improper, and an order so obtained will be discharged *Ex parte De Tasted*, 1 V. & B. 280. 1 Rose, 324.

7. A creditor attending to prove his debt before commissioners of bankruptcy, is privileged from arrest; and in this case the plaintiff in the action was ordered to discharge him, and all parties subjected to costs. *List's Case*, 2 V. & B. 373. 2 Rose, 24, 237. 1 Mad. 49.

8. A creditor had obtained judgment against the bankrupt, who, the day before the execution, committed the act of bankruptcy, by absconding, the petitioning creditor being his brother in law. The judgment creditor unsuccessfully defended an action by the assignees to recover the amount of the property taken in execution; but was, nevertheless, allowed, on petition, to prove his debt, and the bankrupt's certificate was ordered to be stayed in the mean time. *Ex parte Birch*, 1 Mad. 600.

9. A creditor cannot petition for leave to prove a debt larger than he offered to prove before the commissioners, even though the commissioners have refused to admit proof of the smaller sum; because it cannot be considered an appeal from their judgment, when the larger sum was not offered to be proved before them. *Ex parte Fry*, 3 Mad. 132.

10. A person dealing with another for a composition, shall not be bound by a concealment, or representation of the amount of his debt, if the plan, under which the concealment or representation takes place, is not carried into effect. *Ex parte Oakley*, 1 Rose, 138.

11. A creditor having taken out execution against the bankrupt's effects, gave up the proceeds of it received from the sheriff, under an agreement with the assignees, that he should come in with the other creditors for the balance due to him. Such agreement held to mean a proveable balance, and not to let in the debt, if affected with usury. *Ex parte Bangley*, 1 Rose, 168.

12. Verdict is only *primâ facie* evidence of a debt, and will not conclude either the bankrupt or the creditors, who are at liberty to impeach it, and into the circumstances of which, if impeached, the commissioners are bound to inquire. *Ex parte Rashleigh*, 1 Rose, 192.

13. A solicitor, engaged in carrying on legal proceedings for a client who becomes bankrupt pending the proceedings, cannot charge his estate with the costs incurred subsequently to the bankruptcy. *Ex parte Miller*, Buck, 286.

14. Proof cannot be mounted on proof. *Ex parte Smith*, Buck, 492.

15. Debts contracted after the act of

bankruptcy, but before date of the commission, are not proveable under it. *O'Brien* v. *Grierson*, 2 B. & B. 335.

16. It is not correct for commissioners of bankruptcy, when receiving the proof of a debt, not to inquire at what period the debt was contracted. *Ibid.*

17. The proof of a debt, though by the 49 Geo. 3. c. 121, s. 14, a conclusive election to adopt the commission, does not affect the remedies of the party proving for the recovery of his debt unpaid, in cases within the 5 Geo. 2, c. 30, s. 9: creditors who had obtained an order to prove under a second commission, in which 15s. in the pound was not paid, held to be entitled to prove their debts unpaid under a third commission. *Ex parte Buckle*, 1 G. & J. 32.

(*b*) *Manner of Proof, and by whom.*

1. A *cestui que* trust must join his trustee in the proof of a debt under a commission of bankruptcy, the trustee alone will not be admitted to proof. *Ex parte Dubois*, 1 Cox, 310.

2. A creditor residing in Scotland is within the provision of statute 5 Geo. 2, c. 30, s. 26, as to the mode of proving debts under commissions of bankruptcy, by creditors in foreign parts. *Ex parte Macdougall*, 2 Cox, 8.

3. The Lord Chancellor held that the Bank of England was not entitled to prove under a commission of bankruptcy, by a clerk, without a power of attorney, but proposed a general order to enable them. *Ex parte the Bank of England*, 18 Ves. 228. 1 Rose, 142.

4. Discretion of the Great Seal to order proof in bankruptcy upon a valuation, instead of a sale, of securities, regulated by circumstances, and not too readily exercised. *Ex parte Smith*, 1 V. & B. 518. 2 Rose, 63.

5. The petitioning creditor under a commission of bankruptcy must prove his debt at a public meeting, besides proving it privately at the opening of the commission. *List's Case*, 2 V. & B. 374.

6. Where the petitioning creditor had been detained in town on account of the commissioners not having been able to open the commission, and was called by business into the country, the court, by order, gave him permission to prove his debt by affidavit. *In the matter of Graham*, Buck, 47.

7. One partner on behalf of all may prove debts. *Ex parte Hodgkinson*, 19 Ves. 293. Coop. 99. 2 Rose, 172.

8. Corporations may prove debts under commissions of bankruptcy, by the affidavit of a person authorized by a general power of attorney. *Ex parte the Bank of England*, 1 Wil. 295. 1 Swan. 10.

9. Where a party was dead at the time of exhibiting his affidavit of debt before the commissioners, the proof upon such affidavit was held irregular; and the payment of two dividends does not preclude a petition to expunge the proof. *Ex parte Bridges*, 4 Mad. 269.

10. The commissioners under the 51 Geo. 3. c. 15, for issuing commercial Exchequer bills, were admitted, by their secretary, to prove the full amount of their principal, with interest up to the time of the payment of the principal, in preference to all other creditors of the bankrupts. *Ex parte Holden*, 18 Ves. 436. 1 Rose, 173.

11. Where a creditor had become *non compos mentis*, the court, on petition, ordered proof to be admitted by a person on his behalf. *Ex parte Maltby*, 1 Rose, 387.

12. The proof or claim of a debt operates as a discontinuance in an action, so as to preclude the necessity of producing the rule of discontinuance prior to the proofs being admitted. *Ex parte Woolley*, 2 V. & B. 253. 1 Rose, 394.

13. Where the owners, and also the mortgagees of a ship became bankrupts, the creditors, for stores supplied, were directed to prove first against the estate of the owners, in order to relieve that of the mortgagees as much as possible. *Ex parte Machel*, 1 Rose, 447. S. C. 1 V. & B. 216.

14. If a creditor, as an additional security for his debt, take the bankrupt's acceptances, it is his duty, when he proves the debt, to state that fact to the commissioners. *Ex parte Hossack*, Buck, 390.

(c) *Annuities.*

1. Upon proof of an annuity the value is to be ascertained by the price paid, and the time of enjoyment, subject to the circumstances of the contract between the parties. *Ex parte Thistlewood,*

19 Ves. 256. 1 Rose, 290.

2. So in the case of an annuity for the life of the grantee, aged thirty two, taken at an undervalue from his state of health, then not insurable but afterwards restored, and secured on bond and judgment; the value, to be proved on the bankruptcy of the grantor two years afterwards, is not the market-price nor the price paid originally with the variation occasioned by the lapse of time, but the actual value at the bankruptcy with reference to the grantee's age and improved health; and to the price paid and the enjoyment as evidence of the value, not simply reducing it by the payments made the contract involving a contingent risk with reference to the grantee's health, which might have turned entirely against him.

Ibid.

3. Originally under proof in bankruptcy upon the penalty of a bond, securing an annuity, forfeited, the annuity itself was received as assets sufficient. The modern course is to prove the value of the annuity as a debt, for convenience of distribution.

S. C. 19 Ves. 257.
1 Rose, 293.

4. Distinction, before the stat. 49 Geo. 3, c. 121, s. 17. authorizing proof in bankruptcy of annuities generally, between covenant, under which arrears only could have been proved, and a bond under which, if forfeited before the bankruptcy, the value also might have been proved.

S. C. 19 Ves. 249.
1 Rose, 295.

5. The price stipulated in an annuity deed for its redemption, though is no criterion of the value of such annuity to be proved under a commission of bankruptcy, but upon the presumption that the purchase was originally for a fair consideration, and that no peculiar circumstances had occurred to affect its value; the price to be proved is the original sum given, with the variation occasioned by the lapse of time since the grant. *Ex parte Whitehead,* 1 Mer. 10, 127, 724.

19 Ves. 557.
2 Rose, 358.

6. Grant of annuity void for want of a memorial registered, being charged on an estate of less annual value than the annuity. The grantor being the grantee's attorney, preparing the security and depositing the title deeds, but misrepresenting the value of the estate. Proof was admitted under his bankruptcy, for the money advanced, deducting the payments of the annuity received, with liberty to file a bill for an equitable lien, upon the ground of fraud and the deposit of the title deeds. *Ex parte Wright,*

19 Ves. 255.
1 Rose, 308.

7. The 49 Geo. 3, c. 121, s. 17, is framed in general terms, and applies as well to annuities secured by real estates, as to mere personal annuities, and whether there were arrears due at the time of the bankruptcy or not: and the grantee of such annuity may on petition obtain an order for sale of the estate, and the proceeds to be applied in satisfaction of the value of the annuity; and, if not sufficient, to prove for the residue; but if there is delay in the application, the annuity must be valued as it was at the time of the bankruptcy, the grantee accounting for what he has subsequently received. *Ex parte* [illegible] 1 Mad. 426.

8. Bond conditioned to be void upon payment of £5000, with interest from the death of the obligor, and if the obligor should perform his covenant (for the payment of an annuity of £200) contained in an indenture of settlement.

The annuity is in arrear at the bankruptcy, creating a breach of the condition of the bond, to which the certificate would be a bar: the obligee, therefore, held entitled to prove under the commission of the obligor. *Ex parte Rowlatt,*

2 Rose, 416.

9. Where a mother agreed to join her son in conveying her life interest in an estate to a purchaser, in consideration of his securing to her an annuity; but, after the execution of the conveyance and before the annuity was secured, the son became bankrupt. Held, that the mother was not entitled to prove for the value of her life estate, but only for the value of the annuity, and the arrears at the date of the bankruptcy. *Ex parte Brockliss.*

Buck, 406.

(d) *Assignee, a Bankrupt.*

1. Two of three assignees became

bankrupt. The solvent assignee pays a debt due from the three to the estate. Held, that he is entitled to prove a third of the debt against each of the other assignee's estate. But if either of the estates should prove deficient, whether he can prove a moiety of the deficiency against the estate of the other assignee—*Quære. Ex parte Hunter,*

Buck, 552.

2. If an assignee, who has received effects, become bankrupt, a creditor, under the commission in which he was assignee, but who proved his debt after the bankruptcy of the assignee, is not entitled to any proof under the assignee's commission. *Ex parte Stonehouse,*

Buck, 531

(c) *Bill of Exchange.*

1. Where a bill of exchange has been endorsed after the bankruptcy of the acceptor, the endorsee can only prove such debt as the endorsor could have proved at the time of the bankruptcy. *Ex parte Deey,* [illegible]

2. A., being an endorsee of [illegible] Co.'s acceptance for £1301 [illegible] separate commission against [illegible] time of suing out the commission [illegible] the person for whom A. had discounted the acceptances, by payments on account, reduced the debt to £420. A. is entitled to prove for the whole amount, [illegible] for all that is received above the £4[illegible] will be a trustee for D. *Ex parte De Tastet,* 17 Ves. 247.

1 Rose, 10.

3. A. in 1808 accepts bills for B.'s accomodation; B. becomes bankrupt, having paid away the bills, and A. takes them up without having received value. A. (the debt not being proveable under the commission) brings an action against B., and recovers his principal, interest, and costs. He then sells his debt and assigns the judgment. The assignee of this judgment is, under statute 49 Geo. 3. c. 121, s. 8, entitled to prove the original debt under the bankrupt's commission, and to receive a proportionate dividend, and the judgment debt, though greater than the original, will be barred by the certificate. *Ex parte Lloyd,*

17 Ves. 245. 1 Rose, 4.

4. Notice of dishonor to the drawer of a bill of exchange is not necessary, if the acceptor has no effects, and in such case the bill may nevertheless be proved, and if the bill is drawn for the accommodation of the acceptor, or if, in the result of various dealings, the surplus of accommodation is on the side of the acceptor, he is, in regard to the drawer, in the situation of an acceptor, with effects; and the failure of giving notice is equally detrimental. *Ex parte Heath,*

2 V. & B. 240.

5. Where A., a sole trader, B. and C. partners, and D. also a sole trader, engaged in a joint adventure, and for a joint purchase of goods by them, the vendor, with a knowledge of their joint interest, received in payment a bill drawn by A. on, and accepted by B. and C.: held, that on the bankruptcy of A. and of B. and C. the vendor, was entitled to prove the bill against both their estates.

Ex parte Walker, } 2 V. & B. 254.
[illegible], } 1 Rose, 441.

6. Six persons were in partnership as [illegible] them carry on a distinct [illegible] partnership. The two have bill transactions with G., in the course of [illegible] bill drawn by [illegible] accepted by G., the [illegible] drawn and accepted by [illegible] partners, but not endorsed [illegible] in their separate character [illegible] G. gave his acceptance before the [illegible], that the bill was a purchase [illegible] that being dishonored, [illegible] above the amount against the estate of the two partners. *Ex parte [illegible],* 3 Mad. 117.

Buck, 171.

1 G. & J. 9.

[illegible] procures a bill of exchange, [illegible] by the two partners [illegible] their endorsement, to be discounted at the Bank of England, and pays over the proceeds to them. The bill being [illegible], as endorsor, pays the amount to the Bank. Held that G. was entitled to prove against the estate of the two partners, deducting the dividend received under a commission against one of the acceptors, but that, as to what he should receive after payment of 20s. in the pound, he should be trustee for the estate of the two partners. *Ibid.*

8. A. being indebted to B. gives him a check upon his bankers to pay him in a bill at three months. The bankers draw a bill for the amount upon their correspondents in London, who accept it. The drawers and acceptors become bankrupts,

and B. proves and receives a dividend under both commissions. Held that B. was entitled to prove his debt also under A.'s commission. *Ex parte Rathbone,* 3 Mad. 134. Buck, 215.

9. A., the payee of a bill of exchange, endorses it in blank, and delivers it to B.: B. writes above the blank endorsement, "pay C. or order." B. takes up the bill after a commission of bankrupt has issued against the acceptor. Petition that he may be at liberty to prove it under the commission dismissed, with the offer of a case. *Ex parte Isbester,* 1 Rose, 20.

10. All the cases of parties paying bills of exchange after a commission of bankruptcy, have been where the party claiming to prove has been himself liable on them. The difference between transferring a bill without putting the name to it, and endorsing it, is, that in the one case it is a sale, and in the other a discount, subject to the question of intention, whether the transfer should take effect as a sale or discount. S. C. 1 Rose, 23.

11. A. the partner of B. carrying on business at a different place, draws bills of exchange, sometimes in the name of the firm, and sometimes in his own name, on the managing clerk of the partnership in London, and discounts them with bankers in the country. On an application by them that the bills drawn in the separate names of A. might be considered as a parnership debt, as having been applied to partnership purposes, the Lord Chancellor expressing an opinion against the claim, directed dividends to be reserved till after an action at law. *Ex parte Emly,* 1 Rose, 61.

12. Bills of Exchange, purporting to be drawn abroad, as at Amsterdam, without stamps, but which were actually drawn in London, cannot be proved under a commission of bankruptcy, although paid to the holders for a valuable consideration, and without notice. *Ex parte Manners,* 1 Rose, 68.

14. A holder of a bill of exchange drawn by a firm upon some of their members constituting a distinct firm, has a right to prove it against all the parties, according to their liabilities upon the bill, provided he was ignorant of their partnership. *Ex parte Adam,* 2 Rose, 36. 1 V. & B. 493.

15. But such proof will not be admitted where the holder was aware of the identity of the parties *Ex parte Bigg,* 2 Rose, 37.

16. A creditor, who, knowing the partnership of the parties, takes a bill drawn by all, and endorsed by one, is not entitled to double proof, upon the ground, that previously to taking the bill he required, and had the endorsement of the one, and thereby raised a contract for double security. *Ex parte the Bank of England,* 2 Rose, 82.

17. A creditor, by bill of exchange, or promissory note, may prove against all the parties to his security: but if, previously to his proof against A.'s estate, a dividend has been declared upon his proof against another party, such dividend is to be considered as money received upon the bill or note, and its amount must be deducted from the proof against A.'s estate. Nor does it vary the rule that the creditor, not being then prepared to substantiate his proof, had, previously to such declaration of the dividend, been permitted to enter a claim against A.'s estate; and also, previously to such declaration, had made an affidavit of his debt to be laid before A.'s commissioners, at their next meeting.

Ex parte The Royal Bank of Scotland, 19 Ves. 310. 2 Rose, 197.

——— *Todd,* 2 Rose, 202 (*n*).

18. But where the commissioners rejected the proof, but admitted the claims, and it was afterwards decided they should have admitted the proof; it was held, the proof related back to the time of the claim, and payments made upon the bills subsequently to that time ought not to be deducted. *In the matter of Gibson and Johnson,* 19 Ves. 311. 2 Rose, 201.

19. Promissory notes, payable "in cash or Bank of England notes," held not to be promissory notes within the statutes of Anne. The holder, therefore, who had received them from an intermediate person, held not entitled to prove them as a debt against the maker. *Ex parte Imeson,* 2 Rose, 225.

20. Nor can the holder of such promissory notes, who did not receive them immediately from the maker, prove the amount as for money had and received against the estate of the maker. *Ex parte Davison,* Buck, 31.

21. A. and B. are partners in a trade carried on in the name of A. only, and A. draws bills in his own name, payable to his order, which he endorses, and afterwards B. also endorses, and procures them to be discounted: there is no legal contract for a holder to maintain an action against A. and B. upon the bills, unless it appears that A. drew and endorsed the bills in the character of and as representing A. and B. *Ex parte Bolitho.* Buck 100.

22. A person discounting the bills may have a right of action against A. and B. jointly, for money had and received, if he can shew that they received the money, by means of the bills, for partnership purposes. *Ibid.*

23. Where A. employs B. to get bills, which he had not endorsed, discounted for him, B., in order to effect the discounting, endorses them: held that A.'s estate must relieve B.'s from the liability incurred by the endorsements. *Ex parte Robinson,* Buck. 113.

24. A holder of a bill of exchange has no lien on property deposited by the drawer with the acceptor, to cover the liability of the latter in respect of his acceptance; but on the bankruptcy of both the drawer and acceptor, the arrangement of the property between the two estates may render such an equity available. *Ex parte Waring,* 2 Rose, 182. 19 Ves. 345.

25. The drawer of bills of exchange deposits short bills with the acceptor to cover his drawing account. The drawer and acceptor become bankrupts. The holder of the acceptances can call upon the assignees of the acceptor to apply the short bills in discharge of the acceptances, to the extent of the lien which the acceptor had upon them at the time of his bankruptcy. To ascertain that lien an inquiry directed. *Ex parte Parr,* Buck. 191.

26. If by giving an acceptance a debt be constituted, which may be proved under a commission, that, when given for a bill of exchange, is as much a consideration as if the value of the bill had actually been paid in money. *Ex parte Greenwood,* Buck. 239.

27. Where A., at the request of B., and upon the security of a bill of exchange from him for the amount, delivers goods to C., and such goods are partly paid for by C., and then B. becomes bankrupt; held that the bill was given as payment and not as a pledge, and therefore A. could prove as against the estate of B., only the sum remaining due for the goods, and not the full amount of the bills. *Ex parte Reader,* Buck, 381.

29. Notes bought up after the bankruptcy of the maker, cannot be proved, unless it be shewn that the persons from whom they were purchased, were individually entitled to a proof in respect of the notes. *Ex parte Rogers,* Buck, 490.

30. T. in partnership with M. and F., also carried on a separate trade, and being indebted £100 on his separate account to K., he sent him a bill of exchange, that wanted nearly three months of becoming due, for £300, endorsed by T., M., and F., but not by T. in his individual character, and requested K. to give him credit for £100, and to send him a bill for the remainder of the £300. K. gave him credit for £100, and sent him a banker's draft for £200, which was duly paid. The bill for £300 was dishonored; T., M., and F. became bankrupts. Held that it was not a case of discount, but of an exchange of paper, and therefore that K. was not entitled to prove for any part of the £300, against the separate estate of T.
Ex parte Kirby, }
———— *Todd,* } Buck, 511.

(*f*) *Brokers.*

1. A broker acting under a commission *del credere* paid money to the principal, after the bankruptcy of the underwriter, on a loss which happened before the bankruptcy, whether the commission *del credere* gives the broker so substantial an interest in the debt, as to enable him to prove it under the commission against the underwriter—*Quære.* *Ex parte Dubois,* 1 Cox, 310.

2. A sworn broker of the city of London, is entitled to prove in bankruptcy debts arising out of transactions in which he has been engaged as principal, notwithstanding such transactions were in contravention of his bond and of the oath taken to the city, imposed under an authority given by statute 6 Anne, c. 16; but he will not be so entitled, if the debt has arisen out of a transaction in which he acted ostensibly as broker, but really as a principal, such acting being

in itself a gross fraud, and the debt arising out of it could not be enforced in a court of justice. *Ex parte Dyster*,
1 Mer. 155. 2 Rose, 349.

(*g*) *Composition, Creditors by.*

1. Creditors by deed agree to take a composition for their debts by instalments, to be secured by promissory notes, and covenant, as soon as such notes are paid, to release and discharge the debtor, with a proviso, that in case of default of payment, or if any commission of bankrupt should issue before the whole of the composition should be paid, then the covenants on the part of the creditors whose debts should be so unsatisfied should be null and void. The second instalment is not paid, a commission issues, the creditors are entitled to retain the first payment, and to prove, under the commission, for the residue of the original debt. *Ex parte Vere*, 19 Ves. 93.
1 Rose, 281.

2. In case of a composition between a debtor and his creditors, to pay them nine shillings in the pound, by four instalments, with a proviso, that, in case the composition should not be duly paid, then, the release should be null and void; and the debtor pays three instalments, and becomes bankrupt before the fourth is due: the creditors are not remitted to their original debt, but entitled to a proof only for the amount of the remaining instalment. *Ex parte Peele*,
1 Rose, 435.

(*h*) *Contingent Debts.*

1. A debt under a guaranty is a contingent demand, until default made in payment; so if default in payment is not made till after the bankruptcy of surety, it cannot be proved under the commission. *Ex parte Gardom*, 15 Ves. 286.

(*i*) *Contract, illegal.*

1. A debt arising out of a contract to convey British goods to a market in an enemy's country, cannot be proved under a commission of bankruptcy, after peace has been established between that country and Great Britain. *Ex parte Schmaling*, Buck, 93.

(*k*) *Damages.*

1. Promissory notes given for liquidated damages on the compromise of an action for seduction, *per quod servitium amisit*, are proveable under the commission. But not a security given as *præmium pudoris*. *Ex parte Mumford*,
15 Ves. 289.

(*l*) *Debts payable at a future Day.*

1. Stock secured by bond and the collateral security of real estate, to be replaced at the end of three years; and in the mean time the dividends to be paid as they accrued due. The dividends are not paid, afterwards and before the expiration of the three years, the obligor becomes a bankrupt. Held that the obligee was entitled to have the proceeds of the sale of the real estate immediately laid out in the purchase of stock, without waiting the expiration of the three years. *Ex parte Fisher*,
3 Mad. 159. Buck, 188.

2. A written engagement to warrant the payment of a bill of exchange, although good to other purposes, will not enable the holder to prove the debt under the statute of rebate (7 Geo. 1.) as, to be within that statute, he must be creditor by endorsement, no debt being proveable under the provision of that statute, but what arises on the face of the endorsement. *Ex parte Harrison*,
2 Cox, 172.

(*m*) *Discount.*

1. Goods were sold to the bankrupt upon a credit of twelve months, or 20 per cent. discount upon payment within the twelve months. The commission issued after the year expired, and the goods not paid for, but the creditor could only prove for the amount after deducting the discount. *Ex parte Pigou*,
3 Mad. 136.

(*n*) *Election.*

1. Bill of exchange, after proof under a commission against the acceptor, was paid by the drawer; who, after a dividend, having arrested the bankrupt for the balance, and being also a surety for him on another bill, was ordered to discharge him, and restrained from lodging any detainer, under the statute 49 Geo. 3, c. 121, s. 8 and 14. *Ex parte Lobbon*, 17 Ves. 334. 1 Rose, 219.

2. Effect of stat. 49 Geo. 3, c. 121, s. 14, is, that a creditor, coming in under a commission of bankruptcy for the purpose of relief, waves his personal remedy. *Ex parte Joseph,* 18 Ves. 341. 1 Rose, 189.

3. Judgment obtained in an action against a bankrupt, but not followed by execution, the bankrupt having surrendered in discharge of his bail, will not be considered an election to proceed at law, so as to prevent the plaintiff's going in under the commission. *Ex parte Arundel,* 18 Ves. 231. 1 Rose, 143.

4. A creditor having two bills of exchange upon which the bankrupt was liable: proof upon one is an election to relinquish an action upon the other.
Ex parte Dickson, 1 Rose, 98.
——— *Hardenbergh,* 1 Rose, 204.

5. A. and B., partners, gave a joint and several bond to C., who afterwards became indebted to A. B. becomes bankrupt, C. proves the bond under the commission, and then brings a joint action against A. and B., to which B. pleads his certificate; A. was by this form of action precluded from setting off his separate debt. Held that C. had, by proving under the commission, elected to proceed severally, and must therefore proceed against the solvent partner severally, and the court restrained him by injunction from proceeding in the joint action. *Bradley* v. *Millar,* 1 Rose, 273.

6. A creditor having the bankrupt in custody, presents a petition for liberty to prove under the commission: whether this is not a resort to the commission within the intent of 49 Geo. 3, c. 121. s. 14—*Quære Ex parte Lord,* 2 Rose, 421.

7. A creditor, who sues out a commission of bankrupt against one of two partners upon a joint debt, and receives a dividend, may bring an action against the other partner for the residue. *Ex parte Bolton.* Buck, 12.

8. An attachment of the bankrupt, after the commission has issued for non payment of money *into court,* under an order in a suit instituted against him, before the commission issued, is not such an election to proceed against the person of the bankrupt as will satisfy the debt. *Ex parte Benjamin.* Buck, 41.

9. Whether it would have been such an election, if the order had been to pay the money to the party—*Quære. Ibid.*

10. A bankrupt in arrest under *mesne* process, at the suit of a creditor who petitions to prove his debt, is entitled to his discharge *instanter,* upon the order for the proof. *Ex parte Irving,* Buck, 423.

11. The statute 49 Geo. 3. c. 121, s. 14, puts all creditors proving under the commission, in the same situation with respect to proceedings at law against the bankrupt, as the petitioning creditor was before the statute; therefore, where a creditor having issued a writ against the bankrupt and then proved his debt under the commission, and the bankrupt was afterwards arrested, and several detainers lodged against him; held that the bankrupt should be discharged from the arrest and all the detainers the arresting creditor to pay all the costs. *Ex parte Moore,* Buck, 521.

12. Though the commission is not opened, the petitioning creditor cannot proceed at law, if it is capable of prosecution. *Ex parte Prowse,* 1 G. & J. 92.

13. A creditor of the bankrupt, previously to the commission, obtained a verdict against him for a nominal sum, in an action for money had and received, subject to a reference. After the issuing of the commission, the award was made, and judgment entered up for the debt and costs awarded; the creditor having proved his debt, took the bankrupt in execution for the costs: ordered to discharge him. *Ex parte Haynes,* 1 G. & J. 107.

(*o*) *Executor or Trustee Bankrupt.*

1. Proof in bankruptcy, in respect of trust property of infants continued by the administratrix in the trade in which the testator was engaged, carried on by the bankrupt constituting a new firm of which the administratrix was a member. *Ex parte Watson,* 2 V. & B. 414.

2. An executor having committed a *devastavit,* became bankrupt, his assignees sold some leasehold premises, which the bankrupt took as a specific bequest under the will, the produce in their hands, is not specifically liable to make good the *devastavit*; the parties beneficially entitled under the will, are only entitled to prove under the commission, to the amount of the *devastavit. Geary* v. *Beaumont,* 3 Mer. 431.

3. An executor or trustee under a will, carrying on a trade, pledges such trust

property as is specially given to him for that purpose, and also his own property; and what such trust property is, must depend upon the terms of the will: but if such executor or trustee makes use of the assets in the trade, to an extent not authorized by the will, upon a bankruptcy, the excess so employed may be proved as a debt under the commission. And where the testator directed his executors to carry on the trade with the surviving partner, and the capital in the trade was limited, by the articles of partnership, to a certain sum, and the executor advanced beyond that amount: held a breach of trust, and that it was proveable under the commission. *Ex parte Richardson,*
3 Mad. 138.
Buck, 202, 421.

4. An executor and trustee having committed a *devastavit*, is precluded from proving under his bankruptcy; and liberty so to do was given, in the first instance, and without previous application to the commissioners, to a legatee, on behalf of himself and others, with a direction that the dividends be paid into the Bank in trust in the matter.
Ex parte Moody, } 2 Rose, 413.
——— *Preston,* }

5. Where some of the members of a firm are trustees of funds which they misapply, by making use of them for partnership purposes, if such misapplication be with the knowledge of the other members of the firm, the *cestuis que* trust may prove against the joint estate. *Ex parte Heaton,* Buck, 386

(*p*) *Forfeiture.*

1. Under the statute 5 Geo. 2, c. 30, s. 24, the creditor forfeits the whole of his debt due from the bankrupt, and not the part only which was the subject of the composition: and the forfeiture takes place as well under a commission founded on any other act of bankruptcy, as upon the act thereby created. *Ex parte Vernon,*
2 Cox, 61.

2. Security or satisfaction for more than the debt taken, after striking a docket which is not followed by a commission, may amount to a contempt, but is not within 5 Geo. 2, c. 30, s. 24; therefore the original debt is not forfeited, but the security or satisfaction cannot be retained, and the proof under the security under another commission will be expunged. *Ex parte Brown,*
15 Ves. 472.

3. A petitioning creditor, who, with the knowledge of two or three of the creditors, received his debt from the bankrupt: held to have forfeited it under 5 Geo. 2, c. 30, s. 24. *Ex parte Brine,*
Buck, 19, 108.

(*q*) *Friendly Societies.*

1. The preference given by the statute 33 Geo. 3, c. 54, s. 10, to friendly societies over other creditors, is confined to money recovered by the officers of the societies by virtue of their offices, independent of contract, and therefore does not extend to money placed in the hands of a treasurer at interest, and upon the security of his promissory note. *Ex parte The Stamford Friendly Society.*
15 Ves. 28

2. The 33 Geo. 3, c. 54, s. 10, only applies to cases where the officer of the friendly society has, by virtue of his office, been entrusted with the monies and effects of the society. *Ex parte Buckland,*
Buck, 214.

(*r*) *Interest.*

1. Separate creditors shall not receive interest on their debts, until the joint creditors are satisfied. *Ex parte Boardman,*
1 Cox, 275.

2. No interest on the balance of a stated account is proveable under a commission, unless by express contract. *Ex parte Furneaux,* 2 Cox, 218.

3. The assignees had retained out of the estate, the dividends upon the claim, afterward established by petition; the petitioners were held entitled to interest upon such dividends. *Ex parte Rathbone,* 3 Mad. 134. Buck, 215.

4. The rule, that on a written undertaking to pay money on a day certain, or on demand, interest shall run from the day, or demand without a contract for it, does not extend to the case of a surplus in bankruptcy; therefore interest subsequent to the commission is confined to such debts only as by the contract carry interest.
Ex parte Koch, 1 V. & B. 342.
S. C. ——— *Cocks,* 1 Rose, 317.

5. Where there is a surplus of the

bankrupt's estate, creditors are not entitled to interest upon debts, unless it has been provided for by contract either express or implied, and upon bonds not beyond the penalty. An implied contract to pay interest, may be raised from the dealings between the parties, as where the debtor has been in the habit of paying interest upon such or similar securities. Interest is computed and given upon bills of exchange, in an action at law, in the nature of damages, not strictly as interest; and for a breach of the contract, not in pursuance of it.

Ex parte Williams, 1 Rose, 399.
——— *Cocks,* 1 Rose, 317.
S. C. ——— *Koch,* 1 V & B. 342.

6. A court of common law may assess damages upon a count for interest in a declaration by a reference to the master, without the intervention of a jury. *Eyre* v. *Bank of England,* Buck, 419. (*n*).

7. Interest out of a surplus in bankruptcy given to judgment creditors, from the date of the commission to the time when the principal sums were paid; notwithstanding the securities were at the time delivered up to the assignees, with receipts in full, endorsed on them; the creditors apprehending the estates would not produce a surplus, which proved to be a mistake. *Ex parte Day,*
2 B. & B. 77.

(s) *Joint Debts.*

1. A joint creditor is entitled to prove his debt under a separate commission, taken out against one of the partners. *Ex parte Copland,* 1 Cox, 420.

2. Where there is no joint estate or solvent partner, joint creditors may prove under a separate commission.

Ex parte Sadler, 15 Ves. 52.
——— *Machell,* 2 V. & B. 216.
1 Rose, 447.

3. Joint creditors are not permitted to prove against the separate estate, where there is joint property, however trifling in amount. But if the joint property is of such a nature, or in such a situation, that an attempt to bring it within the reach of joint creditors would be deemed a desperate, and, in point of expense, an unwarrantable attempt, it must be considered as if there were no joint property.

Ex parte Peake, 2 Rose, 54.
——— *Anon,* 2 Rose, 54. (*n*).

4. A joint creditor, suing out a separate commission, may receive a dividend under it.

Ex parte Deadney,
——— *Seaman,* } 15 Ves. 479.

5. Joint creditors may be admitted to prove, under a separate commission of bankruptcy, for the purpose of assenting to or dissenting from the certificate, but not to receive dividends with the separate creditors. *Ex parte Taitt,* 16 Ves. 193.

6. Joint creditor, taking out a separate commission of bankruptcy, may prove and receive dividends with the separate creditors, though, as to part of the dividend, he is a trustee for another joint creditor, who, upon the general rule, could not have proved so as to receive dividends. *Ex parte De Tasted,* 17 Ves. 247.
1 Rose, 10.

7. Joint creditors cannot prove under a separate commission of bankruptcy, for the purpose of receiving dividends, but only to assent to, or dissent from, the certificate. An account under a separate commission of bankruptcy, and application of the joint estates, will be directed, on the application of any joint creditor, and the residue, after payment of the joint creditors, will be distributed according to the respective interests of the partners. *Dutton* v. *Morrison,* 17 Ves. 209.

8. Right of joint creditors, under a separate commission of bankruptcy, to an account and application of joint effects, is limited, as to the separate estate, to the surplus. *Ex parte Wilson,* 18 Ves. 442.

9. Joint creditors cannot come in competition with separate creditors, upon the separate estate, if there is any other fund to which they can resort: so, where a commission issued, after a dissolution of partnership, against the continuing partner, the joint creditors cannot prove against the separate estate, though the retired partner is insolvent. *Ex parte Janson,* 3 Mad. 229. Buck, 227.

10. Where, under a separate commission, the separate debts were very small, and the joint creditors resided in Sicily, whither the bankrupt had traded; the court refused to allow the certificate till the joint creditors had had an opportunity of coming in under the commission; and, without the usual undertaking to pay the separate creditors, gave them liberty, in the mean time, to make such proof as they were able, with the offer of a new choice of assignees. *Ex parte Basarro,*
1 Rose, 268.

11. A., holding the acceptance of B., which he had taken in ignorance that B. was a member of the firm of C. & Co., the drawers, one of whom was an infant, proves a debt against the joint estates under the separate commissions against B. & C. (the infancy of the other partner excluding a joint commission), making his proof, not as against the liability of the parties arising from the contract on the bill, but upon his right to include or exclude the resort to a dormant partner: held, that such mode of proof was a conclusive election to resort to the joint funds alone, and discharged the separate estate of the acceptor from the liability which otherwise would have arisen out of the ignorance of the holder, that the acceptor was a member of the firm of the drawers. *Ex parte Liddel*, 2 Rose, 34.

12. A father, member of a bank, transfers a sum of money to the credit of his son with the partnership. For this credit the son is entitled to prove, under a commission against the firm. *Ex parte Skerratt*, 2 Rose, 384.

13. A creditor has an election to resort to a dormant partner as a joint creditor. *Ex parte Norfolk*, 19 Ves. 458.

14. A joint creditor sues out two separate commissions. Under one he proves against the joint estate, and receives a dividend, at which time he was ignorant of his right to prove against the separate estate of the other. Held, that he had not conclusively elected to prove as a joint creditor, but that, refunding the dividend with interest, he might prove as a separate creditor. *Ex parte Bolton*, 2 Rose, 389. Buck, 7.

15. Where, upon the dissolution of partnership, the stock and effects are assigned by deed to the continuing partner, who covenants to pay the joint debts, and afterwards the partners become bankrupts. Held, that the joint creditors, not having previously to the bankruptcy accepted the continuing partner as their sole debtor, have not an election to prove against the separate estate of the continuing partner. *Ex parte Freeman*, Buck, 471.

(*t*) *Joint and several Security.*

1. A creditor under a joint and several bond, may prove against both the joint and separate estate, but he must make his election before a dividend. *Ex parte Bentley*, 2 Cox, 218.

2. A creditor by a joint and several bond, must elect to prove against the joint or separate estate, and is not bound by taking a joint security. *Ex parte Hay*, 15 Ves. 4.

3. The rule in bankruptcy, that a joint and several creditor must elect, does not apply to a case where there is a contract for double security against distinct firms, as a bill drawn by all the partners upon a distinct firm, constituted of some of them, without notice, in which case proof will be allowed against both estates. *Ex parte Adam*, 1 V. & B. 495. 2 Rose, 36.

4. On a separate commission against one of a firm, a joint and separate creditor, who, in respect of his joint debt, had taken a warrant of attorney, and, in the joint action, had sued out a separate execution against the bankrupt: held, entitled to prove his distinct separate debt, without giving up his execution. *Ex parte Stanborough*, 5 Mad. 89.

11. A., a trader, indebted to several persons, enters into partnership with B., and brings his stock in trade into the partnership. By the partnership articles, it was agreed that the joint trade should pay the creditors of A. named in the schedule. Held, that a separate creditor of A., named in the schedule, did not, by the articles, become a joint creditor of A. and B. unless he had assented to the articles. *Ex parte Williams*, Buck, 13.

(*v*) *Marriage Articles, Creditors by.*

1. Covenant in marriage articles, that in case the wife should survive the husband, or he should leave any issue by her, his heirs, executors, and administrators should raise £500, &c. Held, that this was a contingent debt, and not proveable under a commission of bankrupt against the husband, although judgment had been entered up, on a warrant of attorney given for that purpose before the bankruptcy. *Ex parte Jacob*, 1 Eden, 174.

2. A. on marriage executed a bond to trustees for payment of £1,000, within three months after his death, in trust for the wife and issue of the marriage, in the events therein mentioned, with a proviso, that if A. should become insolvent or bankrupt, and the wife, or any of the issue, should be then living, the trustees should

be at liberty immediately to claim, and should be creditors for the sum of £1,000, and receive dividends rateably with the other creditors of A., to be applied solely to the use of the wife and children. A. became bankrupt, this is not a debt which can be proved under the commission.

Ex parte Hill, 1 Cox, 300.

3. In the case of a covenant by the bankrupt in consideration of marriage, immediately after the marriage, or whenever afterwards requested by the trustees, to transfer £2,000 stock, alleged to be standing in his name, though no stock ever actually stood in his name, the proof will be allowed in bankruptcy, but the specific time of making the request must be ascertained. *Ex parte Campbell,* 16 Ves. 244.

4. Settlement on marriage of the wife's fortune, in case of bankruptcy of the husband, though in the form of a bond by him, but as his bond affecting his property, is void as against creditors. *Ex parte Hodgson,* 19 Ves. 206.

5. A settlement after a marriage in Scotland, will not be supported against creditors in bankruptcy, as upon valuable consideration, by a re-celebration of the marriage in England: but, in this case, it was sustained as the consideration of an agreement to settle by the parent of the other party.

Ex parte Hall, 1 V. & B. 112.
1 Rose, 30.

6. Covenant in marriage settlement by the husband, that he would, upon a month's notice, or, in the event of his default during his life, that his representatives would, within a month next after his death, transfer stock in trust, &c. in bar of dower, &c. with a proviso, that notwithstanding the covenant to transfer upon their request in writing, it should be lawful for the trustees, if they thought fit, to forbear requiring the transfer from him during his life.

This is a contingent debt, and not capable of proof under a commission of bankruptcy against the husband, no transfer having been made, or notice given.

Ex parte Allcock, 1 V. & B. 176.
1 Rose, 323.

7. By marriage settlement, property of the wife was vested upon trust to assign £1,000 to the husband, and to invest the remainder in government securities, in one moiety of which the husband took a contingent interest. The husband covenanted, that if the wife should die in his lifetime without having issue to survive her thirty days, he would, within three months after her decease, transfer £500, bank annuities, to the trustees, "for the sole use and property of the nearest and next of kin of the wife." The husband having become bankrupt in his wife's life-time: held, that the covenant did not create a debt proveable under the commission. *Brandon v. Brandon,* 2 Wil. 14.

8. A trader upon his marriage gave a bond to trustees, conditioned for payment of £2,000, within one month after demand, and for payment to them, in the mean time, of interest by half-yearly payments, upon such trusts as were contained in an indenture of settlement. By the settlement it was provided, that the trustees should not call in or demand payment of the £2,000, or any part thereof, during the life of the obligor without his consent. The interest being in arrear, the obligor became bankrupt, never having consented to a demand upon him. Held, this is not to be considered fraudulent, or in contemplation of bankruptcy, and that it is a debt proveable under the commission, the bond being forfeited at law by the non-payment of the interest.

Ex parte Elder, 2 Mad. 282.

9. If, in a marriage settlement, the bankruptcy of the husband is the event upon which the money contracted to be settled by the husband is to be paid to the trustees, they can only prove under his commission, what the husband has actually received of his wife's fortune; and in this case, where the assignees had sold some contingent interests which the husband took under the settlement made by the wife, the trustees were allowed to prove for that amount only. *Ex parte Young,*

3 Mad. 124. Buck, 179.

10. Where the intention of the parties to a marriage settlement was, that a bond from the husband for the wife's fortune should be proveable in the event of his bankruptcy, but through mistake it was omitted to be provided for by the settlement, proof was admitted under the commission. *Ex parte Vern[illegible],*

1 B. & B. 260.

11. By settlement previous to the marriage of the bankrupt, £6,000 stock, (£3,000 of which was the fortune of the wife), was assigned to trustees in trust to pay the dividends thereof to the bankrupt for life, or until he should become bankrupt; and from and after his decease, or

will be permitted to prove them against the joint estate. *Ex parte Atkins*, Buck, 479.

(z) *Security, Creditor holding.*

1. A creditor for the sum of £2500 holding a bill of exchange for £5000 as security, and also a sum of £1700, in dispute between the bankrupt and other parties, made affidavit of his debt, but not being willing to give up the £1700, which he imagined was also a security, the commissioners admitted the claim for £1700, and proof for the residue. It appeared afterwards, that the creditor had no claim to the £1700, and therefore was entitled to prove the whole debt; but in the mean time had received £500 from another party to the bill. Held that the former affidavit could not then be received as proof of the remainder of the debt; and as new proof must be made, and £500 had been received, the creditor could only prove for the residue, after deducting the £500. *Ex parte Worrall.* 1 Cox, 309.

2. A. having purchased goods of B., gave him an order on C., his banker, to pay to B. a bill, for three months, to the amount of the goods. C. accordingly gave to B. a draft on D., in London, payable three months after date, to the order of B., which was accepted; but before it became due, A., C., and D. became bankrupts. Held that as A. had not endorsed the bill, it must be considered as a pledge only in the hands of B., for the payment of the debt, which he must make available, as far as he can, against the estates of C. and D., and prove the deficiency against the estate of A. *Ex parte Dickson,* 2 Cox, 194.

3. So where two partners give a creditor bills of exchange without endorsing them, and before the bills became due, the partners became bankrupts, and the other parties to the bills are insolvent: the bills are to be considered as a pledge only, and must be sold, and the creditor, deducting the proceeds, will be entitled to prove the residue of his debt under the commission. *Ex parte Smith,* 2 Cox, 209.

4. Deduction of a security is never made in bankruptcy, except when it is the property of the bankrupt. So where bills were drawn and accepted by the same persons as constituting distinct firms; proof was admitted under a commission against the acceptor, without deducting the value of a security from the drawer. *Ex parte Parr,* 18 Ves. 65. 1 Rose, 76.

5. A creditor has a right in bankruptcy to prove and avail himself of all collateral securities from third persons, to the extent of 20s. in the pound. *Ex parte Parr,* 18 Ves. 65.

6. Consignment with authority to sell to reimburse advances on the consignment, any deficiency to be made good, and the surplus, if any, restored. Part of the goods being sold to the consigners, it was considered as a return of goods, and the proof under their bankruptcy was limited to the balance of the original advance. *Ex parte Thompson,* 18 Ves. 234. 1 Rose, 165.

7. Bankrupt's property pledged must be sold, and the excess proved as a debt *Ex parte Twogood,* 19 Ves. 234.

8. Where, before the bankruptcy, judgment had been obtained against the bankrupt, in an action upon an agreement for purchase of a leasehold house and furniture, the vendor, not having delivered possession, sold the premises and furniture after the bankruptcy. Held that the vendor's lien for the purchase-money, extended to the furniture, and he was permitted to retain the proceeds of the sale, and to prove for the difference. *Ex parte Lord Seaforth,* 19 Ves. 235. 1 Rose, 306.

9. There is a distinction as to securities held by a creditor, seeking to prove in bankruptcy between bills of exchange and property of uncertain value. The value of the former being ascertained on the face of them, taken at the full amount, and deducted, the holder is in the same situation as any other creditor. *Ex parte De Tastet,* 1 V. & B. 280. 1 Rose, 324.

10. The proof of a creditor who claims to retain property against, or has interests inimical to the general creditors, ought not to be rejected (for the amount of his debt beyond the value of his securities) on the ground that he will be enabled, by his proof, to elect himself assignee. *Ex parte De Tastet,* 1 V. & B. 280. 1 Rose, 324.

11. The application of a creditor, whose debts exceeded in amount the whole of other debts proved, and who held goods of the bankrupt taken in execution, shortly before the commission issued, to

be allowed to prove the difference between the debt and the value of the goods, was refused. *Ex parte Hopley,*
1 Jacob & Walker, 423.

12. Husband and wife assigned to two creditors of the husband a contingent reversion, to which the wife would be entitled if she survived a particular person: the creditors insured the wife's life. She died before the contingent interest fell in; and the creditors receive the insurance money: the husband being a bankrupt, the creditors can prove for the difference only between the amount of their debt and of what remains of the insurance-money, after deducting the premium and expenses of insurance. *Ex parte Andrew's,* 1 Mad. 573.
2 Rose, 410.

13. A creditor having joint property of bankrupt in pledge, and selling the same after the bankruptcy, without applying to the commissioners, may, notwithstanding, prove the remainder of his debt under the separate estates of the bankrupts, if there is no other joint property. *Ex parte Geller,* 2 Mad. 262.

14. The court refused to set aside an election, upon the ground of mistake in the value of the security. *Ex parte Downes,* 18 Ves. 290. 1 Rose, 96.

15. A. and B., partners under the firm of A. and Co., agree with C. to purchase goods on a joint adventure, of which A. and B. were to have the management: the goods are purchased, and C. pays A. and Co. for his share; and they, without the consent of C., deposit the goods with D., who advances money on them, and ignorant that C. is concerned, debits A. and Co. with the advances. The goods are sold at a loss, a commission issues against A. and B., and another against C.: D. is entitled to prove his balance beyond the proceeds against the estate of C., as well as against the estate of A. and B. *Ex parte Gellar,*
1 Rose, 297.

16. There is a discretion in the great seal to order proof in bankruptcy, upon a valuation of securities, instead of a sale; but to be regulated by circumstances, and not too readily exercised. *Ex parte Smith,* 1 V. & B. 518.
2 Rose, 63.

17. A depository has a right to avail himself of his pledge to its utmost extent in point of proof, and to his fullest and most complete indemnity at the time of proving. Thus, a creditor, with whom a bill of exchange had been deposited as a security, first proves his debt against the estate of the drawer, his principal debtor, and thereby, and by other means, reduces his debt. Subsequent to that, the acceptor becomes bankrupt: under his commission he was held entitled to prove, not only for the sum remaining due upon the bill, but all the interest upon his debt at the time of making that proof, to the complete liquidation of the account, in respect of which he held the bill as a security. *Ex parte Martin,*
2 Rose, 87.

18. A creditor who holds a security, and is desirous of voting in the choice of assignees, is entitled to have the security taken at its value, and to prove for the difference. *Ex parte Nunn,*
1 Rose, 322.

19. Where debts were secured by a deposit of hops, the court directed a value to be set upon them, according to the market-price of the day of the choice of assignees, and permitted the creditors to prove for the difference between the price so fixed and the debts secured, and to vote in the choice of assignees. *Ex parte Greenwood,* Buck, 323.

20. Where the creditor proved for goods sold and money lent, and had taken the bankrupt's acceptances in payment of the debt, but concealed that fact from the commissioners, and the acceptances were outstanding: the court ordered the proof to be expunged, with liberty for him to go before the commissioners, and tender his proof, he paying the costs of the petition. If there had been no circumstances of suspicion, which, in this case, made it fit for the assignees to have an opportunity of fully examining the debt, the proof would have been allowed to stand, upon the delivery up of the bills. *Ex parte Hossack,* Buck, 390.

21. Where a solicitor, who has papers in his hands, relating to the bankrupt's estate, upon which he claims a lien for costs, comes in under the commission, and proves his debt, such proof is equivalent to payment, and he must deliver up the papers to the assignees; and the solicitor, having obtained an order for the taxation of the bill, and to prove for the amount, such was held to be a submission to prove, and a relinquishment of his lien from the taxation of the bill; and until taxation the assignees had liberty to

inspect the papers. *Ex parte Hornby*, Buck, 351.

22. A creditor having a lien on property of the bankrupt for his debt: held to be concluded by proving his debt, voting in the choice of assignees, and signing the certificate, and ordered to deliver up the property on which he had a lien. *Ex parte Solomon*, 1 G. & J. 25.

23. A creditor having, shortly before the commission, seized the effects of the bankrupt in execution, and having, after the commission, satisfied part of his debt, by sale of the effects, admitted to prove the residue. *Ex parte Hopley*, 1 G. & J. 63.

(*aa*) *Separate Debts.*

1. A creditor receives a joint note for a separate debt, and gives a receipt as for money paid. The note is no payment, and does not extinguish the debt as a bond would; nor is the receipt, when it appears to have been given for the bill only, conclusive; but the creditor may still prove his debt against the separate estate. *Ex parte Seddon*, 2 Cox. 49.

2. A joint creditor taking a security from one partner on account, but which is not paid, does not render the debt a separate debt. *Ex parte Hodgkinson*, Cooper, 99. S. C. 19 Ves. 291. 2 Rose, 172.

3. A separate commission of bankruptcy, against one partner, the other partner being solvent, the separate estate of the bankrupt must be applied to his separate creditors, exclusively. *Ex parte Yonge*, 3 V. & B. 39. 2 Rose, 45.

4. Goods were ordered by two partners, who afterwards dissolved partnership. A bill for the amount of the goods was accepted by the continuing partner on his own account, refusing to give a joint acceptance, after which the goods were delivered to him; this is a separate debt of the continuing partner. *Ex parte Harris*, 1 Mad. 583.

5. Judgment of outlawry against two of three joint debtors, does not change the nature of the debt so as to make it a separate debt, as against the third debtor, or proveable under his separate commission. *Ex parte Dunlop*, Buck, 253.

(*ab*) *Sureties.*

1. Whoever claims to prove under a commission, must make positive proof of the instance of the debt at the time of the bankruptcy; so a surety paying a debt after the act of bankruptcy, but before the commission taken out against the principal, cannot prove this debt under the commission, nor can he stand in the place of the creditor, unless the creditor proves before the debt is paid. *Ex parte Badger*, 1 Cox, 2.

2. Where a father is tenant for life, of an estate with remainder to his son in tail, and both join in mortgaging the estate for the debt of the father; and the mortgaged estate is sold under the commission against the father: the son cannot prove any debt under the commission in respect of his interest in the estate not being damnified until after the bankruptcy. *Kittier* v. *Raynes*, 1 Cox, 105.

3. The words "persons liable," in the statute 49 Geo. 3, c 121, s. 8, will comprehend all persons rendering themselves responsible for the debt of another, as an acceptor of a bill for the accommodation of the drawer. *Ex parte Yonge*, 3 V. & B. 40. 2 Rose, 40.

4. A surety is entitled to dividends on the debt, proved by their satisfied principal. *Ex parte Brook*, 2 Rose, 334.

5. A. guarantees B. and Co. against any loss they may happen to suffer on account of the non-payment of an instalment, by certain joint debtors of B. and Co. One of the joint debtors becoming bankrupt, B. and Co., under an order for the proof of joint debts under his separate commission, prove the amount of the instalment, and receive a dividend. It was ordered that the benefit of the future dividends on the proof be sold, and the produce paid to B. and Co., and that the monies so received by them, together with the amount of the former dividend, be deducted from the instalment, and that B. and Co. might prove for the difference under A.'s commission. *Ex parte Reid*, Buck, 239.

6. If a surety become bankrupt, the creditor cannot, under 49 Geo. 3, c. 121, s. 8, prove the debt, if it is not due till after the bankruptcy. *Ex parte MacMillen*, Buck, 287.

7. C. and Co. being embarrassed, the Bank of England agreed to advance them £40,000 upon acceptances of the friends of C. & Co. The acceptances were given, and the acceptors, or any substituted acceptors, were secured by C. and Co. assigning to trustees, for that purpose, certain property in America. Two of these acceptances were thus: C. and Co. drew a bill on J. and W. J. for £2,500, which they accepted, and it was endorsed by C. and Co. to the Bank. R. accepted another bill to that amount, drawn by J. and W. J., which was also given to the Bank. The bills when they became due were renewed. Before the renewed acceptance of J. and W. J. became due, they stopped payment; and R. the drawer being called upon, he obtained an acceptance from C. T. T. and endorsed it to the Bank, and the acceptance of J. and W. J. was thereupon delivered to him. J. and W. J. becoming bankrupt, R. proved the amount of their acceptances in his possession, and received 18s. in the pound. On petition, the proof of R. was ordered to be expunged, the dividends repaid, and the bill delivered up. *Ex parte Hunter*, 5 Mad. 165.

(2) *Expunging and Reduction of Proofs.*

1. C. being indebted to A. in a sum of £2000, endorsed bills for him to the amount of £3000; but without any consideration: both became bankrupts. The assignees of A. proved the debt of £2000 under C.'s commission, and the holders of the bills also proved the amount under C.'s commission, and received a dividend of 8s. in the pound. Upon petition, the court ordered the proof of the £2000 to be expunged, and the dividends due thereon to be retained from the assignees of C. for the benefit of his general creditors. *Ex parte Maskelyn*, 1 Cox, 394.

2. Petitioning creditor took security for his debt, and relinquished the commission. Proof of the debt under another commission was expunged. *Ex parte Paxton*, 15 Ves. 461.

3. Proof by petitioning creditor under a security for more than the debt, taken after striking a docket which was not followed by a commission, expunged. *Ex parte Brown*, 15 Ves. 472.

4. Proof in bankruptcy expunged where fraudulently made. *Ex parte Cawthorne*, 19 Ves. 260. 2 Rose, 186.

5. A charge of usury at law must be established by legal evidence; and in equity by legal evidence or admission, with an offer to pay the real debt: but, in bankruptcy, upon the suggestion of usury, the proof is imposed upon the creditor, and if that fails, the whole debt is expunged. *Ex parte Scrivener.* 3 V. & B. 14.

6. The court refused to order an inquiry before commissioners, or an issue to try whether a debt proved was usurious, merely on a deposition of the bankrupt as to usury; where such debt was not objected to till two years after the proof was admitted, and the creditor was dead. *Ex parte Burt.* 1 Mad. 46.

7. The payment of two dividends does not preclude a petition to expunge the proof. *Ex parte Bridges*, 4 Mad, 269.

8. Proof ordered to be expunged where improperly admitted. *Ex parte Hunter*, 5 Mad. 165.

9. Proof upon a debt, upon which, previously to the bankruptcy, the statute of limitations had attached, ordered to be expunged, and the dividends received in respect thereof refunded. *Ex parte Dewdney*, 15 Ves. 479. 2 Rose, 59 (*n*). S. C. *on rehearing.* *Ex parte Roffey*, 2 Rose, 245. 19 Ves 468.

10. Proof upon an award made after act of bankruptcy, was expunged, and an account directed before the commissioners. *Ex parte Kemshead*, 1 Rose, 149.

11. Commissioners cannot expunge a proof; and as long as it remains upon the proceedings, it must be considered as a debt. *Ex parte Graham*, 1 Rose, 456.

12. The examination of a bankrupt taken not in his own bankruptcy, but under another commission, is not, upon the death of the bankrupt, evidence, upon a petition in his bankruptcy, to expunge the debt of a creditor for usury, but it may be used by the commissioners as a clue to direct them in the investigation of the subject upon which it has proceeded. *Ex parte Campbell*, 2 Rose, 51.

13. Where a creditor, holding bills of exchange, proves their amount as his debt, with a statement that he holds the bills as security, and any of the bills are subsequently paid by the other parties to them, the amount so paid must be deducted from the proof and the dividends;

and if the dividends have been paid upon the whole of the proof, without such deduction, the assignees are not thereby concluded; for the Lord Chancellor will order them to be refunded: and it makes no difference whether the bills have been deposited without endorsement, or have been endorsed by the bankrupt to the creditors. *Ex parte Burn,* 2 Rose, 55.

14. Where a creditor held the bankrupt's acceptances, but did not state that fact to the commissioners, the proof was ordered to be expunged, with liberty for him to tender his proof again to the commissioners. *Ex parte Hossack,* Buck, 390.

XIV. Partner.

(a) *Property, joint or separate.*

1. Joint creditors under a bankruptcy are bound by a *boná fide* dissolution of the partnership, and an assignment of the partnership estate and effects to one of the partners. But where, after such dissolution and assignment, the retiring partner filed a bill against the continuing partner, alleging fraud in the non-performance of the articles of dissolution, and praying an injunction and a receiver, which were ordered: held, upon a subsequent bankruptcy, that such interference of the court restored the property to its original character as joint property, unless the plaintiff in equity had, by his conduct between the time of his obtaining the injunction and the bankruptcy, rendered nugatory the effect of such interference; and upon that an inquiry was directed. *Ex parte Rowlandson,* 2 V. & B. 172. 1 Rose, 416.

2. Under a joint commission of bankruptcy, joint property can be recalled from a separate estate, when converted by fraud only, and not, as formerly, by contract express, or implied from acquiescence: but the case, where one partner is also engaged in a different concern, is an exception. *Ex parte Yonge,* 3 V. & B. 34. 2 Rose, 44.

3. Under a commission of bankruptcy against two partners, ships registered in the name of one of them, but in the ordering and disposition of both, form part of the joint estate. *Ex parte Burn,* 1 Jacob & Walker, 378.

4. Under a separate commission, the separate estate is entitled to be reimbursed, out of the joint estate, expenses incurred in recovering property for the benefit of the joint creditors. *Ex parte Rutherford,* 1 Rose, 201.

5. An agreement between two partners on a dissolution of partnership, will not convert the partnership property into separate property; unless, according to the nature of the property, there has been a change of possession, in pursuance of the agreement; and where, after such dissolution and agreement, separate commissions were issued against the two, and property remained outstanding in the partnership names, and in the order and disposition of both, the joint creditors cannot prove, under the separate commission, against the retiring partner. *Ex parte Harris,* 1 Mad. 583.

6. Upon a dissolution of partnership between A. and B., it is agreed, that until A. be provided for, B. should allow him a third of the profits. B. afterwards forms a partnership with C., and carries into it the stock of A. and B.: a commission issues against A. and B. Held that, after the satisfaction of the creditors of B. and C., the joint effects of B. and C. were the separate property of B., and not the joint property of A. and B. *Ex parte Barrow,* 2 Rose, 252.

(b) *Effect of Partnership upon joint Property.*

1. Creditors, as such, independent of the effect of any special contract, have no lien or charges on the effects of their debtor; but, in the distribution of joint estate, may obtain payment through the equities of the partners among themselves. *Ex parte Kendal,* 17 Ves. 526. 1 Rose, 75.

2. Joint creditors have no lien on the partnership effects, prior to dissolution, until execution; which may be joint or several: their equity, after the dissolution, depends upon the rights of the partners. *Ex parte Rowlandson,* 2 V. & B. 173. 1 Rose, 419.

3. Joint creditors, who have taken joint effects in execution, subsequently to an act of bankruptcy by one of the partners, cannot retain them against the assignees under a separate commission, afterwards issued by another joint creditor against the partner. *In the matter of Wait,* 1 Jacob & Walker, 605.

4. The conduct of the parties in a partnership, may supersede the stipulations of the articles, and raise a presumption of assent to a different agreement, and an approbation of a mode of dealing with the partnership funds, from their knowledge of, and acquiescence in it. *Ex parte Harris*, 2 V. & B. 215. 1 Rose, 437.

5. Although the property of a partnership be in one or more members of it, with an interest in the profits merely in the others; yet in bankruptcy, the property is administered as to the joint creditors, as belonging to them all. *Ex parte Hunter*, 2 Rose, 382.

(c) Equities between joint and separate Estates.

1. Under a joint commission of bankruptcy, the separate estate of one partner has a lien on the other's share of a surplus of the joint estate, in respect of a debt proved under bills drawn in the name of the firm for a separate debt, and may come in with the other separate creditors for the deficiency. *Ex parte King*, 17 Ves. 115. 1 Rose, 212.

2. A partnership is not entitled to prove against the separate estate of an individual member of it, in respect of funds drawn by such member out of the general stock, unless the same have been drawn out fraudulently, that is, against the articles of partnership, without the knowledge, consent, privity, or subsequent approbation of his co-partners, or to increase his private estate. *Ex parte Harris*, 2 V. & B. 210. 1 Rose, 129, 437.

3. A joint commission against two partners, A. and B. A. being a dormant partner, the joint creditors elected to resort to the separate estate of B., thereby producing a surplus of the joint estate. Held that the separate creditors of B. have a lien upon B.'s share of such surplus to the extent which B.'s separate estate had been diminished, by the resort of the joint creditors. *Ex parte Reid*, 2 Rose, 84.

4. Joint creditors under an order to prove against separate estates, proving against one or more of them, exclusively of the rest, the estate so burthened, is entitled to reimbursement from the others. *Ex parte Willock*, 2 Rose, 392.

5. Where a partner is entrusted with the entire management of the partnership business, and openly, without disguise or concealment, enters in the partnership books the monies withdrawn by him from the joint stock, for his separate use, it is not a fraud, which will entitle the joint creditors to prove against the separate estate of that partner. *Ex parte Smith*, 1 G. & J. 74.

(d) Different Partnerships.

1. Three persons in partnership, two of whom were also concerned as partners in a distinct house, commissions issued against both firms: the estate of the two cannot claim any thing against the estate of the three, until the joint creditors of the three are fully satisfied. *Ex parte Hargreaves*, 1 Cox, 440.

2. A joint commission against three partners, and another joint commission against two of the same partners, who carried on a distinct trade. A creditor of the three for goods sold and delivered, cannot prove his debt against the joint estate of the two, but may be admitted to prove against the separate estates of each. *Ex parte Clegg*, 2 Cox, 372.

3. The creditors of a firm of three partners, may, under Lord Rosslyn's general order, prove under a commission against another firm, in which such three are also partners. *Ex parte Worthington*, 3 Mad. 26.

4. Where a joint debt was paid by a bill drawn by one of the debtors, and accepted by another, each carrying on distinct trades; proof was allowed under their separate commissions.
Ex parte Hensley, 2 V. & B. 254.
——— *Walker*, } 1 Rose, 441.
——— *Wensley*, }

5. Where several firms are engaged in a joint adventure, the creditors of the adventure, in the event of bankruptcy, and there being no joint property, must prove against the separate estates of the individuals, not of the firms; but semble, the estates of the firms will be entitled to a contribution. *Ex parte Wylie*, 2 Rose, 393.

6. Where a man is a partner in different firms, each of which becomes bankrupt, the surplus of his separate estate shall be applied in discharging the joint debts of the firms, in proportion to the whole amount of the debts proved against

each firm respectively. *Ex parte Franklyn*, Buck, 332.

7. One of three partners assigns his interest in the partnership property to the two continuing partners, who covenant to pay the debts of the three, and afterwards become bankrupt: held, that joint creditors of the three were not entitled to prove against the estate of the two. *Ex parte Fry*, 1 G. & J. 96.

XV. Dividend.

1. If a creditor of a bankrupt prove a debt under the commission on a bill of exchange, and also on a simple contract debt, but afterwards receives 20*s.* in the pound, on the bill of exchange, from the other parties; he cannot take any dividend in respect of the bill of exchange, but only on the remaining debt. *Ex parte Woodman*, 1 Cox, 201.

2. Bankers appointed under a commission of bankruptcy, becoming bankrupt, their estate cannot have any dividend on a debt previously due to them, until the whole received by them, as bankers to that estate, has been accounted for. *Ex parte Bebb*, 19 Ves. 222.

3. It is discretionary in the great seal, to postpone the dividend beyond the time limited by statute 5 Geo. 2, c. 30, s. 33; but a petition by creditors of surviving partners, that the dividend might be postponed until those who were also creditors of a deceased partner, and had filed a bill against his representatives, for an account of his assets and payment of their debts, should have gone in under the decree, was dismissed for want of equity. *Ex parte Kendal*, 17 Ves. 514. 1 Rose, 71.

4. The court has authority to recal dividends which have been ordered or actually paid.

Ex parte Burn, 2 Rose, 59.
——— *Roffey*, 2 Rose, 245. 19 Ves. 472.
——— *Hunter*, 5 Mad. 165.
——— *Dewdney*, 2 Rose, 59. (*n*).

5. Payment of a dividend under a separate commission of bankruptcy, against one partner, raises a new assumpsit by the other, which would deprive him of the benefit of the statute of limitations.
Ex parte Seaman, ——— *Dewdney*, 15 Ves. 499.

6. An order for payment of dividends declared upon a creditor's petition for that purpose, raises (like the execution in the action for which the petition is substituted) a personal responsibility against the assignee. So, where an assignee resisted the payment of dividends upon the ground of usury, and retained the amount at the bankers of the estate, who failed, he, not being able to expunge the debt, was ordered to pay the dividends out of his own pocket. *Ex parte Graham*, 1 Rose, 456.

7. Where an assignee of a bankrupt becomes bankrupt, with money in his hands belonging to the bankrupt's estate, he must reimburse such monies, before he is entitled to any dividend upon his own debt, under the commission to which he was assignee. *Ex parte Bignold*, 2 Mad. 470.

8. Where a banker, appointed under a commission of bankruptcy, becomes a bankrupt, his estate will not be entitled to any dividend on a debt proved by him against the other, until full reimbursement of all property of that estate, beyond the amount of his dividend.
Ex parte Graham, 3 V. & B. 130. 2 Rose, 74.

9. Assignees cannot resist the payment of the dividends upon a debt proved, not even upon having notice of a claim to the dividends by a third person, if such third person does not apply to the court in support of his claim, within a reasonable period after such notice. *Ex parte Alsopp*, 1 Mad. 603.

10. A petition by a creditor for his dividend, under the act 49 Geo. 3, c. 121, s. 12, must be considered as a substitution for an action, which a creditor, before the statute, might have brought: and where a third person has given notice to the assignees of a claim to such dividends, the creditor need not make him a party to the petition. *Ibid.* 1 Mad. 603.

11. Assignees cannot refuse to pay dividends, which are declared. If they object to a proof, they should present a petition to expunge it.
Ex parte Whiteside, 1 Rose, 319.
——— *Graham*, 1 Rose, 458.

12. And unless the assignee succeed in impeaching the debt, they are personally responsible for the dividend. *Ex parte Graham*, 1 Rose, 458.

13. Upon a petition to be paid a dividend, the debt cannot be disputed.
Ex parte Loxley, Buck, 456.
——— *Hodges*, Buck, 524.

14. Upon a petition by a creditor for his dividend, the assignees can only resist the payment, upon such grounds as they could have defended an action previous to the 49 Geo. 3, c. 121. *Ex parte Hodges*, Buck, 524.

15. Upon a petition, under the statute 49 Geo. 3, c. 121, s. 12, for the payment of dividends upon a debt proved, the order of dividend has been received, as in itself establishing the petitioner's case; nor is it an answer to the application, that a petition of the assignees to have the proof of the debt expunged, has been presented and is in the paper: in that case it is usual to make the order for payment of the dividend, but to reserve the question of costs until the hearing of the petition to expunge. *Ex parte Whitwell*, 2 Rose, 161.

16. Order for payment of a dividend in bankruptcy, with interest and costs, obtained on petition under the statute 49 Geo. 3, c. 121, s. 12; the assignees not being prepared to state a proper objection to the proof of the debt. *Ex parte Atkinson*, 3 V. & B. 13.

17. B., a creditor of the bankrupts, assigns his estate and the debts due to him to trustees, in payment of his creditors, and afterwards proves his debt under the commission. Held, that the assignees under the commission, were not entitled to deduct from the dividend on that proof, a sum due from B. to them for costs, upon the dismissal of a bill filed by B. against them, and dismissed subsequent to the assignment, and prior to the proof. *Ex parte Whitehead*, 1 G. & J. 39.

18. Half of the dividends upon a proof of £500, in respect of a legacy to the wife of the bankrupt, ordered to be paid to her without a reference. *Ex parte Newham*, 1 G. & J. 40.

19. A creditor, holding a bill of exchange with the bankrupt's name upon it, proves a debt upon a deposition, stating that he holds the bill as security, and subsequently receives 15*s*. in the pound upon the bill from other parties, and 5*s*. in the pound upon his proof: restrained from receiving further dividends on the amount of the bill. *Ex parte Rufford*, 1 G. & J. 41.

XVI. Bankrupt.

(a) *Surrender.*

1. The court will not appoint a new meeting for the bankrupt's surrender, except he makes out a case of surprise, or unavoidable accident, which prevented his obeying the acts of Parliament; and the court refused, where, at the desire of his assignees, the bankrupt stayed abroad, to get in his effects, till after the usual period for his surrender had elapsed. *Ex parte Dawson*, 2 Cox, 48.

2. An order of the Lord Chancellor on the commissioners to take the surrender of bankrupt after the time, is merely an authority to the commissioners to take the examination, and as a sort of record that the Lord Chancellor does not think it fit that the bankrupt should be capitally prosecuted. *Anon.* 15 Ves. 1.

3. But such an order does not protect the bankrupt from prosecution. *Ex parte Jackson*, 15 Ves. 116.

4. The court will, at its discretion, order commissioners to accept the surrender of a bankrupt, after the usual time for surrendering has elapsed, notwithstanding the assignees oppose. *Ex parte Shiles*, 1 Mad. 248. 2 Rose, 381.

5. An order by the Lord Chancellor to enlarge the time for a bankrupt's surrendering to pass his last examination, must be made six days before the expiration of the forty-second day. *Ex parte Du Freme*. 1 Rose, 311.

6. A bankrupt in prison for debt is entitled to be carried before the commissioners, that he may surrender himself, at the expense of the estate, notwithstanding the estate is insolvent, and the bankrupt might, upon a summary application, have obtained his discharge. *Ex parte Emery*, Buck, 527.

(b) *Protection from Arrest.*

1. The privilege of a party from arrest, while attending his own cause, extends to a bankrupt on his return from attending his petition, for leave to surrender after expiration of the time; having deviated no farther than to call on the solicitor to arrange the proper steps for giving effect to the order. *Ex parte Jackson*, 15 Ves. 116.

2. The protection of commissioners of

Bankruptcy, granted at a private meeting, on the application of the bankrupt, the day after he was served with notice, and before the first public meeting, is good; and where the bankrupt was arrested, the plaintiff in the action was ordered to discharge him, and the officer to pay the costs. *Ex parte Wood,* 18 Ves. 1. 1 Rose, 46.

3. The Crown not being bound by the statutes of bankruptcy, the protection of a bankrupt from an extent is limited to actual attendance upon the commissioners for the purpose of his examination, and that upon the common law privilege of a witness or party; but this does not extend through the intervals of adjournment, by the statute. *Ex parte Temple,* 2 V. & B. 391. 2 Rose, 22.

4. A bankrupt is protected from arrest under an extent, while attending the commissioners on the day appointed for his examination, and remaining in another room in the same house during an interval of adjournment on that day, on the general principle of law protecting a witness. *Ex parte Russell,* 19 Ves. 163. 1 Rose, 278.

5. A bankrupt will be protected under the statute 5 Geo. 2, c. 30, s. 5, through the whole period of his examination, though enlarged by the commissioners, and though they omit to endorse the adjournment on his summons. *Price's Case,* 3 V. & B. 23.

6. When the commissioners adjourn the last examination of a bankrupt, he is privileged, by statute 5 Geo. 2, c. 30, from arrest during the whole of the day to which it is adjourned. *Ex parte Simpson,* 2 Wil. 127.

7. The statute 5 Geo. 2, c. 30, s. 5, protects a bankrupt from arrest during the whole day of his passing his last examination. *Ex parte Davies,* Buck, 80.

8. Although the time has been enlarged by the commissioners. *Simpson's Case,* Buck, 424.

9. Where the last examination is adjourned *sine die,* the bankrupt is not protected from arrest. *Ex parte Woods,* 1 G. & J. 75.

10. A bankrupt, whose last examination had been adjourned *sine die,* and who, at a meeting held under his commission for another purpose, gave his voluntary attendance before the commissioners, in order to be examined, and is there arrested: held, to be entitled to his discharge, on general common law principles, and ordered so to be, with his reasonable and necessary charges, to be paid by the solicitor and the officer. *Ex parte Ross,* 1 Rose, 260.

11. Bankrupt arrested before the time for final examination, which had been extended beyond the forty-two days, had expired, entitled to be discharged. *In the matter of Dalton,* 1 B. & B. 130.

12. A bankrupt, in custody at the time of his surrender, and obtaining his protection, is not privileged against subsequent detainers. *Ex parte Goldie,* 1 Mer. 176. 2 Rose, 343.

13. Where the arrest is illegal, all the detainers are rendered inoperative; and it makes no difference whether such writs are lodged before or after the arrest: and where the arrest is of a bankrupt, he must give notice to the plaintiffs in the retainers of his application to the Great Seal for his discharge. *Ex parte Ross,* 1 Rose, 260.

14. The commissioners can give no directions which will protect an officer from the legal consequence of discharging his prisoner. *Ibid.*

15. In every case of privilege, and more particularly in that of a bankrupt, parties guilty of a violation must abide by the consequence. So, where a bankrupt had been arrested after his surrender, he was ordered to be put into the situation he was in previously to the arrest, and at the costs of the officer who arrested him. *Ex parte Wood,* 18 Ves. 1. 1 Rose, 46.

16. Where the solicitor under the commission was the attorney in the action, and employed the officer for the arrest, but the bankrupt had neglected opportunities for his discharge, the solicitor and officer were ordered to pay the costs, which were limited to reasonable and necessary charges attending the arrest. *Ex parte Ross,* 1 Rose, 260.

17. Bankrupt arrested in returning from commissioners, to whom he had surrendered at a private meeting, cannot be discharged on motion. *Secus,* if he had been taken under any circumstances amounting to a contempt of court. But leave was given to apply by petition immediately. *In the matter of*—— 1 Rose, 230.

18. An order of the Chancellor for the

discharge of a bankrupt after arrest by a creditor, is upon the plaintiff in the action, not the gaoler. *Anon.*
15 Ves. 1.

19. But where the bankrupt is arrested under an extent, the order to discharge is upon the gaoler, and not, as in the case of a private creditor, on the party. *Ex parte Russell*, 19 Ves. 163. 1 Rose, 278.

20. Where a creditor arrested the bankrupt, while under the protection of the statute 5 Geo. 2, c. 30, s. 5, the order was, that the plaintiff in the action do cause him to be forthwith discharged. *Ex parte Davies*, Buck, 81.

(*c*) *Examination.*

1. A bankrupt, though his conduct be fraudulent, has a right to an inspection of his books, &c. under the statute 5 Geo. 2, c. 30, s. 5, for the purpose of his examination; to a list of the debts proved; and to have his necessary wearing apparel delivered up to him.

What may be retained as his necessary wearing apparel, within the terms of the exception, must be determined by him at his last examination, at the peril of indictment. *Ex parte Ross*,
17 Ves. 374. 1 Rose, 33.

2. The bankrupt is not bound to answer any question that has a tendency to accuse him of a criminal act, but is liable to commitment, if, on that account, his answer is unsatisfactory; it is no objection to his answering, that his answer tends to criminate another person. *Ex parte Oliver*, 2 V. & B. 244.
1 Rose, 407.

3. The Lord Chancellor will not make an order upon commissioners how to conduct the examination of the bankrupt. *Ex parte Cridland*, 3 V. & B. 94.
2 Rose, 164.

4. A bankrupt cannot be required to procure, at the expense of his friends, means of completing his examination, not within his own power. *Ex parte Cridland*, 3 V. & B. 103.
2 Rose, 170.

5. Whether for the purpose of determining that the answers of a bankrupt, on his examination, are unsatisfactory, the commissioners can resort to the evidence of third persons—*Quære. Crowley's Case*, 2 Swan. 1.
Buck, 264.

6. It is not sufficient that the bankrupt answers fully, roundly, and positively; it is necessary that he should answer credibly and satisfactorily. *Ibid.*

7. A bankrupt, on his examination, answering a question which embodies a statement of what he said or did on a former day, without denying or qualifying, is understood to admit the statement.
S. C. 2 Swan. 79.

8. But this is not extended to statements of the acts of third persons. *Ibid.* 80.

9. A bankrupt cannot refuse to discover the particulars relating to his estate and effects, although such information may tend to shew that he has committed a criminal act; but if the question put to him, be, whether or not he has done an act clearly of a criminal nature, he may refuse to answer it: so, where a petition prayed that the creditors might be at liberty to examine the bankrupt, whether he, or any person in trust for him, or for his benefit, have received, or are to receive, any sum of money, or other valuable consideration, for his having resigned, or as an inducement to resign, the office of town-clerk of the city of Bristol, it was dismissed. *Ex parte Cossens*,
Buck, 531.

10. Where the bankrupt is fixed with the fact of having received money, which he has not legally employed, he may refuse to say that he has used it illegally; but then he must account for it as still in his possession. S. C. Buck, 541.

11. A bankrupt bound to disclose to the commissioners all circumstances relating to his property, notwithstanding that such disclosure may tend to establish an act of bankruptcy. *Pratt's case*, 1 G. & J. 58.

(*d*) *Commitment and Discharge.*

1. Commitment by commissioners of bankruptcy, for an unsatisfactory answer of the bankrupt, illegal; the recital of the previous examination not correctly stating the admissions upon which the question was founded. *Ex parte Hiams*,
18 Ves. 237.

2. Order may be obtained on application of a bankrupt committed, to bring him again before the commissioners; if no effects, the commissioners to meet gratis, but the fees to be paid out of future effects, if any. If re-committed, the bankrupt would find it difficult to obtain another order. *Ex parte Cohen*,
18 Ves. 294.

3. Commitment of a bankrupt, on a question whether he had communicated to his assignee, according to the direction of the commissioners, where and how, persons named by him as debtors were to be found, and if not, why not, answered " he had not, and could state no reason why:" held, to be illegal, and the bankrupt discharged on *Habeas Corpus*, the commissioners not having power to commit the bankrupt for not answering them through his assignees, unless the bankrupt has pledged himself so to answer, and such pledge must appear upon the warrant, to enable the Lord Chancellor to commit under the statute, 5 Geo. 2, c. 30, s. 18. *Ex parte Cassidy*, 19 Ves. 324. 2 Rose, 217.

4. A bankrupt being committed by the commissioners for not answering, it appeared, that, in the questions put to him, the commissioners had stated facts of which they were informed by the deposition of the messenger, but the deposition was not set forth in the warrant, nor did it thereby appear to have been read to the bankrupt, at the time of his examination. Held, that the warrant was defective, and as the defect was substantial, and not merely formal, the court could not commit the bankrupt under 5 Geo. 2, c. 30, s. 17. *Crowley's case*, 2 Swan. 1. Buck, 264.

5. In deciding the validity of a commitment of the bankrupt, the court cannot travel out of the return. *Ibid.*

6. If commissioners think that the bankrupt has not answered satisfactorily upon his examination, they are bound to commit him; but he may be discharged, either upon his satisfactorily answering to them at a subsequent time, or upon his answer already given being deemed satisfactory by such other jurisdiction as he shall be brought before, by writ of *Habeas Corpus*. *Ex parte Oliver*, 2 V. & B. 244. 1 Rose, 407.

7. In this instance, the answer of the bankrupt not being satisfactory, he was not discharged; but the commissioners were recommended by the Lord Chancellor to proceed to examine him farther. *Ibid.*

8. Upon a question of discharge from commitment by commissioners, the Lord Chancellor will not go out of the return to the writ of *habeas corpus*, into the conduct of the bankrupt under the bankruptcy, or into any examination, other than that stated in the return to the writ. *Ibid.*

9. The commissioners cannot recommit a bankrupt upon the original warrant of commitment; all the examinations connected with the cause of re-commitment must be stated in the warrant, so as upon the face of the return authentically and immediately to present the propriety of detention to the consideration of the court or judge to whom the bankrupt may apply for his discharge. This may be done either as an original warrant of commitment, or of detainer in the nature of a supplemental warrant.
Coombe's case, 2 Rose, 396.
Brown's case, 2 Rose, 400.

(e) *Suits and Actions by.*

1. If a commission of bankruptcy issues against a party, who has a sum of money in his bankers hands, and owing to a compromise among the creditors, the commission, although in force, is not executed; the Court of Chancery will not, under these circumstances, interfere to prevent the party against whom the commission has issued, from recovering the money at law from the bankers, although the commission remains in force. *Fuller* v. *Gibson*, 2 Cox, 24.

2. The inconsistent decisions, that a bankrupt uncertificated has no property, but yet may acquire it by action, cannot be reconciled; but they are both settled points and not to be disturbed. *Ex parte Lees*, 16 Ves. 474.

3. A bankrupt may be restrained by injunction, from vexatiously disputing his commission. *Thorpe* v. *Goodall*, 17 Ves. 393.

4. A joint creditor, having sued out a separate commission of bankruptcy, proved his debt under the commission, and voted in the choice of assignees, may afterwards join the bankrupt as a co-defendant in an action against his partners, upon giving a full indemnity, and undertaking to take no advantage of the verdict or judgment against him, and paying the costs of the petition. *Ex parte Read*, 1 V. & B. 346.

5. Afterwards, the bankrupt's name was ordered to be struck out of the joint action, if the plaintiff at law did not give an indemnity within a week. S. C. 1 Rose, 460.

6. The court will restrain a bankrupt controverting his bankruptcy from vexatious-

ly bringing actions against his assignees: but will not so interfere upon the ground that the bankrupt has failed upon the trial of one action, and an application for a new trial; and was about to bring a second action. *Ex parte Bryant*,

1 V. & B. 211. 2 Rose, 1.

7. A bankrupt cannot file a bill against a debtor to his estate, on the ground of the invalidity of the commission, and of collusion between his assignees and the debtor; the proper course being an action to try the validity of the commission, or a petition to remove the assignees; a bankrupt cannot represent the creditors under his commission, they must be represented by the assignees. *Hammond* v. *Attwood*,

3 Mad. 158.

8. Where the question is, whether an assignee who has no interest, as a creditor, to the estate, or a petitioning creditor, upon whom ultimately a great deal of expence must fall, shall have the superintendance of an action brought by the bankrupt, to try the validity of his commission, the latter must be preferred. The petitioning creditor was, therefore, in this case, ordered to have the conduct of such action, fully indemnifying the assignees. *Ex parte Stewart*, 2 Rose, 6.

9. Where a bankrupt has petitioned to supersede his commission, and no act of bankruptcy appears upon the proceedings, if the court thinks fit to permit the assignees or petitioning creditor to try the question, whether there are any act or acts of bankruptcy in an issue or action, it will require, that they should, previously to the trial, deliver to the bankrupt a particular of the specific acts or act of bankruptcy, on which they intend to rely. *Ex parte Sherwood*, 2 Rose, 162.

10. The court, sitting in bankruptcy, will not restrain a creditor from pursuing his legal remedy, if he has not come in under the commission; but the court, by order, restrained the bankrupt from proceeding in an action of ejectment, brought by him at the instigation of two creditors, who had proved their debts, to recover possession of premises sold under the commission, which had been acquiesced in for seven years. *Ex parte Grant*, Buck, 90.

11. Upon a petition to expunge the proofs upon certain bills of exchange, an action had been directed to be brought against the bankrupts, to try the validity of the debt. A material witness being abroad, the court of common law put off the trial. It was ordered, upon petition, that the bankrupt should be at liberty to file a bill for a commission, to take the examination of the witness abroad. *Ex parte Coles*, Buck, 293.

12. Where the last examination of a bankrupt was repeatedly adjourned, in order that he might produce a written account, and the bankrupt referred to a written account, as the only mode of explaining his trade and dealings; and the last adjournment was made upon his assurance that he would produce such account, if further time was given; held, that such account, not being produced, nor any satisfactory reason given for not producing it on the day to which the adjournment was made, the commissioners were justified in committing. *Stanley Goddard's Case*, 1 G. & J. 46.

(*f*) *Allowance.*

1. Where the bankrupt has not received the allowance, to which he is entitled by the act, under his first commission, it will be ordered to be paid to the assignees under a second commission issued against him; and the payment is so much of course, that service on the bankrupt is unnecessary. *Ex parte Miller*,

2 Cox, 213.

2. A bankrupt has no right to an allowance by payment of dividends to the joint creditors, under the usual order for a distribution of the joint estate, under a separate commission, the distribution not being under the statute. *Ex parte Farlow*,

2 V. & B. 209. 1 Rose, 421.

3. A bankrupt, under a separate commission, paying his separate creditors 20*s*. in the pound, will not, therefore, be entitled to an allowance against the claim of joint creditors to the surplus, under the usual order. *Ex parte Holmes*,

3 V. & B. 137. 2 Rose, 95.

4. Bankrupts, under a joint commission, cannot claim an allowance under the act of parliament, unless both the joint and separate creditors who have proved, are paid 10*s*. in the pound; and though all the creditors who have proved have been paid 10*s*. in the pound, if one of the bankrupts has not obtained his certificate, the other, who has, cannot separate himself from his partner, for the purpose of claiming the allowance. *Ex parte Powell*,

1 Mad. 68.

5. Under a separate commission

against one of a partnership, and the usual order for keeping distinct accounts, the joint estate paid 18s. in the pound, and the separate estate 2s. Held, that the bankrupt was entitled to no allowance under the statute, the payment to the joint creditors being strictly not a payment under the bankruptcy, but under the order, in the nature of a decree upon a bill for an account in equity. *Ex parte Farlow*, 2 V. & B. 209. 1 Rose, 421.

6. And also where, under similar circumstances, the joint estate paid 17s., and was sufficient to pay the remaining 3s. in the pound, leaving a surplus in the hands of the assignees, and the separate estate had paid 3s.; and, upon taking the partnership accounts, a balance appeared in favor of the solvent partners. Held, that the bankrupt was not entitled to an allowance under the statute 5 Geo. 2, c. 30, s. 7. *Ex parte Terrell*, Buck, 345.

XVII. Certificate.

(a) *Signature by Creditors.*

1. The proof of the petitioning creditor's debt, upon opening the commission, does not of itself entitle the creditor to sign the certificate. *Ex parte Davis*, 2 Cox, 398.

2. One partner, though the partnership be dissolved, may sign the certificate for a joint debt, proved under the commission by himself and his co-partners. *Ex parte Hall*, 17 Ves. 62. 1 Rose, 2.

3. A creditor, though, at the same time, the executor of another creditor, can only sign the certificate once. *Ex parte Stracey*, 1 Rose, 66.

4. Certificate was sent back, where creditors had signed it before the bankrupt had passed his last examination. *Ex parte Brown*, 1 Rose, 176.

5. One partner, on behalf of all, may sign the certificate. *Ex parte Hodgkinson*, 19 Ves. 293. Cooper, 99. 2 Rose, 172.

6. One of several trustees cannot sign the certificate for himself and his co-trustees, without authority for that purpose. *Ex parte Rigby*, 19 Ves. 463. 2 Rose, 224.

7. Creditors have an absolute discretion to refuse to sign a bankrupt's certificate. *Ex parte Cridland*, 3 V. & B. 103. 2 Rose, 170.

(b) *Signature by Commissioners.*

1. It appearing, on the bankrupt's examination, that he had lost more than £5, at play, at one time, this cannot be expunged from the examination, for the purpose of enabling the commissioners to sign the certificate, though consented to by the creditor, at whose instance it was inserted. *Ex parte Bartoft*, 2 Cox, 49.

2. The judicial discretion of the commissioners, as to signing the bankrupt's certificate, is not subject to the control of any court. *Ex parte King*, 15 Ves. 126.

3. Where the bankrupt's certificate is sent back, for the purpose of letting in other creditors, the commissioners are not confined by that object, nor bound by the original certificate; but the whole is open to their judicial discretion, the original and supplemental act making but one certificate of the latter date. *Ibid.*

4. The solicitor employed by the bankrupt to procure his certificate, neglecting to obtain the signature of the commissioners to the certificate, which had been long before signed by the proper number of creditors, ordered to deliver up the certificate and affidavits to the bankrupt, and to pay the costs of the application. *Ex parte Houghton*, 1 G. & J. 14.

(c) *Allowance or Staying by the Chancellor.*

1. Though a bankrupt's certificate would be void, if obtained by money, even without his privity, yet the Lord Chancellor refused to stay the allowance, upon mere suspicion, not supported by affidavit, and denied by the bankrupt. *Ex parte Hall*, 17 Ves. 62. 1 Rose, 3.

2. The court doubted the propriety of sending the certificate back to the commissioners, to be reviewed; but, judging from circumstances, appearing on the bankrupt's examination, there had been concealment, the certificate was stayed. *Ex parte Bangley*, 17 Ves. 117. 1 Rose, 187 (n).

3. Until it has been allowed by the Lord Chancellor, the instrument, certifying the bankrupt's conformity, is not strictly a certificate, so that an alteration in it, before it is allowed, does not vitiate the stamp. *Ex parte Sawyer*, 17 Ves. 244. 1 Rose, 141.

4. When concealment of property is established, the great seal will refuse the certificate, *secus*, where concealment is only alleged, upon information and belief. *Ex parte Joseph*, 18 Ves. 340. 1 Rose, 181.

5. The law has left it entirely to the caprice of the creditors to sign the certificate; but if the bankrupt properly conforms, the commissioners are bound to certify, and the Lord Chancellor to allow, the certificate, without regard to the conduct of the bankrupt, previously to the bankruptcy. *Ibid.*

6 The authority of the commissioners and the Lord Chancellor over the certificate, is confined to conduct under the commission, not like the general discretion of the creditors, to sign or refuse. *Ex parte Gardner*, 1 V. & B. 45. 1 Rose, 377.

7. The court will not stay the certificate upon a legal objection (as losing at cards, &c.), unless it be clearly established; because, by the certificate, the court withholds an opportunity of having it tried before a jury. *Ex parte Kennet*, 1 V. & B. 193. 1 Rose, 331.

8. The certificate, under a separate commission of bankruptcy, lying before the Lord Chancellor for allowance, will not be stayed by the suing out a joint commission. In this case, an order was made, allowing the certificate, but impounding the separate commission, and transferring the proceedings and proofs under it to the other commission. *Ex parte Tobin*, 1 V. & B. 308. 1 Rose, 431 (*n*).

9. A bankrupt who, knowingly, permits one fictitious debt to be proved, is not entitled to his certificate. *Freydeburgh's Case*, 3 V. & B. 142.

10. Petition to stay certificate, alleged upon information and belief, that the bankrupt had engaged in stock-jobbing transactions, and had acknowledged, to a person named, that he had lost a particular sum. The bankrupt, by affidavit in answer, denied the loss, but did not deny the acknowledgment. Held, that the objection to the certificate being such as could be tried at law, was not sufficient to stay it, where there was a doubt of the fact, as there was in this case; but, as the acknowledgment of the loss was not denied, the petition was dismissed, without costs. *Ex parte Enderby*, 5 Mad. 76.

11. It is no objection to the allowance of the certificate, that the assignees have permitted the bankrupts to carry on business on the same premises, and in the same firm, and to continue in their houses elegantly furnished; or that the bankrupts have retained in their hands money, as assignees under other commissions. *Ex parte Anderson*, 1 Rose, 93.

12. It is not a ground for staying a certificate, that the party having been before a bankrupt, the commissioners had omitted to certify that fact according to Lord Apsley's order. *Ex parte Black*, 1 Rose, 60.

13. An objection, in point of form, to the proof of a debt, will not avail against the allowance of the certificate. *Ex parte Stracey*, 1 Rose, 66.

14. Upon petition of creditors for liberty to prove, and that the certificate might in the mean time be stayed, the latter part of the application was refused, no satisfactory reason being given for not having proved before. *Ex parte Dyson*, 1 Rose, 67 (*n*).

15. That the bankrupt's accounts are in a slovenly state, is no ground for staying the certificate, unless he has refused his assistance to explain or arrange them. *Ex parte Rawson*, *Ibid.*

16. Certificate was stayed where the bankrupt had suffered a fictitious debt to be proved, it being evidence that he had not made a full discovery. *Ex parte Lafert*, 1 Rose, 330.

17. It is not an objection to the certificate that the bankrupt has not obtained his certificate under a former commission, and that his estate will not pay 15*s.* in the pound. *Ex parte Thompson*, 1 Rose, 285.

18. Nor that the proofs, if upon actual debts, have been made by relations of the bankrupts. *Ex parte Gardner*, 1 V. & B. 45. 1 Rose, 378.

19. That there is a petition pending, to supersede the commission, is no objection to the allowance of the certificate, which, while the commission stands, the bankrupt is entitled to, unless there be objections exclusively attaching upon it. *Ex parte Bonsor*, 2 Rose, 61.

20. The Lord Chancellor expressed his determination, and desired it to be understood, that he never would allow a certificate, where it appeared that the bankrupt had knowingly suffered fictitious debts to be proved against his estate. *Ex parte Shirley*, 2 Rose, 71.

21. An objection by creditors in Scotland, that the bankrupt was properly the object of a sequestration, and that the question of sequestration was then depending in the Court of Session, will not avail against the allowance of the certificate. *Ex parte Cockayne,* 2 Rose, 233.

22. Where, under a separate commission, the separate debts were very small, and the joint creditors resided in Sicily, whither the bankrupt had traded; the court refused to allow the certificate till the joint creditors had had an opportunity of coming in under the commission. *Ex parte Basarro,* 1 Rose, 266.

23. Certificate stayed, that creditors abroad, whose debts would turn it, might have an opportunity of assenting or dissenting. *Ex parte Lord,* 2 Rose, 421.

24. A creditor, having the bankrupt in custody, and petitioning for liberty to prove and stay the certificate, must discharge the bankrupt. *Ex parte Lord,* 2 Rose, 421.

25. *Semble,* a petition to stay a certificate before the bankrupt has passed his last examination, cannot be supported. *Ex parte Groome,* Buck, 39.

26. The court will not stay a certificate upon the petition of a creditor who has not come in under the commission, and who has the means of trying the validity of the certificate at law. *Ex parte Dodson,* Buck, 225.

27. Upon a petition to stay a certificate, imputing conduct to the bankrupt, which, if proved, would amount to felony, the court will not direct an issue to try the fact of conformity. *Ex parte Scott,* Buck, 275.

28. Upon a petition to stay a certificate, on the ground that the bankrupt had lost five pounds at a horse race, an issue was directed. *Ex parte Henderson,* Buck, 557.

29. Certificate not stayed upon matter contained in affidavits in reply, where the petition and affidavits filed with it did not make a case for staying it. *Ex parte Cundall,* 1 G. & J. 37.

30. A mortgagee may petition to stay a certificate. *Ex parte Whitchurch,* 1 G. & J. 71.

(d) *Operation of Certificate.*

1. The bankrupt statutes do not bind the Crown. *Ex parte Russell,* 19 Ves. 165. 1 Rose, 279.

2. An order of the Court of Chancery, for the payment of a sum of money, may be proved under the commission, and will be barred by the certificate. *Wall* v. *Atkinson,* Coop. 198. 2 Rose, 196.

3. A creditor's signing the certificate of surviving partners does not release the estate of a deceased partner. The statute gives the release, in consequence of the certified conformity of the bankrupt to the bankrupt laws. *Devaynes* v. *Noble,* 1 Mer. 570.

4. A certificate does not operate, till after its allowance by the Chancellor; so where a lottery ticket was given to the bankrupt by a creditor, and drawn a prize after the creditors had signed, but before the Lord Chancellor had allowed the certificate, it was held to belong to the creditors, 1 Rose, 142 (*n*).

5. A certificate, obtained under an English commission, operates as a discharge of the debts of Scotch creditors, proveable under that commission. *The Royal Bank of Scotland* v. *Cuthbert,* 1 Rose, 462.

6. To a suit instituted in the Dutch colonial court at Demarara, for the recovery of the balance of an account for sugars consigned to, and received by the defendant and his partner in London, the defendant pleaded his bankruptcy in England, (of which the plaintiffs had notice, but had not proved their debt under it,) and certificate. Held, that the bankruptcy and certificate were a discharge of the debt. *Odwin* v. *Forbes,* Buck, 57.

(e) *Pleading the Certificate.*

1. If a plaintiff, in equity, might proceed at law, for that which he demands by his bill, either by an action of *assumpsit,* or by an action for the *tort,* the bill may be demurred to if it be in the nature of an action for the *tort;* but if it be in the nature of an action of *assumpsit,* the defendant may plead his bankruptcy and certificate.

De Tastet v. *Walker,* Buck, 153.
S. C. *De Tastet* v. *Sharp,* 3 Mad. 51.

2. Equity will not restrain, by injunction, further proceedings at law, upon a verdict obtained through the defendant's neglect to produce his certificate in evidence. *Lingard* v. *Hibbertson,* 1 Rose, 459.

(*f*) *Recalled or Revoked.*

1. Where one of three partners obtains his certificate under a separate commission, and a joint commission afterwards issues against the three; on an application to supersede the separate commission, and an allegation that the certificate was not fairly obtained, the court will direct an inquiry into the circumstances, under which the certificate was obtained. *Ex parte Gillam*, 2 Cox, 193.

2. Bankrupt's certificate, obtained by imposition practised upon the Great Seal, revoked; if no injury to persons subsequently dealing with the bankrupt on the faith of it. A reference directed to ascertain the fact. *Ex parte Tallis*, 1 Rose, 371. 1 B. & B. 321.

3. Where the certificate has been obtained by fraud, it will be recalled. *Ex parte Cawthorne*. 19 Ves. 260. 2 Rose, 186.

4. Where a bankrupt has been for a length of time, as six years, in the possession of his certificate, the court will not recal it. *Ex parte Reed*, Buck, 430.

(*g*) *Discharge of Bankrupt under.*

1. Where the bankrupt was attached for contempt, in not paying a sum of money under an order of court, which was held discharged by his certificate, he was released from the custody of the Marshal of the King's Bench, by an order in the cause, such act of the court being an indemnity to the gaoler. *Wall* v. *Atkinson*, Coop. 198. 2 Rose, 196.

2. The court will not discharge a certificated bankrupt out of custody, without giving the party, at whose instance the attachment is issued, time to shew that the certificate was fraudulently obtained. *Nowers* v. *Colman*, Buck, 5.

XVIII. Supersedeas.

(*a*) *In General.*

1. On a petition to supersede the commission, on the ground of an invalid act of bankruptcy; if the respondent can offer to the court an affidavit of another and a valid act, the commission will not be superseded.
Ex parte Foster, 17 Ves. 414. 1 Rose, 49.
——— *Burgess*, Buck, 233.

2. Discretionary power of superseding a commission of bankruptcy. *Ex parte Hodgkinson*, 19 Ves. 291. Cooper, 99. 2 Rose, 172.

3. A commission of bankruptcy was superseded with costs out of the estates, for the purpose of defeating a prosecution, for omitting to surrender under circumstances of erroneous advice; there being no fraud, and the bankrupt having surrendered to another commission, which had issued and was proceeding. *Ex parte Lavender*, 18 Ves. 18. 1 Rose, 55.

4. The rule that a commission shall not be superseded, under which the bankrupt has not surrendered, dispensed with upon the application of all the creditors who had proved; the bankrupt being out of the country, and not, according to the belief of the petitioner, having heard of the commission. *Ex parte Hopkins*, 1 Rose, 223.

5. Although the great seal has been affixed to an instrument, it is in-operative while it remains in the hands of the Lord Chancellor; but the delivery of a writ of supersedeas to a messenger, although the instrument is not taken out of the bankrupt office, is a delivery to the party. *Ex parte Freeman*, 1 V. & B. 39. 1 Rose, 380.

6. There is a distinction between a commission supersedeable, and one as to which it is declared it shall and may be superseded; in the former case the Lord Chancellor has a discretion, with the object of preventing fraud.
S. C. 1 V. & B. 41. 1 Rose, 384.

7. When a commission is superseded, every thing done under it, falls with it. A joint and separate creditor who sued out a separate commission and proved under it, is, upon the supersedeas, restored to his right of election, to prove against the joint estate. And such a creditor has a right to elect out of which estate he will be paid the costs of the supersedeas. *Ex parte Brown*, 1 V. & B. 61. 1 Rose, 433.

8. A commission of bankruptcy cannot be superseded before it is sealed, but where the petitioning creditor delayed to seal it, and took that objection, the time for sealing it was limited to three days. *Ex parte Williams*, 2 V. & B. 255.

9. Although the requisites to sustain the commission appear on the proceedings to be established, yet, if the court

be satisfied on affidavit of their insufficiency, it will supersede the commission without an issue.
Ex parte Gallimore, 1 Mad. 67.
2 Rose, 234.
——— *Emery*, 2 Rose, 235.

10. A petition to supersede a commission, before the adjudication of bankruptcy, is premature. *Ex parte Hague*,
1 Rose 150.

11. The supersedeas divests the estates conveyed to the assignees by the bargain and sale of the commissioners. *Ex parte Smith*, Buck, 262.

10. Where upon the proceedings the trade was only proved by a single witness, who, in an affidavit filed upon a petition to supersede the commission, contradicted that which he formerly deposed to before the commissioners, the court superseded the commission. *Ex parte Trustrum*,
Buck, 550.

11. Where there is a charge of fraud, the court will hear a petition to supersede the commission, before the finding of the commissioners. *Ex parte Battier*,
Buck, 426.

13. When a petition to supersede a commission is presented by a bankrupt, and an issue directed, the court will order the petition to stand over until such a fixed time, as in all probability the issue will be tried: and if from any circumstance the trial at law does not take place within the prefixed period, the bankrupt must make an affidavit, satisfactorily accounting for the delay of the trial, otherwise his petition will be dismissed.
Ex parte Ranken, 3 Mad. 371.

(*b*) *Who may petition for.*

1. An order was made upon an attorney to put in bail for his client, according to his undertaking: an attachment issued against him for disobedience of the order, and the attorney became bankrupt. The plaintiff in the action has a sufficient interest, under these circumstances, to support an application to supersede the commission. *Ex parte Bold*, 1 Cox, 423.

2. Whether a bankrupt, or any person in the same circumstances, can impeach the commission upon a prior act of bankruptcy and a debt sufficient to support a commission, of which a third person may avail himself as a defence to an action by the assignees—*Quære.*

A petition to revive an order for trying the validity of a commission, in an issue upon that objection, which had not been prosecuted, and was discharged in 1803, dismissed with costs. *Ex parte Donovan*,
15 Ves. 6.

3. A second commission, issued against an uncertificated bankrupt, while the first, of whatever date, is subsisting, is clearly bad: but whether it can be superseded on the petition of the bankrupt, if the assignees under the first will not interfere with the property—*Quære.* *Ex parte Rhodes*,
15 Ves. 539.

4. Supersedeas, on the ground of infancy, refused, upon the petition of the bankrupt. *Ex parte Watson*,
16 Ves. 265.

5. There are circumstances, under which it might not be improper for an uncertificated bankrupt to petition to supersede a second commission against him.
Ex parte Lees, 16 Ves. 474.

6. There are strong objections to the doctrine, that a third person may take objection to a commission which cannot be taken by the bankrupt, especially with reference to criminal cases. *Ex parte Lees*, 16 Ves 476.

7. A bankrupt cannot supersede his commission, even with the consent of all the creditors, while under commitment by the commissioners. *Ex parte Bean*,
17 Ves. 47.
1 Rose, 211.

8. A bankrupt, under commitment, may petition to supersede the commission. *Ex parte Magennis*,
18 Ves. 289.
1 Rose, 60.

9. A bankrupt cannot supersede his commission before surrender.
Ex parte Bean, 17 Ves. 48.
1 Rose, 211.
——— *Roberts*, } 1 Mad. 72.
——— *Wells*, } 2 Rose, 378.

10. The rule was dispensed with, where the bankrupt had been prevented from surrendering by ignorance or mistake, and was under prosecution for not surrendering. *Ex parte Lavender*,
18 Ves. 18.
1 Rose, 55.

11. A bankrupt will be permitted to petition against the commission in *formâ pauperis*. *Ex parte Northam*,
2 V. & B. 124.

12. A separate commission will not be superseded, at the instance of the creditors under a joint commission, if the

joint commission cannot be sustained. *Ex parte Roberts,* 1 Mad. 72.
——— *Wells,* 2 Rose, 378.

13. A creditor cannot present a petition to supersede a commission of bankruptcy, without showing himself to be a creditor, by swearing to his debt, either under the commission, or in support of his petition. *Anonymous,* 2 Mad. 281.

14. A bankrupt will never be permitted to supersede a commission, obtained by means of his own collusion. *Ex parte Warwick,* 4 Mad. 262.

15. A creditor, having proved under the commission, is not thereby precluded from applying to supersede it. *Ex parte Bonsor,* 2 Rose, 61.

16. When a bankrupt is in a situation to try the validity of his commission at law, the court will leave him to his action. And when the bankrupt presents a petition for that purpose, the court will order it to stand over, with liberty to bring an action, but imposing terms as to the time of the trial. *Ex parte Bilhald,* Buck, 220.

17. In general, when a bankrupt, who has not surrendered, petitions to supersede his commission, the court retains the petition till the bankrupt has an opportunity of surrendering; but where the bankrupt, after presenting his petition, dies without having surrendered, but before the last meeting of the commissioners, the court will supersede the commission, upon his petition being revived by his personal representatives. *Ex parte Whittington,* Buck, 235.

18. *Secus,* where the bankrupt dies after the last meeting of the commissioners, without having surrendered, and though all the creditors have been paid in full. *Ex parte Gardiner,* Buck, 458.

19. If a bankrupt die without surrendering, a petition, presented by his representative, to supersede the commission, cannot be heard, unless it make out a case that would induce the court to permit a surrender, if the bankrupt were living. *Ex parte Crowther,* Buck, 480.

20. Where a commission is not prosecuted so far as to give an interest in it to others, the petitioning creditor may obtain a supersedeas, as of course; unless the bankrupt oppose. *Ex parte Prowse,* 1 G. & J. 92.

21. Assignees may apply to supersede, even for defects appearing on the proceedings, but such an application will be watched with great jealousy; and it is their duty to do all in their power to clear away doubts, as to the validity of the commission, before they apply. *Ex parte Graves,* 1 G. & J. 86.

(c) *Certificate obtained.*

1. In case of gross fraud, a separate commission will be superseded, after the bankrupt has obtained his certificate, and entered again into trade; and the separate effects ordered to be delivered up to the assignees under a joint commission subsequently issued. *Ex parte Poole,* 2 Cox, 227.

2. A commission, under which the bankrupt has obtained his certificate, will not be superseded on an objection to the trading, or that debtors to the estate, upon that ground, refuse to pay the assignees. *Ex parte Crowder,* 2 Rose, 324.

3. But, if the application for that purpose were made by all the creditors under the commission—*Quære.* *Ibid.*

4. To supersede a commission, after certificate allowed, unless the invalidity appear upon the proceedings, a case of fraud must be made out. *Ex parte Levi,* Buck, 75.

5. A bankrupt is not permitted, after he has obtained his certificate, to impeach his own commission, upon the ground that he was no trader; unless, upon an action at law, the title of the assignees is successfully resisted, and the commission in consequence becomes inoperative. *Ex parte Bass,* 4 Mad. 270.

6. It was held a great objection to superseding a separate, for the purpose of supporting a joint commission, that the certificate had been obtained under the separate commission, and lay before the Lord Chancellor for allowance. *Ex parte Hamper,* 17 Ves. 403.

(d) *Coexisting Commissions.*

1. It is in the discretion of the Great Seal, to supersede a second commission against an uncertificated bankrupt, and even under some circumstances, upon the petition of the bankrupt. *Ex parte Lees,* 16 Ves. 472.

2. On application to supersede a commission of bankruptcy and issue another, the act of bankruptcy being subsequent to the date of the commission, the solicitor was required to state by affidavit why

he took out a commission, which he could not support. Pending that, the time having expired, another creditor obtained a supersedeas and a commission, under the apprehension of immediate extents. The bankruptcy was afterwards declared under the first commission, upon acts of bankruptcy found previous to its date; but the latter commission was preferred. *Ex parte Mavor,* 19 Ves. 539.

3. A writ of supersedeas and a new commission being obtained, without disclosing that an attendance had been ordered upon a petition to compel the attendance of witnesses to prove the act of bankruptcy to support the first commission, the writ was quashed, and the second commission superseded. *Ex parte Freeman,* 1 V. & B. 34. 1 Rose, 380.

4. A separate commission is superseded, to give effect to a subsequent joint one, upon the principle of convenience and general advantage to the creditors. And the prior petitioning creditor, unless he has been acting *mala fide*, receives all the costs of the superseding. *Ex parte Brown,* 1 V. & B. 60. 1 Rose, 433.

5. That there is a prior separate commission in Ireland in prosecution against one of two partners, is not a ground for superseding a joint commission against them in this country. *Ex parte Crudland,* 3 V. & B. 94. 2 Rose, 164.

6. Before a separate commission can be superseded, for the purpose of more conveniently taking the accounts under a joint commission; the court must see that the joint commission is valid: and where, on the affidavits in support of the petition to supersede the separate commission, the joint commission appeared to be invalid, such petition was dismissed with costs.
Ex parte Roberts, } 1 Mad. 72.
——— *Wells,* } 2 Rose, 378.

7. When creditors apply to supersede a second commission against a bankrupt, notice must be given to the assignees under the first commission. *Ex parte Irvine,* 1 Mad. 74.

8. When a bankrupt has, in an action against his assignees, established that there was no act of bankruptcy, the court will not, unless under very special circumstances, delay superseding the commission till after another trial. It is not a sufficient ground that the assignees have evidence to support the commission, which they were prevented from producing by surprise. *Ex parte Dick,* 1 Rose, 51.

9. A debtor, after compounding with his creditors, became bankrupt, and obtained his certificate, but without paying 15*s.* in the pound; afterwards another commission issued against him. Petition to supersede the last commission, upon the ground that all his property belonged to the assignees under the first commission, was dismissed. The court being of opinion, that, by the statute 5 Geo. 2, c. 30, s. 9, the future property could not be taken possession of by the assignees, on behalf of the creditors under the bankruptcy; but that it might by the creditors, as such, either generally or individually, proceeding against their debtor in a court of law or equity. *Ex parte Baker,* 1 Rose, 452.

10. Where several commissions have issued against partners, the court will, if it be for the interest of all parties, remove the first out of the way, either by superseding them, or by making such arrangements as to render it impossible to take advantage of the objection to the subsequent commission. *Ex parte Wilson,* Buck, 52.

(c) *Concert or Collusion.*

1. A commission of bankrupt was established under very strong circumstances, *viz.* the affidavit and bond for the docket were written by the bankrupt, his brother was the petitioning creditor, who, with his town agent, were the only creditors admitted to proof, and who chose themselves assignees. *Ex parte Steel,* 16 Ves. 161.

2. If a commission is clearly proved to be the commission of the bankrupt, it must be superseded. *Ex parte Gardner,* 1 V. & B. 45. 1 Rose, 377.

3. A commission of bankruptcy may be taken out for the purpose of defeating an execution, provided there is no collusion; but where the act of bankruptcy was a denial by concert and contrivance, between the bankrupt and his sister, who was the petitioning creditor, and the object of the commission was, not to benefit the creditors, but to injure a judgment creditor, by exhausting the property, such commission was superseded; the pe-

titioning creditor paying the costs of the petition. *Ex parte Binmer*, 1 Mad. 250.

4. Where a petition to supersede a commission, on the ground of its being concerted, states, that the validity of the commission is in a course of being tried at law; though there is no opposition, the court will not supersede the commission, but will only retain the petition till the event of the trial at law is known. *Ex parte Price*, 3 Mad. 228. Buck, 230

5. If a commission be obtained by collusion with the bankrupt, but assignees are chosen, who are not under his control, and the commission is fairly proceeding for the benefit of the creditors, the court will not supersede it. *Ex parte Warwick*, 4 Mad. 262.

6. A commission on a concerted act of bankruptcy, though carried on *bonâ fide* and without collusion, was superseded with costs. *Ex parte Gouthwaite*, 1 Rose, 87.

7. The court will not support a concerted commission, even though it be for the benefit of the creditors that it should proceed. *Ex parte Brookes*, Buck, 257.

8. It is a well-established rule of the court, that a commission taken out by the bankrupt, or at his instance, cannot stand, even though it has all the legal requisites for its validity. *Ex parte Staff*, Buck, 249, 431.

9. Semble, where the circumstances are such as to make the bankrupt the agent of the petitioning creditor, such a commission would be bad at law, on the ground of an implied concert on the part of the petitioning creditor.

S. C. Buck, 431.

10. It is an invariable rule, that a commission taken out at the instance of the bankrupt, cannot be supported, however hostilely it may be prosecuted. *Ex parte Grant*, 1 G. & J. 17.

11. Although the act of bankruptcy may not have been concerted, yet, if the commission is clearly the commission of the bankrupt, and he evidently has the management and direction of it, the court will not hesitate instantly to supersede it.

Ex parte Downes, } 1 Rose, 398.
——— *Ansley*, }

12. Concerted commission superseded at the costs of the solicitor and petitioning creditor. *Ex parte Prosser*, Buck, 77.

(*f*) *Consent of Creditors.*

1. A commission of bankruptcy may be superseded at any time, after the first meeting of the creditors, with the consent of all the creditors who have proved. *Ex parte Duckworth*, 16 Ves. 416.

2. The court refused to supersede a commission of bankruptcy, without the consent of all the creditors who had proved, certified by the commissioners, and an affidavit of the bankrupt's confirmation of all purchases under the commission. Consent of creditors, who had received 20*s.* in the pound, not dispensed with. *Ex parte Milner*, 19 Ves. 204.

3. A commission of bankruptcy, which had not been opened, superseded on consent of the petitioning creditor. *Ex parte Trigwell*, 1 V. & B. 348.

2. By general order, 21st August, 1818, no commission of bankruptcy shall be superseded on the ground of the consent of all the creditors who shall have proved their debts, until after the second meeting; and, on the commissioners being satisfied, at the second meeting, that a petition will be presented for superseding the commission, with the consent of all the creditors who shall have proved debts, the commissioners shall adjourn the choice of assignees to some future day, in order to afford the opportunity of presenting such petition for a supersedeas, in the manner hitherto accustomed.

Buck, 281. 1 Swan, 333. 3 Mad. 392.

5. Commission cannot be superseded with the consent of the petitioning creditor, before the first meeting for the proof of debts, it being within the spirit of the general order, 21st August, 1818. *Ex parte Law*, 4 Mad. 273.

(*g*) *Commissioners, improper.*

1. The evasion of Lord Rosslyn's order, requiring the names of two barristers to be inserted in a country commission, is a ground for superseding it; and carrying the commission to a distance, to get it out of the reach of barristers, is sufficient evidence of such evasion to have it superseded, with costs. *Ex parte Harbin*, 1 Rose, 58.

2. A separate commission, directed to a joint creditor who acted under the commission, and permitted his joint debt to be proved, without an order from the Lord

Chancellor, was superseded at the costs of the petitioning creditor. *Ex parte Story,* Buck, 70.

(*h*) *Debts satisfied or secured.*

1. It is a ground for superseding a commission of bankruptcy, that a part of the bankrupt's property will satisfy all the debts, taking care to secure that object immediately and effectually. *Ex parte Bryant,* 1 V. & B. 211. 2 Rose, 1.

2. But the proceedings under the commission will not be stayed, pending an enquiry relative to an estate offered by the bankrupt for that purpose. S. C. 1 V. & B. 506.

3. Commission not suspended upon an offer to pay into the name of the Accountant-General a fund, alleged to be sufficient for the payment of the creditors. *Ex parte Kemp,* 2 Rose, 5 (*n*).

4. When sales of the estate have taken place, the court will not supersede the commission, although all the creditors have been paid 20*s.* in the pound. *Twogood* v. *Hankey,* Buck, 67.

(*i*) *Delay or Acquiescence.*

1. A commission, after nearly two years' acquiescence of the bankrupt, will not be superseded, without an issue to try its validity. *Ex parte Kirk,* 15 Ves. 464.

2. In a case where fifteen years had elapsed since the first commission issued, and during the last seven years the bankrupt, who was son-in-law to the petitioning creditor, was permitted to carry on trade in another place, the petition of the petitioning creditor under the first, to supersede the second commission, was dismissed, with costs.
Ex parte Lees, } 16 Ves. 472.
——— *Poulden,* }

3. A. and B. partners, separate commissions issue against them: A. obtains his certificate, but, before it is confirmed by the Lord Chancellor, a joint commission issues against him and B. Upon a petition that A.'s separate commission might be superseded, the Lord Chancellor directed the joint commission to be superseded, on the ground of length of time, and A.'s having obtained his certificate, and a doubt whether there were any joint effects. *Ex parte Rowlandson,* 1 Rose, 89.

4. Upon an application, by a petitioning creditor, for liberty to proceed with a commission which had been kept unexecuted pending an arrangement for a composition, or to supersede it, and take out another; the Lord Chancellor superseded the commission, without prejudice to the bankrupt's action, and refused to order that the same petitioning creditor should take out another. *Ex parte Smith,* 1 Rose, 332.

5. A commission superseded, on the ground of delay alone, when it had been kept five months without being opened; but the court will not, in such case, assign the bond, that being conclusive at law. *Ex parte Fletcher,* 1 Rose, 454.

6. It is in the discretion of the court to supersede a commission, whether the bankrupt has or has not got his certificate under it, but the court would not do so upon the petition of joint creditors (who suffered a considerable time to elapse, without having obtained an order to prove, for the purpose of assenting to, or dissenting from the certificate), in a case where the certificate was lying for confirmation, and no misconduct was imputed to the bankrupt.
Ex parte Cutten, } Buck, 68.
——— *Appleton,* }

(*k*) *General Order, 26th June, 1793.*

1. Commission of bankruptcy, especially against country bankers, to be executed immediately, without waiting the time allowed by the general order of 1793. *Ex parte Mavor,* 19 Ves. 542.

2. Commission of bankruptcy not supersedeable under the general order, 26th June, 1793, where, due diligence being used, the adjudication was prevented by keeping evidence out of the way. A writ of supersedeas, and a new commission being obtained, without disclosing that an attendance had been ordered upon a petition to compel the attendance of witnesses under the first commission, the writ was quashed, and the second commission superseded. *Ex parte Freeman,* 1 V. & B. 34. 1 Rose, 380.

3. To prevent a supersedeas under the general order in bankruptcy, 26th June, 1793, the strongest proof is required of the purpose *bonâ fide* to prosecute the commission, but prevented by accident, illness, adjudication too late for the Gazette, &c. *Ibid.*

4. Proof of an act of bankruptcy, &c. warranting the adjudication, is a sufficient proceeding within the general order, 26th June, 1793, to prevent a supersedeas
S. C. 1 V. & B. 38. 1 Rose, 382.

5. Commission of bankruptcy, supersedeable under the general order, 26th June, 1793, is not superseded without petition, and the writ issuing, which is subject to the Lord Chancellor's discretion; but an affidavit, that it does not appear from the Gazettes that the party has been adjudged a bankrupt within the time, is sufficient *primâ facie* evidence.
S. C. 1 V. & B. 42.

6. In a country commission the bankruptcy was found on the 28th day, but no notice given of it at the bankrupt office till two days afterwards; the commission was held to be supersedeable within the general order of the 26th of June, 1793, although, by the course of post, from the place where the commission was opened, an earlier communication was impossible; the practice being uniform, from the first existence of the order, to supersede on the 30th day, upon an application made on the 29th, unless notice has been previously given on the 29th of the adjudication. *Ex parte Henderson*, Coop. 227.
2 Rose, 190.

7. If a person, aware that a commission, supersedeable under Lord Rosslyn's order, is to be proceeded in, takes out another, it will be superseded with costs. *Ex parte Sanden*, 1 Rose, 85.

8. In a case of two commissions against a bankrupt, where the petitioning creditor under the first had been prevented from prosecuting it by the artifices of another person, whose object was to give effect to certain transactions between himself and the bankrupt, by a lapse of two months between such transactions and the issuing a commission; the court ordered the last commission to be superseded, and a *procedendo* upon the first, which had expired for want of prosecution. *Ex parte Knight*,
2 Rose, 319.

9. A solicitor, having struck a docket, ordered, within the regular time, the commission to be sealed; but, through the mistake of the clerk, the fees were not paid to the secretary. Another solicitor then struck a docket against the same bankrupt. The Lord Chancellor held, that the mistake of the clerk was a sufficient ground for the court to uphold the first commission, as the general order 29th December, 1806, ought not to be construed too strictly. *Ex parte Slatford*, Buck, 1.

10. A commission supersedeable, for want of prosecution under the general order of the 26th of June, 1793, cannot be superseded by the bankrupt without a petition. *Ex parte Gale*,
1 G. & J. 43.

(*l*) *Misdescription, or Misnomer.*

1. A commission will not be superseded on account of a misdescription of the bankrupt, if he is well known as described in the commission. *Ex parte Horsley*, 2 Mad. 11.

2. Where the bankrupt was described as of "Copthall Buildings, in the City of London," and he really carried on his business in Copthall Court, which was adjoining to, and leading from Copthall Buildings, and his counting-house was about eighty yards from the junction, the commission was superseded on the petition of the assignees. *In re Gordon*,
2 Mad. 13, (*n*).

3. And where the bankrupt was described as "J. Needham, of A., in the parish of Hope;" and, in another commission, as "J. Needham, of A. in the parish of Tidswell;" and the bankrupt lived at Tidswell, and another person answering the description at Hope, the first commission was superseded with costs. *Ex parte Marsdon*, 2 Mad. 13 (*n*).

4. Where the error was in stating the name of "Balwin," instead of "Baldwin," with an omission to describe the bankrupt as the surviving partner of a person deceased, the commission was nevertheless supported. *In the matter of Baldwin*, 2 Rose, 20. 248 (*n*).

5. The law will not permit a man to say he is not known by the name which he has himself adopted: so, where the bankrupt was described in the commission by the christian names of Robert Martin, when his real christian name was only Robert, but it appeared that he had himself adopted and used the name of Martin, it was held no objection to the validity of the commission. *Ex parte Smith*, 2 Rose, 25.

6. A commission, issued against a bankrupt by the name of Laidlow, was superseded at the instance of a creditor

who had actually taken out another commission by the right name of Laidlaw, although the bankrupt had used as well one name as the other; but whether such commission would have been superseded at the instance of the bankrupt himself—*Quære. Ex parte Schofield,*
2 Rose, 246.

7. Whether, on the ground of *idem sonans*, the court would refuse to interfere, if no second commission had been issued—*Quære. Ex parte Schofield,*
2 Rose, 246.

8. Bankrupts should be described in the commission according to their legal or known description. Where the bankrupts were described as of "Sun Wharf, London, and Wolverhampton," they having no residence or establishment at Wolverhampton; commission superseded.—*Ex parte Beckwith,* 1 G. & J. 20.

(m) Object, improper or foreign.

1. Though a commission of bankrupt is a matter of right, yet where it has been taken out under circumstances of oppression, the court will examine into it strictly; and, if there should be no sufficient act of bankruptcy on the proceedings, will not sustain it by directing an inquiry as to any other act. *Ex parte Smith,*
1 Rose, 147.

2. Although all the requisites of a commission concur to its validity, yet it will be superseded if taken out for an indirect and improper object, (as a landlord to determine a lease, contrary to good faith). *Ex parte Gallimore,* 2 Rose, 424.

3. Or with a view to force the bankrupt to a compliance with an arrangement with his creditors. *Ex parte Harcourt,* 2 Rose, 203.

4. If, in suing out a commission, the petitioning creditor be influenced by motives not fraudulent, although other than the mere distribution of the estate; the court will not, on that account, supersede the commission. *Ex parte Wilbeam,**
Buck, 459.

5. Although there be a trading, a debt, and an act of bankruptcy, yet if the commission be taken out for a purpose foreign from its object, as to work a dissolution of partnership, it is supersedeable at the costs of those who take it out. *Ex parte Browne,* 1 Rose, 151.

6. A commission of bankruptcy is, in a qualified sense, a legal right, and is not affected by any bye object in suing it out, unless there is a fraud; and therefore a petition of the bankrupt to supersede the commission, on the ground that it was taken out by his partners for the purpose of dissolving the partnership, was dismissed. *Ex parte Wilbran,*
5 Mad. 1.

7. It is no objection to a commission, that it is taken out to defeat an execution. *Ex parte Gardner,* 1 V. & B. 45.
1 Rose, 377.

8. Where a commission is taken out in violation of good faith &c., application may be made to the court to supersede it, notwithstanding that it is supersedeable at the bankrupt office for want of prosecution. *Ex parte Lowe,*
1 G. & J. 78.

(n) Place where executed being distant.

1. The court will not supersede a commission, because it is directed to a place at a great distance, 200 miles, from the residence of the great body of the creditors, although for the convenience of such creditors, the time for the choice of assignees will be enlarged. *Ex parte Fellows,*
2 Mad. 141.

(o) Third Commission, Dividend under the second being insufficient.

1. It is not sufficient ground to supersede a joint commission against two partners, that one of them has been the subject of two former commissions, under which he has obtained his certificates, and has not under his second commission paid fifteen shillings in the pound. *Ex parte Hodgkinson,* 19 Ves. 291.
Cooper, 99.
2 Rose, 172.

(p) Statute, Supersedeas by.

1. A petitioning creditor having taken security for his debt, relinquished the commission; upon a petition presented by the creditors, the commission was superseded, the proof of the petitioning creditor's debt under another commission expunged; and he being an assignee, a new choice was directed. *Ex parte Paxton,* 15 Ves. 461.

2. A bankrupt cannot supersede his commission under the statute 5 Geo. 2, c. 30, s. 24, by impeaching the petitioning

creditor's debt, on account of a security for such debt being taken privately; the remedy under that statute being to a creditor and not to the bankrupt. *Ex parte Kirk,* 15 Ves. 464.

3. The Great Seal is in no instance compelled to supersede a commission, except by the imperative language of the statute 5 Geo. 2, c. 30, s. 24, where a petitioning creditor receives from the bankrupt greater security or satisfaction for his debt, than the rest of the creditors; but it is in the habit of exercising a discretionary power of supersedeas, to prevent an abuse of a commission, as a process in the nature of an execution, and from analogy to the practice of the other courts in this respect.
Ex parte Freeman, 1 Rose, 380. 1 V. & B. 40.

4. The commission of a petitioning creditor, who, with the knowledge of two or three of the creditors, received his debt from the bankrupt, superseded under the statute 5 Geo. 2, c. 30, s. 24, at the petition of a creditor privy to the transaction; but whether such creditor will be permitted to sue out a new commission—*Quære. Ex parte Brine,* Buck, 19.

XIX. Proceedings.

1. The assignees are entitled to custody of proceedings in bankruptcy, and if the commissioners detain the proceedings from the assignees, it being out of the line of their duty, they will be liable to costs. *Ex parte Scarth,* 15 Ves. 293.

2. The clerk of enrolments is not entitled, as against the assignees, to a lien on the proceedings for the expences of their enrolment upon an order obtained by the bankrupt.
Ex parte Sandison, 1 Rose, 275. 19 Ves. 161.

3. Semble, a judge at chambers cannot compel the production of proceedings in bankruptcy.
Ex parte Warren, 19 Ves. 162. 1 Rose, 276.
Coombe's Case, 2 Rose, 399.
Crowley's Case, Buck, 270. 2 Swan. 75.

4. Commission of bankruptcy superseded and an action brought, the Lord Chancellor ordered the commission and proceedings to be delivered by the solicitor to the secretary, and by him to the associate, to be produced on the trial, with liberty to inspect and copy. *Ex parte Warren,* 19 Ves. 162. 1 Rose, 276.

5. The court frequently orders proceedings in bankruptcy to be brought into the secretary's office, and there deposited; as, where it directs a criminal prosecution for a conspiracy, or where it assigns the bond. S. C. 19 Ves. 163. 1 Rose, 277.

6. In a case where the bankrupt's books and papers were in the master's office, in Ireland, in a suit by the assignees under an English commission, against the assignees under an Irish commission, the assignees were ordered to procure them, if necessary, or copies, if the commissioners should think copies sufficient, at the expence of the estate; and the bankrupt, not having the power or means of procuring them, would not be liable to commitment, if his examination should thereby prove defective.
Ex parte Cridland, 3 V. & B. 94. 2 Rose, 164.

7. Neither the assignees, nor the solicitor under the commission, will be permitted to say the proceedings are in any other person's hands than their own. *Ex parte Bullen,* 1 Rose, 135.

8. There can be no lien upon proceedings under a commission in bankruptcy as against the assignees.
Ex parte Bullen, 1 Rose, 135.
——— *Hardy,* 1 Rose, 395.
——— *Anon,* 1 Rose, 208.

9. Two of three assignees direct the solicitor to the commission to give up the proceedings to another. The third assignee, not concurring, has a right to know whether such change will be beneficial to the estate. *Ex parte* ———, 1 Rose, 207.

10. But *semble*, if the third assignee has not a satisfactory reason for withholding his concurrence, he will be liable for the costs of an application to the Great Seal for an order for their delivery. *Ex parte Scruby,* *Ibid.* (*n*).

11. Books, referred to by the bankrupt on his last examination, form part of the proceedings, and must be delivered up to the assignees; and such order will be made, with costs, if, by improperly refusing them, an application to the Great Seal is rendered necessary. *Ex parte Hardy,* 1 Rose, 395.

12. Depositions, upon which commissioners have founded a report upon a reference to them, are proceedings in the bankruptcy, and, as such, to be left in the custody of the assignees. *Ex parte Newton*, 2 Rose, 19.

13. It has now been so frequently ruled, that there can be no lien on the commission and proceedings, that they are always ordered to be delivered up with costs. *Ex parte Titley*, 2 Rose, 83 (*n*).

14. A bill of exchange, on which the commission issued, was ordered to be left with the assignees, and enrolled of record with the commission and proceedings, pursuant to the statute 5 Geo. 2, c. 30, s. 41. *Ex parte Jackson*, 2 Rose, 188.

15. The commission and proceedings are inadmissible evidence of an act of bankruptcy, under the act 4 Geo. 3. c. 101, s. 10, for the purpose of defeating a conveyance. *Whitworth* v. *Graham*, 2 Rose, 364.

16. Proceedings in bankruptcy impounded in the bankrupt office.
Ex parte Wilson, } Buck, 48.
——— *Todd*, }

17. Upon a petition to supersede a commission, the bankrupt's examination before the commissioners is evidence to shew that the petitioner is not a creditor, although the petitioner was not present at such examination. *Ex parte Fowles*, Buck, 98.

18. Examinations are not evidence against a person not a party to the inquiry; but they may furnish a ground for directing an examination of the persons in the presence of the bankrupt.
Ex parte Scott, Buck, 280.
——— *Coles*, 3 Mad. 315. Buck, 242.

19. It is in the discretion of the Lord Chancellor to permit or refuse a defendant at law to have copies of his examination before the commissioners. Upon this petition, the examinations having been laid before the Lord Chancellor, he refused the application. *Ex parte Chater*. Buck, 290.

20. Application by the petitioning creditor and provisional assignee, under a subsisting commission against H. and G., to compel the solicitors, under a superseded commission against the same parties, to deliver up the proceedings under the superseded commission, refused. *Ex parte Shaw*, 1 G. & J. 124.

XX. Petition.

(*a*) Generally.

1. A petition failing as to the principal objects, will generally be dismissed. *Ex parte Ross*, 17 Ves. 376. 1 Rose, 37.

2. Bankrupt has a right to petition in respect of his interest in the surplus of the estate. *Saxton* v. *Davis*, 18 Ves. 81. 1 Rose, 79.

3. A petition in bankruptcy praying distinct orders under several commissions, requires several stamps. *Ex parte Wilson*, 18 Ves. 439.

4. Exceptions were filed to the Master's report, under a reference in bankruptcy, upon petition for liberty to except. *Ex parte Thistlewood*, 19 Ves. 248. 1 Rose, 291.

5. The court will not order a petition against a bankrupt's certificate to be received after the time allowed for that purpose, and to be considered as presented within the time, though the motion for that purpose is made before the time expires. *Ex parte Emmett*, 1 Mad. 111.

6. On a petition by a person found a bankrupt, to supersede his commission, on the ground that he has not committed an act of bankruptcy, the court, though there is no affidavit on the other side in support of the commission, or notice that the proceedings would be produced, will look into the proceedings to see if there is an act of bankruptcy. *Ex parte Vypond*, 1 Mad. 624.

7. The depositions of a witness before the commissioners cannot be read, in support of a petition in the bankruptcy, to expunge the debt of a creditor, who was no party to the examination; since, if false, no indictment for perjury could be sustained, as to support such an indictment, the false testimony must be material to the determination of the question raised in the petition, in which the affidavit was filed.
Ex parte Coles, 3 Mad. 315. Buck, 242.
——— *Scott*, Buck, 280.

8. The examination of a bankrupt before commissioners, is not admissible evidence upon the bearing of a petition, unless notice has been given of an intention to make use of them. *Ex parte Stracey*, 1 Rose, 68.

9. If a creditor, believing a commission

to be invalid, does not prove under it but, acting adversely, declares to the bankrupt and his friends, that he means to petition for a supersedeas, and to stay the certificate, unless his debt be paid or satisfied, that is not such a tampering as will operate in bar to his petition. *Ex parte Paterson,* 1 Rose, 402.

10. A petition to stay a certificate is an exception to the regular course of proceeding, and may be heard out of its turn. *Ex parte Anderson,* 1 Rose, 93.

11. But the petition, being called on, will not be allowed to stand over for the purpose of filing affidavits in reply, till the court sees such affidavits are necessary. *Ex parte Gardner,* 1 Rose, 371 (*n*).

12. In general, every application in bankruptcy must be by petition; but the court will, on motion, order the service of an order made on a petition in the bankruptcy.
Ex parte Anderson, Buck, 38.
——— *Peyton,* Buck, 200.
——— *Gitton,* Buck, 549.

13. Or the service of a petition in the bankruptcy. *Ex parte Peyton,* Buck, 200.

14. Or the postponement of the hearing of a petition, if the motion is by consent. *Ex parte Gitton,* Buck, 549.

15. If a person presenting a petition to supersede a commission, himself becomes a bankrupt before the petition is heard, his assignees must present a supplemental petition, to have the benefit of that already presented, or it will be dismissed.
Ex parte Birdwood, Buck, 99.
——— *Rattray,* 1 Rose, 197 (*n*).

16. A petition to enforce a claim of proof, must state the grounds of rejection by the commissioners.
Ex parte Curtis, 1 Rose, 274.
——— *Schmaling,* Buck, 93.

17. By general order, June 11, 1817, petitions struck out of the Vice-Chancellor's paper, on account of non-attendance, not to be restored, except by order made upon petition.
2 Mad. 146. Buck, 107.

18. Petition to expunge a charge of collusion made in another petition, and to be heard before that petition, dismissed as unprecedented, and with costs; but the other petition coming on to be heard, and the charge of collusion being unfounded, it was dismissed with costs, as against the party so charged. *Ex parte Leigh.* Buck, 132.

19. The court will not entertain an application to postpone the hearing of a petition for the purpose of replying to affidavits, unless the application be made at least two days before the petition appears in the paper. *Ex parte Wiltshire,* Buck, 232.

20. The court will not, upon the petition of the bankrupt, unsupported by any creditor, direct inquiries as to the management of the estate, if he have not a pecuniary interest therein. *Ex parte Harrison,* Buck, 246.

21. Petition by the bankrupt, to expunge the proofs of various creditors, dismissed, as being multifarious. *Ex parte Coles,* Buck, 256.

22. A petition of appeal from the Vice Chancellor's order, must have the signature of a barrister. *Ex parte Holt,* Buck, 429.

23. Upon a mere petition for a rehearing of a petition in bankruptcy, it is not necessary to give notice to the opposite side. A petition therefore to discharge an order of rehearing, obtained ex parte, was dismissed with costs. *Ex parte Hensor,* Buck, 427.

24. It is the practice of the court to take the assistance of a jury, when there is so much of doubt that such assistance is felt to be necessary to the right determination of the case. But it is not the practice of the court to put the parties to the expense of trial by jury, without first hearing all the evidence read, and the case fully argued, unless the counsel on both sides agree in stating, that such must necessarily be the result if the matter were gone into. Upon this principle the Lord Chancellor heard a petition upon an appeal from the Vice Chancellor's order, directing an action to be brought. *Ex parte Heygate.* Buck, 442.

25. A petition may be framed in the alternative, as for a supersedeas, or a new choice of assignees; and the respondent cannot call on the petitioner to elect to proceed for only one of the objects of the petition, unless under special circumstances. *Ex parte Scholey,* Buck, 476.

26. Petition by the bankrupt to supersede the commission was dismissed without a counter petition, the commission having been established by an action at law, and the bankrupt not appearing. *Ex parte Caponhurst,* Buck, 476.

27. All material facts in a petition must be alleged, as well as proved: and

where a petition to supersede did not contain an allegation that the petitioner was a creditor, it was ordered to stand over with liberty to amend. *Ex parte Oxley,* 1 G. & J. 12.

28. Joint creditors may petition to prove against the separate estate, on account of a fraudulent abstraction of joint funds, without a previous application to the commissioners. *Ex parte Smith,* 1 G. & J. 74.

(*b*) *Signing.*

1. The general order of 12th August, 1809, was made to prevent improper petitions, and to enable the Chancellor to make the attorney, where the case calls for it, pay the costs of an improper petition; so, where the petition prayed that a charter-party might be delivered up, and the commission superseded, and there appeared on the affidavits, in support of the petition, no grounds for a supersedeas, but that the petition arose out of the interested views of the attorney, who claimed a security on the charter-party, the attorney was ordered to pay the costs. *Ex parte Cuthbert,* 1 Mad. 78.

2. Bankrupt petition witnessed by the agent of the solicitor who presented the petition, is not a sufficient compliance with the general order of the 12th August, 1809; but the petitioner and his solicitor being in court, they were permitted to sign the petition at the hearing. *Ex parte Weston,* 1 Mad. 75.

3. A solicitor presenting a petition in bankruptcy, on his own behalf, an attestation, under the general order 12th August, 1809, was, on an application for that purpose, dispensed with. *Ex parte Kingdon,* 1 Mad. 446.

4. Application to the Lord Chancellor, to answer a petition which had not been signed by the petitioner, in a case where the parties lived in the country, and the final dividend, against which the petition was to be presented, would otherwise be made before the signature was obtained, and the party undertaking that it should be signed before it was served, was refused. *Anon,* 1 Rose, 97.

5. In a case where the petitioner resided at York, and it was of importance that the petition should be heard on the next petition day, the Lord Chancellor permitted the agents of the petitioner to sign the petition, they undertaking to be answerable for the costs. *In the matter of Boldero,* 1 Rose, 231.

6. The general order of 12th August, 1809, held to be complied with by the solicitor "authenticating" the signature of the petitioner, without "attesting" it. The object of the order being to secure the responsibility of a solicitor to the propriety of the application. *Ex parte Tilley,* 2 Rose, 83.

7. The general order of 12th August, 1809, is sufficiently complied with, where the petition is signed by the petitioner, and such signing is "attested" by the agent of his solicitor, and "authenticated" by his solicitor, who did not witness the signing, but knew the petitioner's hand-writing.
Ex parte Bellot, 2 Mad. 259.

8. A petition presented by assignees must, under the general order, 12th August, 1809, be signed by all who present it, and not by one only, as in the case of partners. *Ex parte Morgan,* Buck, 109.

9. Application to permit a petition to be signed by the petitioner's agent, in London, granted, it being near the end of the sittings after Trinity term. *Ex parte Stone,* Buck, 255.

10. The general order of the 12th of August, 1809, held not to be complied with by the solicitor authenticating the signature of the petitioner, without attesting it. *Ex parte Bury,* Buck, 393.

11. Petition, which purported to have been signed "in the presence of Thomas Lee, Master Extraordinary in Chancery," permitted to stand over, for the purpose of amendment, and of an affidavit being filed, to shew that Lee was, at the time of the signature, the petitioner's solicitor or agent, the petitioner paying the costs of the day. *Ex parte Rawlinson,* 1 G. & J. 19.

12. Petition to stay the bankrupt's certificate, attested by the solicitor's agent, which is not in conformity to the general order, dismissed with costs. *Ex parte Hirst,* 1 G. & J. 76.

(*c*) *Service,*

1. If the bankrupt is not served with the petition to stay his certificate, in time to hear the petition on the next petition day, he is entitled to his certificate. In

this case, the petition was not answered till the day before the petition day, and not served till the morning of that day, and was then received by the bankrupt without objection; but it was held, to be within the rule, and the petition was accordingly dismissed. *Ex parte Brenchley,* Coop. 97.

2. If a bankrupt is not served with the petition to stay his certificate, upon which attendance is ordered, he is entitled to his certificate, as of course. *Ex parte Kendall,* 1 V. & B. 543.

3. A petition to stay a certificate must be served personally upon the bankrupt, before the petition day.
Ex parte Colbourne, 2 Rose, 187.
——— *Harford,* Buck, 38.
——— *Groome,* Buck, 39.

4. A petition to stay certificate, must be served, personally, two clear days before the petition day. *Ex parte Hopley,* 1 G. & J. 63.

5. The bankrupt does not wave the objection of personal service of the petition, by taking office copies of the affidavits. *Ex parte Kendall,* 1 V. & B. 543.

6. Nor by filing an affidavit in answer. *Ex parte Harford,* Buck, 38.

7. Nor by an application to the court to advance the petition in the paper. *Ex parte Groome,* 1 Buck, 39.

8 Service of a petition at the last place of residence of an absconding assignee, ordered to be good service. *Ex parte Bonbonous,* 3 Mad. 23.

9. An order was obtained on motion, that service of a petition, in bankruptcy, on the attorney of a party abroad, whose debt was sought to be expunged, should be deemed good service. *Ex parte Palon,* 3 Mad. 116.

10. Where the debt of a creditor in America was proved by an agent, service of the petition, to expunge the proof, was ordered, on motion, to be made on such agent. *Ex parte Dunlop,* 3 Mad. 279.

11. The court can act upon affidavit of service of the petition, in cases of supersedeas, as well as in other cases. *Ex parte Crump,* Buck, 4.

12. A person keeping out of the way to avoid the service of an order made upon petition in bankruptcy, it was ordered, upon motion, that service at his office should be good service. *Ex parte Anderson,* Buck, 38.

13. One of two partners, the other being abroad, proves a debt and delay. Service of the petition, to expunge the debt, upon the attorney appointed to receive the dividends, ordered to be good service, upon motion. *Ex parte Peyton,* Buck, 200.

14. Petition to supersede commission, must be served on the bankrupt. *Ex parte Barber,* Buck, 493.

15. Petition, by petitioning creditor, to supersede a commission, sealed but not opened, must be served upon the bankrupt. In this case, the petition stood over for that purpose. *In the matter of* ——— 1 G. & J. 23.

16. The court will not order, that service of a petition, to stay a certificate, at the bankrupt's residence, should be good service, unless the application be made before the petition day; except in cases where an earlier application is prevented by the conduct of the bankrupt. *Ex parte Harrison,* 1 G. & J. 71.

(*d*) *Amending.*

1. Petition to have short bills, in the hands of the bankrupt, delivered up; the petitioners were not creditors at the time the petition was presented, the cash balance being against them, but had since become so, turning the balance in their favor, by taking up the bankrupt's acceptances on their account. The order was made, without requiring the petition to be amended, by stating that fact; but the order stated the consent of the crown, holding an extent for acceptances of the bankrupt, on account of duties received, and remitted specifically by the country bank. *Ex parte Roxton,* 17 Ves. 426. 1 Rose, 15.

2. Where a petition was presented in the name of an agent, which ought to have been presented in the name of the principal, who was abroad; it being an evident mistake, and there appearing no sinister object in the petition, the party was allowed to amend the title, on paying the costs of the day, but without prejudice to the other party, shewing that such petition was presented by the agent, without authority from the principal. *Ex parte Rew,* 1 Mad. 309.

3. Petition was permitted to be amended, upon paying the costs of the day. *Ex parte Peyron,* 2 Rose, 368.

4. Petition allowed to stand over, to amend the title. *Ex parte Mills,* Buck, 230.

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XXI. Affidavit.

(a) Generally.

1. Where an affidavit in bankruptcy, is irrelevant and scandalous, it will be ordered to be taken off the file, with costs as between attorney and client. *Ex parte Simpson.* 15 Ves. 476.

2. The court has the same jurisdiction, where . . affidavit is filed in court and referred to the master. *Ex parte Le Heup,* 18 Ves. 223.

3. An affidavit in bankruptcy to the . . . of a witness, not limited to the ge- . . question, whether he was to be be- . . . upon his oath, but going to particular facts, and scandalous, was taken off the file, with costs. *Anon,* 3 V. & B. 93.

4. Wilful misrepresentation as to credit, gives a remedy by way of damages, on the ground of . . . but this is administered with great caution: and therefore in bankruptcy where the evidence of the party is received, it must be in all particulars, consistent, and clear of contradiction and obscurity. *Ex parte Carr,* 3 V. & B. 108.

5. Affidavits, filed in support of a petition to supersede a commission and stay a certificate, need not to be answered, if founded only upon information and belief, unless it is stated in the affidavit from whom the information was received, and that such person refuses to make an affidavit. *Ex parte Stevens.* 4 Mad. 256.

6. Upon a bankrupt petition being called, it was objected to the hearing, that a long affidavit in support of the petition had just been filed. Held, the petitioner was at liberty to wave the use of the affidavit, and that the question of expense, created by the affidavit, not affecting the merits, might be met on another application. *Ex parte Ross,* 1 Rose, 53 (*a*).

7. On a reference of a matter in bankruptcy to the master, affidavits which might have been read at the hearing of the petition in court, may be received in evidence by him.

Ex parte Jackson, }
——— *Heywood,* } 1 Rose, 45.

8. False swearing, under circumstances not strictly amounting to perjury, is an indictable offence as a misdemeanor. *Ex parte Overton.* 2 Rose, 257.

9. The court will not order an inquiry upon an affidavit, that merely states general hearsay information and belief, unless the case be pregnant with circumstances of suspicion. *Ex parte Coles,* Buck, 244.

10. Affidavits in reply, are only to be permitted in cases where new matter is introduced in the affidavits, answering the petition. *Ex parte Shayle,* Buck, 244.

11. Affidavits that merely state hearsay and belief, as to a commission being concerted, are not alone sufficient to induce the court to direct an issue, but if they are corroborated by circumstances of suspicion attending the case, an issue will be directed. *Ex parte Boyle,* Buck, 247.

12. Although the affidavits in support of a petition, and those in opposition to it are conflicting, yet the court will hear them read, and the arguments of counsel, before it sends the parties to t . the question raised by the petition, at law. *Ex parte Trestram,* Buck, 550.

13. Commissioners ought not to make affidavits, unless they are served with the petition. *Ex parte Husband,* 1 G. & J. 108.

(b) Swearing.

1. Affidavit in support of a petition, must not be sworn before the petition is answered. *Ex parte Northwood,* 2 Rose, 246.

2. Except in cases of petitions to stay certificates. *Ex parte Overton,* 2 Rose, 257.

3. Affidavits in support of the petition, sworn before the petition is answered, cannot be read. *Ex parte Parks.* Buck, 332.

4. Affidavit sworn in support of a petition before a master extraordinary, who was solicitor to the commission, was not allowed to be read. *Ex parte Brockhurst,* 1 Rose, 145.

5. Affidavits sworn before the clerk of the solicitor to the commission, not allowed to be read, but the petition ordered to stand over, with liberty to reswear the affidavits. *Ex parte Green,* 1 G. & J. 16.

(c) Filing.

1. No affidavits can be admitted against the allowance of a certificate, but such as have been filed in the office at the same

time with the petition, or are necessary in reply, according to the general order, 10th November, 1805. *Ex parte the Bank of Scotland.* 1 V. & B. 5. 1 Rose, 375.

2. Though respondents may have formal objections to a petition, they still ought to be prepared to meet the merits, if the objections should be overruled; and where the respondent, depending upon such objections, neglected to file affidavits, the court permitted the petition to stand over, upon his paying the costs, to be taxed by the Master, if the parties disagreed. *Ex parte Bellot,* 2 Mad. 259.

3. An affidavit of personal service of a petition must be filed before it can be read in court. *Ex parte North,* 4 Mad. 395.

4. The filing of an affidavit in bankruptcy, is the swearing and carrying it into the bankrupt office: it is there within the reach of the Lord Chancellor, should the purposes of justice at any time require the production of it. *Ex parte Newton,* 2 Rose, 19.

5. Affidavits in support of petitions in bankruptcy, filed subsequently to the petition day, cannot be read at the hearing. 2 Rose, 161.

6. Affidavits on petitions in bankruptcy may be filed after the petition day; but, in such case, the petition will be ordered to stand over, to give time to answer them. *Ex parte Sparrow.* 2 Mad. 184.

7. If a respondent knowing that the affidavits, in support of the petition, are filed after the petition day, answer them, he thereby waives the objection to the irregularity. *Ex parte Bury,* Buck, 393.

8. But the respondent, by answering affidavits irregularly filed, does not waive the objection to their being read, if he have no notice of their irregularity. *Ex parte Smith,* Buck, 395.

9. An affidavit in support of a petition to stay a certificate, filed after the petition is presented, cannot be read, unless it is explanatory of some matter introduced by the bankrupt in answer to the petition. *Ex parte Dodson,* Buck, 178.

10. Affidavits in support of the petition, filed after the petition day, cannot be read. *Ex parte Peel,* Buck, 394.

11. In such cases the petition was permitted to stand over till the next day of petitions, that the respondent might answer the affidavits, the petitioner paying the costs of the day.
Ex parte Peel, Buck, 394.
——— *Smith,* Buck, 395.

12. An office copy is the only evidence the court will admit of the filing of the affidavit. *Ex parte North,* Buck, 396.

13. And where respondents are too late in filing their affidavits, the court will let the petition stand over, to give the petitioner an opportunity of replying to them, the respondents paying the costs of the day. *Ex parte the Corporation of Doncaster* Buck, 463.
Ex parte Trustram, Buck, 464.

14. If, upon a petition to stay a certificate, the bankrupt do not file his affidavits in answer till after the petition day, the petitioner is entitled to have the petition stand over, that he may have an opportunity of replying to any new matter in the bankrupt's affidavits. *Ex parte Radcliffe,* Buck, 289.

15. Upon a motion to postpone the hearing of a petition in bankruptcy, affidavits filed after the petition day may be read. *Ex parte Cotton,* Buck, 549.

XXII. Issue.

1. An order obtained to try the validity of a commission in an issue, on the objection of a previous act of bankruptcy, and a sufficient petitioning creditor's debt, afterwards discharged for want of prosecution, a petition to revive such order dismissed with costs. *Ex parte Donovan,* 15 Ves. 8.

2. A creditor of the bankrupt is not a competent witness to sustain a commission upon an issue directed to try its validity. *Ex parte Malkin,* 2 Rose, 27.

3. The party who has to sustain the affirmation, is to be plaintiff in an issue to try the validity of the commission, and, as such, has the choice of the court where it is to be tried. *Ibid.*

4. If a commission is taken out upon an act, proved at the trial of an issue to have been concerted with the petitioning creditor and the solicitor, the court will supersede it, and will not direct another issue to try the validity of the commis-

sion, with liberty to prove other acts. *Ex parte Prosser,* Buck, 77.

5. Upon an order to proceed to trial upon two issues, to try the validity of the commission, the plaintiff to give notice, in writing, to the bankrupt, of the acts intended to be relied on at the trial. Held, that the petitioner, in his notice, must specify the acts relied on, the times when they were committed, and the witnesses who will be called to prove them. *Ex parte Bogen,* Buck, 137.

6. In directing an issue, the court will not order the examination of persons at the trial, who, by the rules of the courts of law, could not be examined without such order, except, sometimes, in cases where the facts in dispute rest on the knowledge of the plaintiff and defendant only. *Ex parte Dister,* Buck, 231.

7. The practice of the court is, where the case requires it, to direct the bankrupt to be examined upon an issue to try the validity of the commission. *Ex parte Staff,* Buck, 431.

8. Where the petitioner swore positively to a debt, and was contradicted by the bankrupt, there being no other evidence, an issue was directed, at the trial of which the bankrupt and the petitioner were to be examined. *Ex parte Williamson,* Buck, 546.

XXIII. Costs.

1. It is no objection to the allowance of costs, that a necessary party appears, without being served with the petition. *Ex parte Garland,* 1 Mad. 318.

2. If a creditor be brought before the court to have his debt expunged, and no good grounds are shewn for expunging it, he is entitled to costs; but where the affidavit of the creditor, made upon his proof, was calculated to mislead, the court refused him costs. *Ex parte Hustler,* 3 Mad. 117. Buck, 171.

3. Bankrupt obtaining leave to surrender after the proper time for surrendering is expired, pays the costs. *Ex parte Carter,* 4 Mad. 394.

4. Equitable mortgagee praying a sale of mortgaged estate, must pay the costs of the petition, and of the assignees' appearance to it, not out of the produce of the mortgaged estate, but personally; but if the assignees oppose the petition on frivolous or mistaken grounds, they pay the costs occasioned by such opposition. *Ex parte Horne,* 1 Mad, 622.

5. Equitable mortgagee must pay the costs of his petition. *Ex parte Warry,* 19 Ves. 472.

6. Equitable mortgagee not entitled to costs upon sale of pledge, though it was owing to the bankrupt, that no regular mortgage was made. *Anon,* 2 Mad. 281.

7. Equitable mortgagee by deposit of deeds, with a writing expressing the terms of the deposit, is entitled, on petition in bankruptcy for a sale, to have his costs out of the produce of the mortgaged property. *Ex parte Tew,* 3 Mad. 372.

8. Costs of the application given to a mortgagee by deposit, upon a petition for the usual order, there being a written instrument specifying the agreement for the deposit. *Ex parte Brightwen.* Buck, 148.
S. C. ——— *Brightens,* 1 Swan. 3.

9. In all cases where there is an equitable mortgage by a written instrument, specifying the terms of the agreement, the mortgagee, upon the usual petition for a sale of the premises, is entitled to his costs. *Ex parte Sikes,* Buck, 349.

10. Equitable mortgagee held to be entitled to costs out of the proceeds, upon the usual petition for sale, though the written instrument referred to, required the aid of parol testimony to explain it. *Ex parte the Vauxhall Bridge Company,* 1 G. & J. 101.

11. Upon an application for sale of an equitable mortgage, the costs of the assignees are to be paid out of the proceeds of the estate. *Ex parte Garbutt,* 2 Rose, 78.

12. It is a general rule, that, when a petition to stay a certificate is dismissed, it is dismissed with costs; but the bankrupt may forfeit that privilege by misconduct.
Ex parte the Bank of Scotland, 1 Rose, 375. 1 V. & B. 5.
——— *Gardner,* 1 Rose, 377. 1 V. & B. 45.
——— *Black,* ——— *Nichols,* 1 Rose, 67 (*n*).
——— *Kennet,* 1 Rose, 331. 1 V. & B. 193.

13. When a petition is to supersede a commission for collusion, and stay a certificate, and there are suspicious circumstances, costs will not be given, though the petition fails. *Ex parte Stevens*, 4 Mad. 256. Buck, 389.

14 Costs will always be given against a party, who, by refusal to deliver up the proceedings to the assignees, makes an application to the great seal necessary. *Ex parte Hardy*, 1 Rose, 396.

15. Where a separate commission is superseded, to give effect to a subsequent joint commission, the petitioning creditor is to be reimbursed his costs out of the joint estates. *Ex parte Pachelor*, 2 Rose, 26.

16. Where the petitioning creditor declared the commission to be invalid, he was held liable to costs of inquiries, thereby rendered necessary to ascertain its validity. *Ex parte Glossop*, 2 Rose, 386.

17. The general rule in bankruptcy is, that, if the petitioner do not pray his costs, he cannot have them. *Ex parte Atkinson*, Buck, 215.

18. Since assignees would have to pay the costs of an action brought against them by the bankrupt, by analogy to the rule of law, the court directed the assignees to pay the costs of a trial upon an issue directed to try the validity of the commission, in which they undertook to be plaintiffs, and the bankrupt the defendant; but they were not made to pay the costs of the petition to supersede the commission. *Ex parte Edwards*, Buck, 232.

19. Where a petition in bankruptcy was dismissed as multifarious, costs were not given out of the estate, on the ground that it would be hard upon the other creditors, whose debts were indisputable. *Ex parte Coles*, Buck, 256.

20. Bankrupt presenting an unnecessary petition, his solicitor was ordered to pay 40*s*. costs. *Ex parte Parker*, Buck, 313.

21. A commission having been issued for the purpose of defeating a judgment, the judgment creditor was directed to try the validity of the commission, and succeeded upon the trial. The petitioning creditor directed to pay the costs of superseding the commission, and of the petition. *Ex parte Heming*, Buck, 350.

22. If, when a petition is called, the petitioner do not appear, the respondent must produce an office copy of the affidavit of service, before the rising of the court, to entitle him to his costs. *Ex parte Astell*, Buck, 396.

23. Costs are not given upon an appeal from the deliberate judgment of the commissioners, but the rule does not extend to ex parte cases, where the opposite side has not the opportunity of being heard, and the commissioners have not exercised a deliberate judgment. *Ex parte Greenway*, Buck, 420.

24. A commission having been superseded with costs, to be paid by the petitioning creditors; one of them being a woman, after the costs were taxed, married: her husband ordered to pay the taxed costs within a fortnight. *Ex parte Eagle*, Buck, 548.

25. Petitioning creditor ordered to pay the messenger his costs, as taxed by the commissioners, and the assignees to pay his subsequent costs, where the commission was supersedeable, and was considered as superseded. *Ex parte Johnson*, 1 G. & J. 23.

26. Bankrupt not allowed the costs of his petition to supersede the commission, where he was in a situation to try its validity at law in the first instance. *Ex parte Marks*, 1 G. & J. 70.

27. A creditor cannot apply to have the solicitor's bill taxed, except on the ground of neglect of duty by the assignees. *Ex parte Walker*, 1 G. & J. 95.

28. No costs given upon a petition by joint creditors, to prove against the separate estate, there being no joint effects or solvent partner. *Ex parte Bradshaw*, 1 G. & J. 99.

29. The court sitting in bankruptcy has no discretion to relax the rule as to the payment of the costs of taxation of the solicitor's bill; and such costs must be paid by the solicitor, where more than one-sixth of the amount is taken off by the taxation.

Ex parte Hatherway, 2 Mad. 329.
——— *Inman*, Buck, 129.

30. The rule applies also to the bill as taxed by the commissioners. *Ex parte Westall*, 3 V. & B. 141.

BARON AND FEME.

I. HUSBAND.

(a) *Rights and Liabilities.*

1. Right of the husband to release the orphanage share of his wife, a freeman's daughter. *Salkeld* v. *Vernon*, 1 Eden, 64.

2. Wife's reversion, which cannot fall into possession during the husband's life (as a reversion upon his own death) is not assignable by the husband. *Dalbiac* v. *Dalbiac*, 16 Ves. 122.

3. A husband can dispose of his wife's property in expectancy, against every one but the wife surviving. *White* v. *St. Barbe*, 1 V. & B. 405.

4. The husband maintaining his wife, and receiving her separate income, will not be liable to account for more than one year upon an assumed agreement to subject that fund to maintenance. *Brodie* v. *Barry*, 2 V. & B. 39.

5. Where the wife, as heir, is put to her election, and the husband takes no benefit under the will, the election will not affect his marital right. *Brodie* v. *Barry*, 2 V. & B. 127.

II. WIFE.

(a) *Rights and Liabilities.*

1. An infant may, by contract previously to her marriage, bar herself of a distributive share of her husband's personal estate, in the event of his dying intestate.
Drury v. *Drury*, 2 Eden, 39.
Earl of Buckinghamshire v. *Drury*, 2 Eden, 60.
See also *Opinions and Judgment of C. J. Wilmot*, 177.

2. Where husband and wife had lived together, the wife is not entitled to an account of her separate property further back than her husband's death, either against his representatives, creditor, or assignee. *Dalbiac* v. *Dalbiac*, 16 Ves. 116.

3. A feme covert is permitted to transact, as to her separate property, but such transaction must be perfectly fair and open. *Ibid*, 16 Ves. 125.

4. A female infant cannot be bound, by her covenant upon marriage, to settle her real estate without an option, when twenty-one, to refuse to confirm it; nor can her husband aid her in defeating, or prevent her confirming the settlement, when of age. *Milner* v. *Lord Harewood*, 18 Ves. 259.

5. A feme covert is not entitled to shew cause against a decretal order, as an infant is; but the order is binding on her, till reversed. *Burke* v. *Crosbie*, 1 B. & B. 503.

6. A feme covert is as much bound by a decree, as a feme sole. *Burke* v. *Crosbie*, 1 B. & B. 502.

(b) *Wife's Equity against the Husband, or his Assignee.*

1. Where there is no settlement, the wife is entitled to a provision, as against the particular assignee of the husband, for valuable consideration of the whole of the wife's equitable interest. *Earl of Salisbury* v. *Newton*, 1 Eden, 370.

2. The equity of compelling the husband to make a settlement out of the wife's estate, does not survive to the children, but is personal to her. *Scriven* v. *Tapley*, 2 Eden, 337.

3. A feme covert who had married without a settlement, and whose husband had taken the benefit of an insolvent debtor's act, became entitled, by the death of her father, and under a bond executed by him upon his marriage, to one-sixth part of his real and personal estate. The father, by his will, gave the daughter £8,000, in lieu of the interest she took under the bond. It was held, that the interest of the husband's assignee, under the insolvent debtor's act, was confined to what the daughter would have taken under the bond, and that the court had much greater consideration for an assignment by special contract, than for an assignment by mere operation of law; and where the equitable interest of the wife is transferred by mere operation of law, without any express consent of the wife, as in this case, the creditors stood precisely in the place of the husband, and therefore subject to the wife's equity. The assignee having, in consequence, proposed before the master, to settle one moiety of his claim upon the wife and children, and divide the other moiety among the husband's creditors, the proposal was approved of, and carried into execution by the court. *Worrall* v. *Marlar*,

1 Cox, 153.

4. In a suit by a feme covert, to establish her equity in personal property bequeathed to her, the court granted an injunction to restrain the husband from making an assignment of the property, although satisfied that the wife's equity would not pass by such assignment, but with a view to prevent his encumbering the case with new parties. *Roberts* v. *Roberts*, 2 Cox, 422.

5. A husband cannot, by assignment of the wife's property, put the assignee or purchaser, for a valuable consideration, in a better situation than himself, but such purchaser or assignee must be subject to the wife's equity. *Ibid.*

6. Where an equitable interest is given to the wife, for her life only, the court permits the husband to enjoy it, without the consent of the wife, or making any provision for her. But if the husband fail to perform the obligation of maintaining the wife, as by deserting her, the court will apply any equitable interest which the husband retains, for her life, either wholly or in part, for her maintenance. And where the husband becomes bankrupt, or takes the benefit of an insolvent debtor's act, the same equity will be enforced against his general assignee; but the principle does not apply to a particular assignee of such life interest, for a valuable consideration, who purchased the property before circumstances had raised any equity in it for the wife; therefore, where the wife joined the husband in a sale of a life-interest to the wife, and afterwards the husband became bankrupt, a bill against the purchaser, to establish the wife's equity, was dismissed with costs. *Elliott* v. *Cordell*,

5 Mad. 149.

7. The children of a feme covert have no equity, after the death of their mother, to insist on a settlement out of a legacy to her, unless there is a contract or decree for a settlement in the mother's life-time. *Lloyd* v. *Williams*,

1 Mad. 450.

(c) *What shall be her separate Estate.*

1. A bequest of two bonds and a mortgage to a married woman, with a direction that they should be delivered up to her, whenever she should demand or require the same, is a bequest to her separate use.

Dixon v. *Olmius*, 2 Cox, 414.

2. A gift by a husband to his wife, either as a *donatio mortis causâ*, or as a *donatio inter vivos*, to her separate use, must be established by evidence beyond suspicion. In this case, the claim of the wife was negatived.

Walter v. *Hodge*, 2 Swan. 92.

3. Legacy to A. "for her sole use and benefit," vests the property, exclusive of the marital right. *Adamson* v. *Armitage*, Coop. 285.

4. The marital right of the husband cannot be taken away, without clear intention; but where the wife, previously to marriage, settled her property to trustees, "for her sole use, benefit, and disposition," it was held to be separate estate. *Ex parte Ray*, 1 Mad. 199.

5. A court of equity will execute a trust for the sole and separate use of a married woman, when the intention of the donor to that effect is unequivocally declared; but where the testator gave a legacy to a trustee for the sole and separate use of his daughter, who was married, and afterwards gave the residue "for her own use and benefit", this will not make the residue a legacy to the separate use of the wife. *Wills* v. *Sayer*,

4 Mad. 409.

(d) *Liability of Wife's Separate Estate.*

1. How far the settled estate of the wife shall be exonerated from the mortgage made by husband and wife, for use of husband, out of husband's personal estates—*Quære.* *Astley* v. *Earl Tankerville,* 1 Cox, 82.

2. A bond of a feme covert, as surety, may be enforced against property settled upon her, to her separate use for life, with power of appointment or disposition by will, or any writing purporting to be a will; and if she should die in the life time of her husband, without such appointment or disposition, either of the whole or any part, then as to the whole or such part to the person or persons, as would be entitled according to the statute of distribution, as if she died unmarried and intestate. *Heatley* v. *Thomas,* 15 Ves. 596.

3. Securities obtained from a married woman, having separate property by a creditor of her husband, who, by suppressing that fact and for the purpose of repaying the debt, procured himself to be appointed one of the trustees, his co-trustee not being a party to the transaction, will be set aside. *Dalbiac* v. *Dalbiac,* 16 Ves. 116.

4. The payment of a debt by the promissory note of a married woman, decreed out of the rents and profits of estates, settled to her separate use for life. *Bullpin* v. *Clarke,* 17 Ves. 365.

5. Advances to a married woman deserted by her husband, on the credit of a fund in court, her property, for her maintenance, though it exceeds the income, will be reimbursed out of the capital. *Guy* v. *Pearkes,* 18 Ves. 196.

6. In the distribution of the separate property of a married woman, as assets, after her death, a bond is not entitled to priority, being as a bond void. *Anon.* 18 Ves. 258.

7. Under a settlement in trust to pay the rents and interests, to the separate use of the wife during the joint lives of husband and wife; if she survived, for her heirs and executors; if he survived, according to her appointment by will; in default thereof a limitation over as to the real estate; and as to the personal, to her executors, the wife cannot during the coverture bind the capital surviving to her; and as to the effect of her subsequent undertaking, when sole, to pay her bond given during coverture, the creditor was left to his remedy at law. *Lee* v. *Muggeridge,* 1 V. & B. 118.

8. Pin money subject to the property tax, but not to a deduction for alimony, being clear of maintenance. *Ball* v. *Coutts,* 1 V. & B. 292.

9. Settlement of money upon trust, to permit the wife to receive the interest during her life to her separate use, with a proviso against anticipation. The husband joins with a surety in a covenant to pay an annuity, secured by the wife's assignment of the interest to become due, and of the principal sum, in the event of there being no children of the marriage. The surety will not be entitled to any remedy in equity, under the assignment, in respect of payment of the arrears of the annuity, recovered against him by an action upon the covenant, although he had no notice of the proviso in the settlement against anticipation; the charge of fraudulent concealment not being sufficiently established. And even if fraud of the wife had been fullly made out, the Lord Chancellor was strongly inclined to think, that it would not be sufficient to support such an assignment, as that would be to give the wife the power of alienation against the intention of the settler. *Jackson* v. *Hobhouse,* 2 Mer. 483.

10. There may be a separate enjoyment of property by a feme covert in equity, and she has, as incident to the power of enjoyment, a power of charging her separate property; and where the wife joins her husband in a security, it is implied to be in execution of such power. But whether the separate estate of a feme covert is liable to answer general demands upon her—*Quære.* *Greatley* v. *Noble,* 3 Mad. 79.

11. A married woman, separated from her husband, and having a separate maintenance, renders the same liable by accepting a bill of exchange; and the court granted an injunction to restrain the trustees from paying the separate maintenance, until after payment of the bill and costs. *Stuart* v. *Viscount Kirkwell,* 3 Mad. 387.

12. A widow, having an estate to her and her heirs, under the will of her deceased husband, by whom she has a son, marries again and joins the husband in a mortgage of the estate, reserving the equity of redemption to the husband and his heirs, without any recital in the deed or special circumstance, except the mere

circumstance of this reservation, to show that it was intended to make a new settlement of the estate: upon death of the wife and husband, bill to redeem by the son of the wife by the first husband, against the heirs of the second husband; and so decreed below, and decree affirmed in *dom. proc.* the rule being, that in such cases the husband, notwithstanding the terms of the reservation, is seized of the equity of redemption, as he was before of the legal estate only *jure uxoris*. *Ruscombe* v. *Hare*, 6 Dow. 1.

13. A feme covert having, by her settlement, full power and dominion over her separate estates, granted an annuity to a young lady upon her marriage, for whom she had promised to provide. This annuity is a specific lien on the separate estate of the feme. *Power* v. *Bailey*, 1 B. & B. 49.

14. The husband of the grantor having notice of the execution of the deed, the grant is not a fraud upon him. *Ibid.*

15. The covenant of a feme covert having a power over her separate estate, is binding upon her. *Ibid.* 1 B. & B. 52.

(*e*) *Disposal of Wife's Property.*

1. A sum of money in the public funds was given by will to the separate use of a feme covert, with a power of appointment by deed or will; and in default of appointment, the same to go to her legal representative: the feme covert executed the power by deed in favor of her husband. A bill was filed, stating, that ample provision had been made for the feme covert in case she survived her husband: and upon her being examined in court, and consenting, the trustees were decreed to transfer the fund to the husband. *Frederick* v. *Hartwell*, 1 Cox, 193.

2. Where, by marriage settlement, a sum of money was vested upon trust, to pay the interest to the husband and wife successively for life, and the principal, after the death of the survivor, as the survivor should appoint. The husband and wife appointed the money immediately and absolutely to the husband; and, upon personal examination of the wife, the court directed the trustees to pay the money to the husband, and to deliver up the settlement to be cancelled. *Macarmick* v. *Buller*, 1 Cox, 357.

3. The transfer of stock, the property of a married woman, to the husband, merely as trustee, will not vest it in him so as to entitle his representatives. *Wall* v. *Tomlinson*, 16 Ves. 413.

4. A married woman has a right to dispose of property, settled in trust for her separate use, to be paid into her hands on her receipt, &c. unless restrained to payment, not by anticipation. *Brandon* v. *Robinson*, 18 Ves. 434.

5. Where a married woman expressly stipulates, that in the event of her surviving, the property shall be hers, reserving no power of disposition over it during the coverture, there are no means by which she can dispose of it while she remains covert. *Lee* v. *Muggridge*, 1 V. & B. 123.

6. It is extremely doubtful, whether, under a contract of the husband to sell the estate of his wife, a court of equity will decree him to procure her to levy a fine; and no case has gone so far as to compel a father to procure his son to join in a recovery. *Howel* v. *George*, 1 Mad. 7.

7. A married woman, by her consent in a court of equity, can only depart with that interest which is the creature of a court of equity: such equity arises upon the husband's legal right of present possession. The principle has no application to a remainder or reversion, until it falls into possession. If the wife could, by her consent, pass a remainder or reversion in personal property to the husband, she would not only part with a future possible equity, but with her chance of possessing the whole property by surviving her husband, and a court of equity interferes to protect the property of the wife against the legal rights of the husband; and will never lend itself as an instrument to enable the husband to acquire a right in the wife's personal property which he could not acquire at law. *Pickard* v. *Roberts*, 3 Mad. 384.

8. Payment of a sum of money under £200 to the husband in right of the wife, ordered, upon the petition of the husband and wife, notwithstanding a suggestion that the petition had not her concurrence. *Elworthy* v. *Wickstead*, 1 Jacob & Walker, 69.

9. Where the husband prevents access to his wife with the view of preventing her executing her power of appointment, whether the court can interfere by injunction—*Quære*. *Middleton* v. *Middleton*, 1 Jacob & Walker, 94.

10. An order, disposing of the real estate of a feme covert, made on her consent, and acquiesced in during her life, will not be set aside on a doubtful case, made many years afterwards by the representatives. *Burke* v. *Crosbie*, 1 B. & B. 489.

(f) Her Capacity to make a Will.

1. A feme covert, with the consent of her husband, may make a complete will of personal estate, and appoint a general executor, who will, in that case, be the general representative, not only of the feme covert, but of any testator of whose will the feme covert was executrix; and where the feme covert, being executrix of her former husband, made a will in execution of a power under her marriage settlement, to dispose of £700, and appointed one her executrix, generally, upon which the ecclesiastical court had granted probate generally, such executrix will be a general representative, both of the feme covert and of her former husband. *Barr* v. *Carter*, 2 Cox, 429.

2. Probate of the will of a feme covert, which is now necessary, is limited, as to any beneficial interest, to her power by the assent of her husband; but as executrix of another person, a feme covert has the power of continuing the representation vested in her by law, without the authority of her husband. *Stevens* v. *Bagwell*, 15 Ves. 139.

3. A feme covert can make a will, under a power given to her in the form of a bond. *Moss* v. *Brander*, 1 Phil. 254.

4. A married woman can make a will of property left, during coverture, to her sole and separate use. *Tappenden* v. *Walsh*, 1 Phil. 352.

III. Articles of the Peace and Writ of Supplicavit.

1. Order for security, under a *supplicavit*, on articles exhibited by the wife against her husband, under statute 2 Jac. 1, c. 8, stating acts of ill usage and threats. It appearing that the husband had received on his marriage a fortune of nearly £5000, security required was, himself in £1000 and two sureties in £300. *Heyn's case*, 2 V. & B. 182.

2. And in a subsequent case, where the articles of the wife stated personal ill usage of a very aggravated nature, the security required from the husband was, himself in £1000 and two sureties in £500 each. *Dobbyn's case*, 3 V. & B. 183.

3. The security under a writ of *supplicavit*, on articles by a wife against her husband, is not to be unreasonable, with reference to his circumstances; but leave was given to apply again in case of a repetition of ill treatment. *Tunnicliff's case*, 1 Jacob & Walker, 348.

IV. Separation.

1. There is no doubt of the general jurisdiction of a court of equity, to decree the specific performance of articles between husband and wife for a separation, and a separate maintenance; but the court exercises its discretion in this case very cautiously, and will not give its assistance until it has seen whether from the circumstances of the case, there is, or is not a probability of the parties being reconciled. A sentence in the ecclesiastical court for the restitution of conjugal rites, is a reason for the court to refuse to give its assistance in such a case; and in general, if such an agreement is not fit to be enforced, the court will, on a cross bill, order it to be delivered up; although there may be cases, in which no relief will be given to either party. *Fletcher* v. *Fletcher*, 2 Cox. 99.

2. But equity will not interfere in an agreement between husband and wife, for the wife to give up part of her separate property to the husband, in consideration of their living separate, and although the application to the court is made by the wife. *Durand* v. *Durand*, 2 Cox, 207.

3. A court of equity will not carry into execution articles of separation between husband and wife; but engagements between the husband and a third party, as a trustee, though originating out of and relating to such separation, are valid, and may be enforced in equity. *Worrall* v. *Jacob*. 3 Mer. 268.

4. The general doctrine, held to be clear, (notwithstanding the doubts that might be supposed to hang over it from some of the reports) that a reconciliation of married persons, after a separation decreed, entirely does away the effect of the decree of separation. *Bateman* v. *Countess of Ross*, 1 Dow, 235.

5. The mere circumstances of a husband and wife living under the same roof after a separation, is not of itself proof of reconciliation, if it appears that they live in a state of animosity. *Ibid.*

6. Separation *a mensa et thoro* decreed where the adultery of the husband was fully proved, and cruelty, though no acts of personal violence, and after the parties had lived together more than twenty years. *Otway* v. *Otway*, 2 Phil. 95.

7. Separation *a mensa et thoro* decreed at the suit of the wife, upon evidence of repeated acts of cruelty of the husband. *Harris* v. *Harris*, 2 Phil. 111.

8. Where the husband, upon conviction of the adultery of the wife, deserted her without leaving her any provision, held to be entitled nevertheless to separation, where it had not been in the husband's power to provide for her, and upon proof of her adultery. *Reeves* v. *Reeves*, 2 Phil. 125.

9. Where the conduct of the wife towards the husband was proved to have been extremely irritating and reprehensible, a complaint of cruelty brought by her against the husband was dismissed. *Waring* v. *Waring*, 2 Phil. 132.

10. Proceedings instituted by the husband against the wife for adultery, after the death of him with whom the adultery had been committed, though a verdict by default had been given against him, and after a delay of five years, a separation was refused, the delay being unaccounted for; but as the adultery was fully proved, and the embarrassment of the husband clear, the court gave him liberty to pray to have the conclusion of the cause rescinded, in order to offer affidavits to repel all probability of connivance or acquiescence, and to account for the delay. *Best* v. *Best*, 2 Phil. 161.

11. Upon a satisfactory affidavit being produced, separation was decreed. *Ibid*, 172.

12. Separation *a mensa et thoro* decreed at the suit of the wife, upon clear evidence of aggravated cruelty and adultery. *Smith* v. *Smith*, 2 Phil. 207.

V. Maintenance or Alimony.

1. Upon the petition of a feme covert, stating that her husband representing himself as a man of fortune, had deceived her into a marriage with him; and that since her marriage she had endured great hardship and cruelty, while living with him in different gaols where he had been confined for debt, and that she and her child were destitute of support. The court ordered her to be allowed maintenance for herself and child out of a fund standing in the name of the accountant-general, to which the husband had become entitled in right of his wife, during the coverture, notwithstanding the husband opposed the petition. *Atherton* v. *Nowell*, 1 Cox, 229.

2. Where the wife, who was entitled to the interest of a fund under a will as separate property, was insane, though no commission had issued, and had been maintained in Scotland by the husband; and an only child, an infant, was entitled to the capital of the fund, in the event of surviving his mother: upon the husband's application for an allowance, inquiries were directed as to the just maintenance and the husband's ability, with due regard to her comfort, &c. *Brodie* v. *Barry*, 2 V. & B. 36.

3. Where husband and wife lived separate by mutual consent, and there was no evidence of any cruelty on the part of the husband, who, before marriage, had settled part of her property upon her, the court refused to decree maintenance. *Duncan* v. *Duncan*, Coop. 254.

4. Where the delinquency of the husband was established, and the bulk of the joint fortune came from the wife, a moiety was given for permanent alimony, but given from the date of the sentence only, and not from the return of the citation. *Cooke* v *Cooke*, 2 Phil. 40.

5. Where the joint property was £5,500 per annum, the greater part of which came from the wife, and the family of six children were maintained by the father, the court decreed permanent alimony of £2000 per annum, from the date of the sentence of separation. The delinquency of the husband being very gross. *Otway* v. *Otway*, 2 Phil. 109.

6. Alimony allowed to the wife pending a suit against the husband for cruelty and adultery, where the suit did not appear vexatious, or was attended with dilatory proceedings; and the income of the husband, part of which arose from the wife's fortune, being £1500 per annum, the wife was allowed £200 per

annum, in addition to £300 per annum, her separate property. There was one child, which the wife was desirous of having, but it being detained by the husband, the court would not lessen the alimony on account of its maintenance. *Smith* v. *Smith*, 2 Phil. 152.

7. In an aggravated case of cruelty and adultery on the part of the husband, and where the joint income was £2000, the bulk of which, originally belonging to the wife, and settled on her, had been given up by her to the husband, the court allowed £450 for alimony, pending suit, and £1000 as permanent alimony. *Smith* v. *Smith*, 2 Phil. 235.

8. Where no delay was attributable, alimony was given from the date of the sentence and the appeal; but in a case of delay, it would be decreed only from the return of the inhibition. *Loveden* v. *Loveden*, 1 Phil. 208.

VI. Survivorship.

1. Where a feme covert was entitled to one-sixth of the residue of a testator's estate, upon a bill filed by another residuary legatee, to which she and her husband were defendants, a decree was made for a sale of the estate, and payment, *inter alios*, of her share: held, that the share so decreed vested absolutely in the husband by survivorship, and not subject to the debts of the wife; and that the court will interpose to recover such money from the hands of the wife's creditors. *Forbes* v. *Phipps*, 1 Eden, 502.

2. Husband and wife, seised under a settlement for their lives successively, with remainders in strict settlement, and to the heirs of the wife, having no issue, joined in a mortgage by fine, declaring the ultimate use to the survivor.

Declaration, or clear intention equivalent to it, is necessary to change the uses; and where no purpose appears beyond the mortgage, the title of the wife will be established against claims under the husband surviving her. *Innes* v. *Jackson*, 16 Ves. 356.

3. Stock, the property of a married woman, is not reduced into possession so as to be vested in the husband, by a transfer to him merely as a trustee. *Wall* v. *Tomlinson*, 16 Ves. 413.

4. A wife, after marriage, received from her father a cheque in her favor upon his bankers, presented it, and received in exchange a promissory note for the amount. Part of the principal money on the note was paid to the husband; and he also received the interest due on the remainder up to the time of his death. Held, that upon the death of the husband, the wife was entitled to the note as a *chose in action*, which, not being reduced into possession, had survived to her. *Nash* v. *Nash*, 2 Mad. 133.

5. Husband and wife join in an assignment of a reversionary interest of the wife in certain trust stock, as security for the payment of an annuity granted by the husband; the husband afterwards takes the benefit of the Insolvent Debtor's Act, and a general assignment is made of his property: the person, on whose death the wife was to take, dies, and then the husband dies, without having done any other act to reduce the stock into pos ssion. Held, the first assignment put the assignee in the same situation as the husband, and he dying before his wife, the property survived to her, notwithstanding her execution of the assignment; and the general assignment under the Insolvent Debtor's Act does not pass a reversionary interest in the wife, she surviving her husband, any more than a general assignment in bankruptcy. *Hornsby* v. *Lee*, 2 Mad. 16.

6. Wife, an infant, being entitled to a present interest in certain personal property, and also to certain other contingent interests, a deed of separation was entered into between herself, her father, and her husband, by which she was to retain her present interest in the property; and it was agreed that the husband should have a certain share in the contingent property, if it should fall into possession.

The husband died before the wife. Held, that the deed was a nullity as to the wife; and that the contingent interest falling into possession, she was entitled by survivorship. *Stamper* v. *Barker*, 5 Mad. 157.

7. A fund in court, belonging to a married woman, being assigned by her husband, an order was made, the wife being examined and consenting, that part should be transferred to the assignee, and that the interest of the other part should be paid to the separate use of the wife, with liberty for the persons entitled to apply on her death. She died, having survived her husband. Held, that the

assignee was not entitled to the other part. *Johnson* v. *Johnson*,

1 Jacob & Walker, 472.

8. Voluntary assignment by husband of a fund in court belonging to the wife, will not bar her right by survivorship. *Ibid.*

VII. Suits by or against the Wife.

1. Where a bill prays relief against the husband, and discovery against the wife as agent to her husband, demurrer as to the wife will be allowed. *Le Texier* v. *Margravine of Anspach.*

15 Ves. 159.

2. Demurrer of a married woman to a bill of discovery against her and her husband, in aid of an action for a debt upon her account, allowed. *Barron* v. *Grillard,* 3 V. & B. 165.

3. In general, a feme covert cannot contract; and if made a defendant, may demur to the whole bill. To make her liable, it is necessary to shew she has separate property, and has contracted in respect of it: for though the court may decree against the separate estate of the feme covert, it never decrees against her person. To a bill against husband and wife for specific performance of an agreement to purchase, containing a statement that the wife had separate monies and property of her own to a larger amount than the purchase money, and an interrogatory in support of the statement, a demurrer by the wife was allowed, as the discovery could not benefit the plaintiff. *Francis* v. *Wignell*, 1 Mad. 258.

4. Upon a bill against a feme covert, seeking an account of monies received under a will fraudulently obtained by her, and placed out in securities in trustees' names, and that the same might be repaid out of her separate estate, the court held, that supposing no relief could be had against the separate estate, yet, taking the statements in the bill to be true, the trustees would be bound to transfer the property to the representatives of the testatrix, a general demurrer was therefore overruled. *Greatley* v. *Noble,*

3 Mad 79.

5. Husband and wife, being defendants to a suit, and the wife living separate from the husband, he was allowed, on his own affidavit of the fact, and that he had no control or influence over her, to put in a separate answer, and an order was made that he should not be liable to process, if she neglected to put in an answer. *Barry* v. *Cane*, 3 Mad. 472.

6. When husband and wife are defendants, and, by the death of the husband, a new interest arises to the wife, the suit becomes defective, a supplemental bill is necessary, and she is not bound by the answer put in during the coverture. *Mole* v. *Smith*, 1 Jacob & Walker, 665.

7. An attendant term having become vested in the wife of the owner of the inheritance, as representative of the trustee, whether an assignment of it to a purchaser, to prevent dower, can be compelled—*Quære. Mole* v. *Smith,*

1 Jacob & Walker, 665.

8. In the Ecclesiastical Court, if cruelty and adultery are both charged against a husband, it is not absolutely necessary to prove cruelty. *Smith* v. *Smith*,

2 Phil. 67.

9. In a libel in the Ecclesiastical Court, in a cause for the restitution of conjugal rights, it is not necessary to plead specifically that the parties were of twenty-one years of age, provided it is pleaded that the marriage was lawfully solemnized in consequence of a licence duly obtained. *Pool* v. *Pool*,

2 Phil. 119

10. A suit by the wife against the husband for adultery, was dismissed, on account of delay in the proceedings, and where there appeared to have been long acquiescence and condonation. *Walker* v. *Walker*, 2 Phil. 153.

11. The committee of a lunatic may institute proceedings in the Ecclesiastical Court against the wife of the lunatic for adultery. *Parnell* v. *Parnell*,

2 Phil. 158.

12. A feme covert, who lives apart from her husband, and holds herself out, and contracts debts as a feme sole, will not be entitled at law to summary relief, but left to her plea of coverture. *Ex parte Watson*, 16 Ves. 266.

13. In the Ecclesiastical Court affidavit of the husband was admitted to satisfy the court as to the reason of his delay in instituting proceedings against the wife for a separation. *Best* v. *Best*,

2 Phil. 172.

BASTARD.

(a) Devise or Bequest to.

1. A bequest "to such child or children, if more than one, as A. may happen to be ensient of by me;" a natural child, of which she was then pregnant, cannot take under this bequest: though a bequest to the natural child of which a woman was ensient, without reference to any person as the father, would probably be good, there being in that case no uncertainty. *Earle* v. *Wilson*, 17 Ves. 528.

2. A bastard cannot take as the issue of a particular person, until it has acquired the reputation of being the child of that person, which cannot be before its birth. *Ibid.* 17 Ves. 531.

3. Testator, after directing his two illegitimate children by C. B., naming them, to be maintained out of his estate, gave them certain legacies; he then gave to all the other children he might have by C.B. £6000 each, and after other bequests gave the residue among his said children: by codicil the testator directed maintenance of another child by C. B. born after the date of the will, and interlined his name with the names of the other children in the first part of the will. Held that the child last born, was entitled to maintenance and a share of the residue, but not to the legacy of £6000, as the interlineation would not enable him to take under the prospective legacy. *Arnold* v. *Preston*, 18 Ves. 288.

4. A natural child cannot take by a prospective bequest to the natural children of his father, made before his birth. *Ibid.*

5. A devise by a married man, having no legitimate children, "to the children which I may have by A., and living at my decease;" natural children, who before the date of the will had acquired the reputation of being his children by her, are entitled as upon the whole will intended and sufficiently described, rejecting a description of the devisees in passages of a written book unattested, but of which probate was admitted under a reference in the will to "the observations and directions, which I shall leave in a written book." *Wilkinson* v. *Adams*, 1 V. & B. 422.

6. Whether if there were also legitimate children by the same mother, they could take together with the illegitimate children, under the same description; and whether future illegitimate children can take under any description in a will— *Quære.* *Ibid.*

7. An illegitimate child cannot take by the description of child of his reputed father, until he has acquired the reputation of being such child. S. C. 1 V. & B. 462.

8. A bastard may take by purchase if sufficiently described, and having acquired the reputation of the child of that person. S. C. 1 V. & B. 466.

9. Bequest to the child, of which an unmarried woman was then ensient, without reference to any person as the father, is good; the object of the bequest being sufficiently pointed out by the description. *Gordon* v. *Gordon*, 1 Mer. 141.

10. But whether a bequest to an illegitimate child not *in esse* would be good, although described as the child of a particular mother—*Quære.* *Ibid.*

11. Illegitimate children may take a legacy under the general name of children, where it was known to the testator at the date of the will that there were no legitimate children in existence, or capable of coming into existence; so a legacy "to the children of C. K. who shall be living at the testator's death," and at the date of the will C. K. was dead, leaving three illegitimate children, but never having had any legitimate children, the illegitimate children were held entitled. *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419.

BILL OF EXCHANGE AND PROMISSORY NOTE.

BILL OF EXCHANGE.

(a) *Generally.*

1. An authority given to A. to draw bills in the name of B., must be taken as given to be made use of in the common course of business, therefore may be exercised by the clerks of A. *Ex parte Sutton*, 2 Cox, 84.

2. Whether bills of exchange may be attached in Scotland, under circumstances, as being in the hands of an agent or factor of the debtor, though not against onerous endorsees—*Quære*. *Stevenson* v. *Anderson*, 2 V. & B. 411.

3. The acceptor of a bill of exchange is considered as a debtor and not a surety. *Grant* v. *Mills*, 2 V. & B. 309.

4. If, by giving an acceptance a debt is constituted, which may be proved under a commission, that is as much a consideration for a bill of exchange, as if the value of the bill had actually been paid in money. *Ex parte Greenwood*, Buck, 237.

(b) *Transfer of.*

1. A mere discount of a bill without the endorsement of the party who receives the money, does not give the holder of the bill any claim against such party. *Ex parte Roberts*, 2 Cox. 171.

2. Distinction between discount and deposit of bills depending on not the mere fact of endorsement, but the intention to make an absolute transfer, giving full power to go against all parties on the bills, or merely to enable the person with whom they are deposited, to receive the amount from the other parties. Endorsement is *prima facie* evidence of the former, unless the object of mere deposit is clearly shewn. *Ex parte Twogood*, 19 Ves. 229.

3. Inference from a mortgage, and the want of endorsement upon some bills in a remittance, that the object as to the whole was deposit, not discount. *Ex parte Baldwin*, Cited 19 Ves. 231.

4. A. and B. are partners in a trade carried on in the name of A. only, and A. draws bills in his own name, payable to his order, which he endorses, and afterward B. also endorses, and procures them to be discounted; there is no legal contract for a holder to maintain an action against A. and B. upon the bills, unless it appears that A. drew and endorsed the bills in the character of, and as representing A. & B. *Ex parte Bolitho*, Buck, 100.

5. A person discounting the bills may have a right of action against A. and B. jointly, for money had and received, if he can shew that they received the money, by means of the bills, for partnership purposes. *Ibid.*

(c) *Where a Discharge or Satisfaction of the Debt.*

1. The taking a note is not payment of the debt, but the creditor may, nevertheless, maintain his action for goods sold and delivered. *Ex parte Seddon*, 2 Cox, 49.

2. A debtor giving to his creditor a bill, endorsed by him or not, in discharge and satisfaction of the debt; that is a discharge, and the holder becomes a creditor in respect of the bill: but if a bill is given, and nothing more passes, the bill will be a satisfaction if paid, otherwise not. *Ex parte Hodgkinson*, 19 Ves. 295. Coop. 101.

3. Bills of exchange are to be considered not as a security, but a mode of payment; therefore the taking bills of exchange for the purchase-money of an estate, is no waver of the vendor's lien. *Grant* v. *Mills*. 2 V. & B. 306.

4. Specialty security is not waved by taking a promissory note for the balance of interest due on such security. *Curtis* v. *Rush*, 2 V. & B. 416.

5. Vendor held not to have waved his lien on the estate sold, by taking the promissory note of the vendee, and receiving its amount by discount. *Ex parte Loaring*, 2 Rose, 79.

(d) *Notice of Dishonor.*

1. Notice of dishonor to the drawer of a bill of exchange is not necessary, if the acceptor has no effects; but if the bill is drawn for the accommodation of the acceptor, or if in the result of various dealings, the surplus of accommodation is on the side of the acceptor, he is, in regard to the drawer, in the situation of an acceptor with effects, and the failure of giving notice is equally detrimental. *Ex parte Heath*, 2 V. & B. 240.

2. But whether securities, as title

deeds, and short bills, are effects for this purpose—*Quære.* *Ibid.*

3. Bankruptcy of acceptor of a bill of exchange does not dispense with notice to the drawer. *Boultbee* v. *Stubbs,* 18 Ves. 21.

4. Immediate notice of a bill dishonored at an early hour is good. *Ex parte Moline,* 19 Ves. 216. 1 Rose, 303.

5. The bankrupt represents his estate till assignees are chosen, therefore notice of a dishonored bill to a bankrupt, as drawer, before the choice of assignees, is good. *Ibid.*

(*e*) *Equitable Relief upon Bill or Note lost.*

1. A bill for payment of a promissory note, which had been cut in two parts, one being produced, and the other alleged to be lost, although offering an indemnity, dismissed for want of equity; as, proving the loss, an action at law might be maintained. *Mossop* v. *Eadon,* 16 Ves. 430.

2. The endorser of a bill of exchange which has been lost, has a remedy against the acceptor, by bill in equity, to compel payment; and that although he might have recovered on the bill at law, his equity being founded on the want of power in a court of law to impose terms on the plaintiff, of giving the defendant security against the forthcoming of the bill, which would have been good ground for an injunction to restrain such an action; nor is it any answer to such a suit, that the bill of exchange was a mere accommodation bill, that the plaintiff might have applied before, or that the drawer has since become insolvent. *Davies* v. *Dodd,* 4 Price, 176.

3. The endorsee seeking relief in equity against the acceptor of a lost bill of exchange, is not bound to institute his suit within any given period, although the drawer may in the meantime have become insolvent. *Ibid.*

BLASPHEMY.

1. Blasphemy was an offence punishable at common law prior to the statutes 9 and 10 W. 3, c. 32, which does not take away the common law punishments for blasphemy. *Attorney General* v. *Pearson,* 3 Mer. 407.

BOND.

BOND.

(*a*) *Consideration of.*

1. Voluntary bond, though void against creditors, being valid as between the parties, its surrender is a consideration that will sustain a substituted bond against creditors, unless with a fraudulent design, as by an insolvent, to substitute a valid for an invalid security against creditors. *Ex parte Berry,* 19 Ves. 218.

2. Where marriage is one of the considerations of a bond, the amount of pecuniary consideration is immaterial. *Prebble* v. *Boghurst,* 1 Swan. 319.

3. A. having by settlement secured to his wife an ample jointure, passed his bond to her after marriage, to answer a particular purpose; this bond was declared to be voluntary, and set aside in favor of the legatee of the husband, against the representative of the wife. *Stratford* v. *Powell,* 1 B. & B. 1.

(*b*) *Joint and Several.*

1. Where it appears, on the face of a

joint bond, that it was intended to be joint and several, both courts of law and equity will consider it as joint and several: but a court of equity, on the ground of mistake, will go further than a court of law. And where a bond is in form only a joint bond, and it is suggested to have been the intention of the parties to make it joint and several, the court will refer it to the Master, to ascertain what was the intention of the parties. *Ex parte Symonds*, 1 Cox, 200.

2. Under a joint and several bond the obligee, though he might have several executions, cou'd not bring a joint and also several actions.
Ex parte Brown, ——— *Munton* } 1 V. & B. 65.

(*c*) *Construction of.*

1. A grandfather, in consideration of a bond from the father to grant him an annuity of £50 during his life, enters into a counter-bond with the father, conditioned for payment to the son of a like annuity, in case he was not sufficiently provided for during the life of the grandfather, exclusive of any allowance from his father; the son obtains, through some other interest, a place in the Ordnance Office, with a salary exceeding the amount of the annuity: this was not a sufficient provision within the meaning of the bond, being an office only during pleasure; whereas the provision in the contemplation of the parties must have been one of a permanent nature. *Peché* v. *Smith*, 3 Mer. 312.

2. A bond, conditioned to settle lands, "if the obligor shall become seised," will not affect lands of which he is seised at the date of the bond. *Prebble* v. *Boghurst*, 1 Swan. 321. 1 Wil. 168.

3. A bond, executed on the marriage of the obligor, conditioned to settle land "if he should become seised in possession," affects copyhold as well as freehold. S. C. 1 Swan. 580.

(*d*) *Payment or Satisfaction of.*

1. The presumption of payment of a bond after twenty years, may be repelled by evidence that the obligor had no opportunity or means of payment. *Fladong* v. *Winter*, 19 Ves. 196.

2. A bond for the performance of a covenant to pay an annuity until a person should be in the enjoyment of a benefice which he might hold during his life, of the yearly value of £600, held to be satisfied by his induction to a living of that value accompanied with a bond to resign in favor of either of two sons of the patron, when qualified to take it; but liberty was given to take the opinion of a court of law.
Ex parte Rainier, *Rowlatt* v. *Rowlatt*, } 1 J. & W. 280.

(*e*) *Forbearance of Payment.*

1. If a bond is assigned by the obligee towards satisfaction of a debt owing by him to another person, such assignee is chargeable for wilful default in forbearing the obligor, to the amonnt of any loss incurred by such forbearance. *Ex parte Mure*, 2 Cox, 63.

(*f*) *Penalty.*

1. The penalty of a bond is never considered in a court of equity as the price of a man's doing what he has expressly agreed not to do. And where a retiring partner sold the good will of the concern to the continuing partner, and entered into a bond, with a penalty for carrying on the same business, the court granted an injunction to restrain an action on the bond, upon payment of the damage actually sustained, to be ascertained by an issue *quantum damnificatus;* for the court would restrain the obligor from setting up a trade in opposition to his own agreement, though he had paid the penalty. *Hardy* v. *Martin*, 1 Cox, 26.

(*g*) *Equitable Relief against.*

1. In a suit to set aside a bond given by the plaintiff to the defendants, his bankers, for what was due to them from plaintiff's bailiff, on a general balance of account, under which they claimed the amount of bills accepted by the bailiff in plaintiff's name, though without his knowledge or participation in the proceeds, the court directed the defendants to sue the plaintiff at law. The defendants accordingly selecting such of the bills as were just sufficient to cover their claim, brought actions and recovered, except on one, which bore an en-

dorsed receipt. It was held, that the defendants had no equity against the plaintiff, in respect of the bill upon which they had failed at law, and if they had any equity, it was too late to insist upon it; on further directions, the course should have been by motion or petition for a new trial, and that the plaintiff was entitled to a perpetual injunction, but not to have the bills delivered up to be cancelled. *Holworthy* v. *Mortlock*, 1 Cox, 141.

2. Where a sum of money was advanced to a necessitous heir, by subscription from different persons, including his attorney, to enable such heir to prosecute suits; and he gave an absolute bond for double the sum lent, with a defeasance executed some days after, purporting that, if he did not recover the estate, or half of it, the bond should be delivered up: the transaction was held to be unconscionable, savouring of champerty, and dangerous to public justice; and the bond was decreed to be delivered up to be cancelled, upon payment of the sum actually advanced, with interest, but deducting plaintiff's costs. *Strachan* v. *Brander*, 1 Eden, 303.

3. A father having advanced a child in its infancy, upon his coming of age takes a bond from him to a greater amount than the sums advanced: held, the bond obtained by parental influence, and was decreed to be set aside altogether, and not to stand as a security for the advancement, that not being a debt; and a loose expression in a letter from the son cannot be considered a confirmation. *Carpenter* v. *Herriot*, 1 Eden, 338.

4. Where equity relieves against a bond as unconscionable, the court will not allow even a *bona fide* creditor, to whom the bond has been assigned as a security for his debt, to put it in suit, because all equities follow the bond into whatever hands it may have come; and the court will order the bond to be delivered up to be cancelled. *Hamil* v. *Stokes*, 4 Price, 161. Dan. 20.

5. A plaintiff praying an assignment from the defendant of a bond, alleged to have been satisfied by the payment of the sum due on it by the testator in his lifetime, on account of the defendant, referred to the Deputy Remembrancer to ascertain the facts of the debt having been satisfied, on whose account, and whether it was a specialty, or due on the bond. *Jackson* v. *Radford*, 4 Price, 274.

6. Such an assignment not being available, the court would direct (if they relieved the plaintiff), that the obligees shall permit their names to be used by the plaintiff in putting it in suit. *Ibid.*

7. A bond was given by the purchaser of a contingent interest, which no longer existed at the time of the bargain, (as of the reversion expectant on an estate tail, the tenant in tail having in fact suffered a recovery). A court of equity will order such bond to be delivered up to be cancelled, and the interest paid on it to be refunded, although there was no fraud, and both parties were alike ignorant of the fact of the contingency having been destroyed. *Hitchcock* v. *Giddings*, 4 Price, 135. Dan. 1.

8. Bond given for securing a premium, payable by instalments, as the consideration of an admission to a partnership for a certain period, will be ordered to be delivered up to be cancelled, if the original partner cause the other to be made bankrupt, whereby the partnership is dissolved. *Hamil* v. *Stokes*, 4 Price, 161. Dan. 20.

9. Post-obit bonds, though the risk had been incurred, held to be available only for the money actually advanced for them on account of the confidential situation in which the parties stood with respect to each other. *Bernal* v. *Marquis of Donegal*, 3 Dow, 133.

10. Bill to restrain proceedings at law on a bond and injunction, granted. The bond held to be a valid security; but instead of dismissing the bill as to the injunction, the court below decrees payment, with interest, not from the date or from the time at which the amount was made payable, but from a subsequent period, at which time only it appeared that the bond was intended by the parties to be payable. This, it seems, is correct; for the bond is relieved against to a certain extent, and the plaintiff must be presumed to have consented to have the relief made effectual according to the rights of the parties. *Daly* v. *Kelly*, 4 Dow, 437, 438.

BOUNDARIES.

BOUNDARIES.

(*a*) *Jurisdiction.*

1. All the cases where the court has entertained suits for establishing boundaries, have been where the soil itself was in question, or there might have been a multiplicity of suits. Commissions to fix boundaries of legal estates are not of course; there ought to be some equity arising from the acts of the parties to give the court jurisdiction. *Wake* v. *Conyers*, 1 Eden, 331. 2 Cox, 360.

2. Jurisdiction of the Court of Chancery, as to granting a commission to ascertain boundaries, took its commencement from the writ *de rationabilibus divisis*, or that *de perambulatione facienda*: and was first exercised only upon consent, then probably upon the application of one party having an equitable claim; and to such an exercise of the jurisdiction there is no objection: but a Court of Equity will not interfere between two independent proprietors, to force either to have his right so determined. *Speer* v. *Crawter*, 2 Mer. 410.

(*b*) *Commission to ascertain, when granted.*

1. Bill does not lie for the mere purpose of settling the boundaries of two manors. *Wake* v. *Conyers*, 1 Eden, 331. 2 Cox, 360.

2. A tenant contracts, among other obligations, to keep his landlord's property distinct from his own during his tenantcy, and to leave it clearly distinguished at the termination of it; and where the tenant permits the boundaries to be destroyed, so that the landlord's land cannot be distinguished from tenant's land, and restored specifically, the tenant must substitute land of equal value; such substituted land, or its value, to be ascertained by commission. *Attorney General* v. *Fullerton*, 2 V. & B. 263.

3. A bill by the lord of the manor of W. against the lord of the adjoining manor of I. (who was also lessee of the manor of W.) and against commissioners under an act for inclosing lands within the manor of I., alleging confusion of boundaries, arising out of the union of possession of the two manors; and that the defendants were proceeding, in combination together, to set out a boundary of the manor of I., which would include lands belonging to the manor of W., but that the subsisting lease would prevent the bringing an action of trespass; and the bill prayed a commission to set out the land lying within, and being part and parcel of, the manor of W. The answer of the defendant, lord of the manor of I., set out boundaries, referring to perambulations made previously to the union of possession; and, the lease having expired since the filing of the bill, and it not being established in evidence that there was confusion of boundaries occasioned by default or neglect of the owners of I., while lessees of W., the bill was dismissed, with costs as against the commissioners, but without costs as against the other defendant. *Speer* v. *Crawter*, 2 Mer. 410.

4. The circumstance of confusion of boundaries furnishes *per se* no ground for the interposition of the Court of Chancery. *Speer* v. *Crawter*, 2 Mer. 418.

5. A commission to ascertain and distinguish boundaries, and if not to be distinguished, to set out lands of equal value, upon a bill by a prebendary against lessees of the prebendal lands, also owners of other lands within the parish, with which the prebendal lands had become intermixed and confounded, by reason of the unity of possession. *Willis* v. *Parkinson*, 2 Mer. 507.

6. A termor, who by himself, or his under tenants, has suffered the boundaries between the demised premises and contiguous lands of his own, to become confused, is not entitled, after the expiration of the term, to a commission to

ascertain them in opposition to the assignee of the lessor who then entered, and had since continued in possession of both, it not being shewn that such possession was improperly obtained. *Miller* v. *Warmington*,
1 Jacob & Walker, 484.

(c) *Commissioners, naming.*

1. Lessees of prebendal lands, who are also owners of freehold and copyhold lands within the manor, constitute, quoad the prebendal rights, one person; and therefore, on a commission decreed to a prebendary to ascertain boundaries of the prebendal lands, the prebendary is entitled to name as many commissioners as his lessees. *Willis* v. *Parkinson*, 1 Swan. 9.

CANAL.

1. Though the court will not restrain an action of trespass by a party through whose estate a canal is cutting, for deviating from the line prescribed by the act of Parliament, because he has laid by and rested upon his legal rights, yet, if he obtains an injunction to restrain their deviating, and then moves to commit them, the court will not do so in a disputed case, without a trial by a jury, and directing an issue at law. *Agar* v. *Regent's Canal Company*, Coop. 77.

2. Equity cannot compel a resort to commissioners appointed under an act of Parliament to settle disputes between parties, arising from a navigation. In this case, a lease for years having expired, the court refused an injunction to restrain the landlord from proceeding to recover possession. *Stanhope* v. *Pilkington*, Coop. 193.

3. Persons authorised by act of Parliament to cut a canal, and required to appropriate certain sums for the construction and maintenance of works to protect a harbour in which the canal was intended to terminate, will not be restrained from cutting through their own lands at a distance from the harbour, in the event of a present insufficiency of funds for the completion of the undertaking, and pending an application to Parliament for further powers to levy money. *Mayor &c. of King's Lynn* v. *Pemberton*, 1 Swan. 244.

4. Persons authorised by act of Parliament to cut a canal, if their funds are insufficient for the completion of the undertaking, may, on the prompt application of the owner of lands through which they are cutting, be restrained from proceeding. *Mayor &c. of King's Lynn* v. *Pemberton*, 1 Swan. 250.

CASE.

1. Courts of law will not answer speculative questions; and therefore a case must state conveyances, &c. that may raise the question. *Bliss* v. *Collins*,
1 Jacob & Walker, 426.

2. A case sent for the opinion of a court of law, must be signed by the counsel on each side, and if either side refuse to sign, they are understood to wave the benefit of it. *Ibid.*

CHAMPERTY.

1. Assignment to navy agents of part of the subject of a prize suit then pending, void, amounting to champerty; viz. the unlawful maintenance of a suit, in consideration of a bargain for part of the thing, or some profit out of it; which is not confined to courts of common law. *Stevens* v. *Bagwell*, 15 Ves. 139.

2. A bond may be set aside where the consideration, though not strictly champerty, yet savors of it. *Wood* v. *Downes*, 18 Ves. 128.

CHARITY.

I. JURISDICTION.

1. A protestant dissenting chapel may be such a charity as to be the subject of an information by the Attorney General. *Attorney General* v. *Fowler*, 15 Ves. 85.

2. Information for the regulation of Harrow School, dismissed as to the removal of governors unduly elected according to the founder's statutes, they not being inhabitants of Harrow; the Court of Chancery not having jurisdiction with regard either to the election or amotion of corporators of any description, eleemosynary corporations being the subject of visitatorial jurisdiction: therefore, in the case of the crown becoming visitor for want of an heir of the founder, the removal of a *corporator de facto* must be sought by petition to the Great Seal, and not by bill or information. As to the effect of the time during which the defendants had held their offices of governors against an inquiry into their original eligibility—*Quære. The Attorney General* v. *Earl Clarendon*, 17 Ves. 491.

3. The internal management of a charity is the exclusive subject of visitatorial jurisdiction; but under a trust, as to the revenue, abuse by misapplication will be controled in the Court of Chancery, and in most cases, by petition, under the statute 52 Geo. 3, c. 161. *Ex parte Berkhamstead School*, 2 V. & B. 134.

4. Relief for charities by petition, instead of information, under the statute 52 Geo. 3, c. 101, is limited to questions of abuse of trust, as between the trustees and the objects of the charity, but is not applicable to an adverse claim to land, as having formerly belonged to the charity. *Ex parte Rees*, 3 V. & B. 10.

5. The jurisdiction under the statute 52 Geo. 3, c. 101, as to giving relief, in cases of abuse of charity, on petition; and 40 Geo. 3, c. 56, as to money entailed, is discretionary. S. C. 3 V. & B. 11.

6. Constructive trusts are not within the 52d. Geo. 3, c. 101, which gives relief upon petition, in the case of charities. *Ex parte Brown*, Coop. 295.

7. The statute 52 Geo. 3. c. 101, was meant to extend only to cases of plain breach of trust, committed by persons in their character of trustees, not to the case of benefits derived from such breaches of trust by third persons. *Ex parte Skinner,* 2 Mer. 453.

8. An information having been filed, and a petition presented with the same objects, the court cannot give relief upon the petition as to such as are regularly within its limits, and leave the rest to be disposed of on the information. *Ibid.*

9. It may be doubtful if a petition seeking a variation of a lease would be within the statute, 52 Geo. 3. c. 101, but a petition which prays an account of the assets of a deceased trustee is clearly not within it. *Ex parte Skinner,* 1 Wil. 4.

10. On a petition presented by inhabitant householders, under the statute, on account of a misapplication of the funds of a parish charity by the trustees, where the application does not extend to regulate or alter the charity, or to carry it into execution, the court of exchequer has jurisdiction, under the statute 52 Geo. 3. c. 101, although the charity be established by royal charter. *In re Chertsey Market,* 6 Price, 264.

II. Devise or Bequest.

(a) *Where valid.*

1. Devise of lands to "the thirteen fellows of Christ's, and the fellows of Gonville and Caius, living at the testator's death," is a devise for the benefit of the whole body corporate, not of the particular fellows in their natural capacities; and such devise is valid under the exception in the statute of mortmain. *Attorney General* v. *Tancred,* 1 Eden, 10.

2. A. by will executed before the statute of mortmain, directs B. to settle a freehold estate, to pay a sum not exceeding £100 per annum, in such manner, and upon such trust, on such a part of the poorer people of a parish as he should think and find to be a most proper charity; and B. in pursuance thereof, by will executed after the statute, appoints out of the same estate, a sum less than the £100 per annum: this second will is only an execution of the power in the first will, and being to be considered as part of such will is not affected by the statute of mortmain; and as the amount to be appointed was discretionary in B., it cannot be increased under the 43 Eliz. to the whole amount given by the will of A. *Attorney General* v. *Bradley.* 1 Eden, 482.

3. A bequest of money to be paid for preaching a sermon on Ascension-day, for keeping the chimes of the church in repair, and also to the singers in the gallery of the church, are all bequests to charitable uses, within 43 Eliz. *Turner* v. *Ogden,* 1 Cox, 316.

4. The testator directed the dividends of certain sums in the public funds, to be applied for or towards establishing a school, and afterwards directed that a salary should be paid to a school master, and the surplus of the dividends to be applied in buying books, fire, clothes, and other necessaries for the children, and placing them out as apprentices, but no part to be applied for victuals, drink, or lodging. Although it did not appear that there was any school in existence, the court thought this bequest was not void under the statute of mortmain, as the directions for the application of the fund would, before the statute, have excluded the court from applying any part in purchasing land or building. *Attorney General* v. *Williams,* 2 Cox, 387.

5. Trust by will to pay the income of testator's personal estate by his wife for life; enjoining her to cooperate with his trustees in carrying his wishes into execution, and directing her, with the advice and assistance of his trustees, to lay out one moiety in promoting charitable purposes as well of a public as a private nature, and more especially in relieving such poor distressed persons, either the widows or children of poor clergymen, or otherwise, as his wife shall judge most worthy and deserving objects, giving a preference to poor relations. Held, that the object was charity in general, with a preference, among the poor, of poor relations: the distribution to be at the discretion of the wife, with the advice and assistance, but not subject to the control of the trustees. *Waldo* v. *Caley,* 16 Ves. 206.

6. A legacy to be laid out in land in Scotland, for a charity, is not within the statute 9 Geo. 2. c. 36. *Mackintosh* v. *Townsend,* 16 Ves. 330.

7. Devise to A. and his heirs, with a direction that yearly he "and his heirs shall for ever divide and distribute, according to his and their discretion, among the testator's poor kinsmen and kinswomen, and amongst their offspring and is-

sue, dwelling within the county of Brecon, £20 by the year." This is in the nature of a charitable bequest among a particular description of poor; and the will, which was made in the year 1581, was sustained, and inquiries directed as to the poor relations dwelling within the county of Brecon. *The Attorney General* v. *Price*, 17 Ves. 371.

8. The testator by his will "directs" the rest and residue of all his effects "to be divided for" certain charitable purposes mentioned, "and other charitable purposes as I do intend to name hereafter." He afterwards makes a codicil, but names no charitable purposes. This is a good disposition of the residue in favor of charity, to be carried into execution by the court, regard being had to the objects particularly pointed out by the testator. *Mills* v. *Farmer*, 1 Mer. 55, 722.

9. A disposition by will in favor of a charity may be construed by rules different from those applicable to the case of individuals. *Ibid*, 1 Mer. 94, 101.

10. A devise to a corporation, upon trust "from time to time, yearly, for ever," to lay out the yearly rents and profits in the repair of the road, "at their discretion." Upon an information against the corporation, at the relation of the trustees of the road under the turnpike act, an account was directed from the time of passing the act. *Attorney General* v. *Brewers' Company*, 1 Mer. 495.

11. Bequest of money to be laid out in building upon land already in mortmain is good. *Attorney General* v. *Munby*, 1 Mer. 327.

12. A bequest of residue "to the widows and children of seamen belonging to the town of Liverpool," is a valid charitable bequest to be applied in aid of a subsisting charity for such poor sailors' widows and children as should, in the judgments of the persons appointed to administer, be deserving objects of it. *Powell* v. *the Attorney General*, 3 Mer. 48.

12. If a testator gives personal property to erect and endow a school or hospital, it must be considered, unless otherwise declared, that it was his intention that land should be acquired, and buildings made, as necessary parts of his purpose. But where the testator, after giving a sum of money to establish two charities, expressly directs, that "the said monies should not be applied in the purchase of land, or erection of buildings, in the expectation that other persons would, at their expense, purchase land and building for those purposes;" this takes the case out of the statute of mortmain: and the will, directing the interest to be paid annually to the trustees, it was held, they were entitled to such payments from the death of the testator, and that they must apply it in the maintenance and support of the charities, although the expectations of the testator, with respect to the purchase of land and buildings by other persons, were wholly disappointed. The charities were decreed to be established; and the particular manner of the administration of them to be considered after the accounts were taken. *Henshaw* v. *Atkinson*, 3 Mad. 306.

13. A bequest of money for the improvement of land already in mortmain, is valid. *Ibid*, 3 Mad. 310.

14. The testator directed a sum of money to be laid out in the funds, the interest and dividends to be applied in providing a proper school-house. This is a good charitable bequest, as a school-house may be hired; and that the dividends only should be so applied, is some evidence of an intention that land should not be purchased; and the charity may continue for ever without the purchase of land. And a bequest of a residue for the benefit of such public and private charities as the executors might think fit; and, amongst others, to establish a life-boat at Brighthelmstone, is also a valid charitable donation. But a part of the residue, being money on mortgage and a lease, did not pass, as being void under the statute; though such fixtures in the house leased, as the testator had a right to remove, being mere personal chattels, and forming also part of the residue, passed to the charities. *Johnston* v. *Swann*, 3 Mad. 457.

15. A bequest of a sum of money "for building a house for reduced gentlewomen," is valid, and not against the mortmain acts in Ireland. *Attorney General* v. *Power*, 1 B. & B. 145.

16. Whether a bequest of a sum of money, to be applied "in clothing such poor children as should be educated in the School of the Nunnery at Waterford," be legal—*Quære*. *Ibid*.

17. An inquiry directed to ascertain the character and description of the school. *Attorney General* v. *Power*, 1 B. & B. 145.

18. A bequest to Roman Catholic bishops, and their successors, in trust, would be good for the joint lives of the bishops, if they are particularly named, but subject to the control of the Court of Chancery. *Ibid.*

(*b*) *Void in Mortmain.*

1. The legislature intended, by the exception in the statute of mortmain, to save devises for the benefit of particular members, as well as of the whole body, and also such devises as were really and *bona fide* for the benefit of colleges, not those where the legal interest only passes to the college in trust for other charitable uses; but the exception extends only to colleges established at the time when the statute was enacted. *Attorney General* v. *Tancred*, 1 Eden, 10.

2. Devise was held to be void, being proved to be upon a secret trust for a charity; where the conveyances had been made by the devisees, and the trust declared, although the devisees denied by their answer having made any promise to convey. *Edwards* v. *Pike*, 1 Eden, 267.

3. A devise, by a will attested by three witnesses, to trustees and the heir of the survivor, upon a secret trust for a charity declared by an instrument, executed at the same time as the will, and attested by two witnesses only, was held void under the statute of mortmain. *Boson* v. *Statham*, 1 Eden, 508. 1 Cox, 16.

4. A devise of freehold and leasehold estates to trustees, with a direction to sell and buy ground, and erect an alms-house, and lay out the residue in land, is void under the statute of mortmain; and therefore so much of a decree at the Rolls, which declared, that if the trustees could obtain the gift of a piece of ground, they might erect an alms-house, giving them two years to procure such gift; and also that they were entitled to have the assets marshalled, so as to throw the debts, &c. on the leasehold, reversed on appeal by the Lord Chancellor. *Attorney General* v. *Tyndall*, 2 Eden, 207.

5. Where the testator, by will executed previous to the statute of mortmain 9 Geo. 2, devises real estate and personal estate to be laid out in land for a charity; and by a codicil not attested, but made subsequently to the statute, he confirms the will. This, as to the personal estate, operates as a new will, and the bequest of the personal estate is therefore void. *Attorney General* v. *Heartwell*, 2 Eden, 234.

6. A bequest of money to build and endow an hospital upon land not already in mortmain, is void under the statute of mortmain, 9 Geo. 2. *Pelham* v. *Anderson*, 2 Eden, 296.

7. A legacy towards the erecting and endowment of an hospital for the county of D. is void as within the statute of mortmain, if it be necessary to purchase land for the purpose; but it may go in aid of the endowment of any hospital already existing. *Foy* v. *Foy*, 1 Cox, 163.

8. A bequest of money to be laid out in land, and applied to a charitable use, but, until an eligible purchase can be made, to be laid out at interest, and applied in the same manner: it is imperative on the trustee to invest the money in land, the bequest therefore is void under the statute of mortmain; and a part of such money being given in favor of two persons by name, if given on a confidence in their officiating in the charity, it is a charitable bequest, and therefore void. *Grieves* v. *Case*, 2 Cox, 301.

9. A devise of real and personal estate, in trust for debts and legacies, some of which were to charities. These all void under the statute (9 Geo. 2, c. 36,) as a charge of charity legacies upon the real and leasehold estates and money on mortgage; but on a deficiency of assets the other legatees will be preferred to the heir. *Currie* v. *Pye*, 17 Ves. 462.

10. A recital in a will of property assigned to charitable uses, which assignment is void under the statute of mortmain, the grantor not having lived to the period prescribed by the statute for rendering the deed effectual, does not operate as a confirmation, or by way of relation, so as to pass the property assigned. *Attorney General* v. *Munby*, 1 Mer. 327.

11. Testator having several charges on lands, by his will directed his trustees and executors to convert all his property into ready money, and after payment of his debts, legacies, &c. to pay the residue to his wife. The wife survived the testator, and, by her will, disposed of the residue of her personal estate, after certain payments to charities. After her death, the charges on the lands were paid off. Held, that the monies charged on lands did not pass

to the charities, but that such bequest was void under the statute of mortmain. *Attorney General* v. *Harley*, 5 Mad. 321.

12. Where a testator, having bequeathed the residue of his personal estate to trustees, to be a perpetual endowment or maintenance for two schools, introduced the following clause in his will: "And I recommend that, at a convenient time, my money shall be collected together, and laid out in the purchase of a freehold messuage and tenement, or lands which are freehold, to be a perpetual endowment for the two schools." The bequest was held to be void, because the recommendation so to dispose of the money, being imperative upon the trustees, created a trust which left them no power to refrain from laying it out in land, and so brought the gift within the statute of mortmain. *Kirkbank* v. *Hudson*, 7 Price, 212.

13. Such a bequest would otherwise have been good; or, if there had been, in any part of the will, a discretion given to the trustees, as to laying out the money in land, or otherwise applying it to the use of the charity. *Ibid.*

(c) *Void, for Uncertainty.*

1. A bequest, in trust for such "benevolent purposes" as the trustees in their integrity and discretion may unanimously agree upon, cannot be supported as a charitable legacy; the word "benevolent" not being to be restricted to the sense of charitable, so as to authorise the court to say, that the application of the property must be confined to such objects as are, strictly speaking, objects of charity. The bequest, therefore, is void for uncertainty, and distributable among the next of kin. *James* v. *Allen*, 3 Mer. 17.

2. A bequest in Ireland, to Roman Catholic bishops and their successors, is void, no such characters being known to the laws of Ireland. *Attorney General* v. *Power*, 1 B. & B. 145.

(d) *Aided in Equity.*

1. The court will not martial assets to give effect to a bequest, void by the statute of mortmain.
Mogg v. *Hodges*, 1 Cox, 9.
Foy v. *Foy*, 1 Cox, 165.

2. Nor for the purpose of enlarging the personal estate for the benefit of a charity. *Attorney General* v. *Hurst*, 2 Cox, 364.

3. If the testator's intention appears to be to give the whole of a fund to a charity, the objects of which are not sufficient to exhaust the whole, the court will apply the residue as nearly to the testator's designation as it can. *Attorney General* v. *Painter-Stainers' Company*, 2 Cox, 51. *Attorney General* v. *Hurst*, 2 Cox, 364.

4. But, it is not sufficient that the testator has expressed a general intention to die testate, as to his whole property; there must be some words to guide the court to some object. *Attorney General* v. *Painter-Stainers' Company*, 2 Cox, 59.

5. In all cases in which a testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing left uncertain but the mode of effecting it, the court of chancery will supply the mode. *Mills* v. *Farmer*, 1 Mer. 95.

6. Where the intention to give to charitable purposes is clearly expressed in a will, the court will carry such intention into effect, whether the testator has or has not named an executor or trustee. *Ibid.* 1 Mer. 96.

III. Grant.

(a) *Valid or Invalid.*

1. A conveyance of land to a charitable use, enrolled within the time limited by the statute of 9 Geo. 2, c. 36, is not void by reason of any reservation to the grantor of a power of regulating the charity. It is sufficient that the deed is executed by the grantor, at the time of the enrolment, and need not be executed by the grantees. *Grieves* v. *Case*, 2 Cox, 301.

2. A grant by indenture, executed more than twelve months before the grantor's death, and duly enrolled, of a house and premises, held under a church lease, to Trinity College, Cambridge, on trust, for the use of the rector for the time being of G. This is a valid grant, under the statute of mortmain, notwithstanding the grantor was himself the rector of G., and retained the deed in his possession till his death. But an assignment of mortgaged premises, and of the principal sum due

thereon, to the same college on the like trust, but executed within twelve months before the assignor's death, is void, under the statute of mortmain, and cannot be set up by reference to a will made afterwards, giving the advowson of the living beneficially to the college. *Attorney General* v. *Munby*, 1 Mer. 327.

3. Grant of land to a college, not beneficially, but in trust for other objects, is not within the exception of the statute in favor of the universities. *Attorney General* v. *Munby*, 1 Mer. 327.

4. A parliamentary grant of a duty on coal, imported into a town upon the sea-coast, in aid of the pecuniary inability of the inhabitants to protect the town from the encroachments of the sea, is a gift to a charitable use. *Attorney General* v. *Brown*, 1 Swan. 265.

(*b*) *Aided in Equity.*

1. If the person has in himself full power to convey, and the uses are charitable, equity will aid a defective conveyance to such uses, under the statute 43 Eliz.; as where the conveyance was defective, the limitations of the uses being to certain officers of a corporation, and not to the corporation itself, the charity, being within the exception of the statute of mortmain, was established. *Attorney General* v. *Tancred*, 1 Eden, 10.

2. By letters patent of King Edward 6, the master, wardens, and commonalty of the mystery of skinners, of London, were incorporated as "governors of the posses-"sions, revenues, and goods of the free "grammar school of Sir A. J. in Tun-"bridge;" and enabled to receive lands and hereditaments of Sir A. J., for the support of the same. The said Sir A. J. made a will, devising the said lands and hereditaments, which was void, and only to be rendered valid by the 43 Eliz. By acts of parliament of the 14 and 31 Eliz. intituled, &c. *not noticing the will*, but reciting certain deeds and transactions relating to the said school; and reciting, that lands had been bought with Sir A. J.'s money; and reciting that, "in the "conveyance, the said Sir A. J. in trust "did join with himself one H. F." the said lands and hereditaments were vested in the said master, wardens, and commonalty of the mystery of the skinners, in their capacity of "governors of the pos-"sessions, revenues, and goods of the "free grammar school of Sir A. J., knight, "in the town of Tunbridge." In this case the will was rejected, although set up by the 43 Eliz., and had always been supposed by the company to have been part of the muniments of their estate. But a secret parol trust, in favor of the school exclusively, was inferred, from the other various instruments, to have been made before the will. *Attorney General* v. *The Skinners' Company*, 5 Mad. 173.

IV. How administered.

(*a*) *Trustees, Removal and Appointment of.*

1. Governors of an eleemosynary corporation, even where their election might be said to be a fraud, are not removed, without a petition to the Lord Chancellor in his visitatorial capacity; but corporations, constituted trustees, have sometimes been, by decree, divested of their trust for an abuse of it, as any other trustees. *Attorney General* v. *Earl Clarendon*, 17 Ves. 499.

2. In a case of breach of trust, a corporation, who were trustees, were, on petition under the statute 52 Geo. 3, c. 101, divested of their trust, and ordered to convey to new trustees. *Ex parte Greenhouse*, 1 Mad 92.

3. Clause in a deed creating a charity, in case of the desertion or removal of trustees; directing the remaining trustees, within a limited time, to elect new trustees in the room of the trustees so deserting, &c. A trustee cannot be discharged, under this clause, without a regular proceeding on the part of the remaining trustees, to replace him by a successor; and if no such successor has been appointed, the clause will not prevent him from acting again, after having withdrawn himself; nor will the court allow such trustee to be discharged for endeavouring to preserve the object and ends of the institution, for the protection of which this clause was introduced into the instrument. *Attorney General* v. *Pearson*, 3 Mer. 412.

4. Upon a clause for the appointment of new trustees, in case of any of the old trustees changing, or becoming of a different religion from the congregation, (the charity being the establishment of a dissenting meeting-house), if any question

arises, whether a trustee has been properly removed, it becomes necessary for the court to inquire what was the religion of the society, not to animadvert upon it, but to ascertain whether the change is substantiated. *Ibid,* 3 Mer. 413.

5. Trustees of a charity are never appointed by the court, without a reference; but where the amount of the fund was extremely small, the master was ordered to appoint the trustees at once, without coming back to the court. *Attorney General* v. *The Earl of Arran,* 1 J. & W. 229.

6. The founder of a charity, having named as trustees the occupiers of certain annual offices, to avoid the necessity of annual transfers to the new trustees, the court appointed other trustees to hold the funds, the selection of the objects of the charity being left to those appointed by the founder. *Ex parte Blackburne,* 1 J. & W. 297.

(*b*) *Objects of the Charity.*

1. An alteration in the constitution of Harrow school, with a view of reducing it to a mere parochial school, by restraining the number of boys not on the foundation, refused: the admission of such boys without prejudice to the children of the poor inhabitants, being expressly directed by the founder, and the small resort of the latter not being proved to be the result of abuse. *Attorney General* v. *Earl Clarendon,* 17 Ves. 491.

2. The course of education and internal discipline, left by the founder to the governors and masters. The governors being expressly authorized to alter the founder's rules, alterations long known and acquiesced in, will be presumed to have been by their authority, though the precise order does not appear. Any substantial deviation from the principle and purpose of the institution is the subject of visitatorial interposition. *Ibid.*

3. Decree, on information, correcting deviations from the will of the founder of a charity school, by separating the school from the master's house, taking foreign pupils, so as to deprive the poor children of the master's attention, &c., and applying the surplus revenue beyond the maintenance of the existing objects, arisen since the founder's death, cypres to the same uses, comprehending every object, the poor children, the master's salary, and the alms-people. *Attorney General* v. *The Coopers' Company,* 19 Ves. 187.

4. A failure of duty, from misunderstanding of the duty of the master of a charity school, is not, of itself, a ground of removal. *Attorney General* v. *The Coopers' Company,* 19 Ves. 192.

5. Where the charity is to be established in Scotland, the court of chancery directs the money to be paid to the trustees, to be by them administered according to the law of Scotland, or under the directions of the Scotch courts. *Attorney General* v. *Lepine,* 19 Ves. 309. 2 Swan. 181.

6. Information and bill to quiet the possession of the relators and plaintiffs (one claiming as the surviving trustee, the other as minister of a protestant dissenting meeting-house), for an appointment of new trustees, and an injunction to stay proceedings in ejectment by the defendants, also claiming to be trustees of the meeting-house. Upon motion for an injunction, it appeared, that the meeting-house was erected in the year 1701, under a trust deed, whereby the purpose was declared to be "for the worship and service of God," the plaintiffs and relatives contended, from the purpose so expressed, that the intention was for promoting the doctrine of the Holy Trinity, and that the trust could not be diverted from the purpose for which it was intended; the defendants insisting that the intention was as general as the purpose expressed, and had no regard to any particular tenets, the injunction was granted (upon the parties undertaking to abide by such order as the court should thereafter make), and it was referred to the master to inquire in whom the legal estate was vested, the particular object (with respect to worship and doctrine) for which the trust was created, the usage of protestant dissenters, as to the election of ministers, and the duration of their office; and whether any and what agreement or understanding, relative thereto, subsisted between the parties. *Attorney General* v. *Pearson,* 3 Mer. 353.

7. Where an institution exists, for the purpose of religious worship, and it cannot be discovered from the deed declaring the trust, what was the nature of the religious worship intended, it must be implied from the usage of the congregation. But if it appears to have been the founder's intention, although not expressed in the

trust deed that a particular doctrine should be preached, it is not in the power of the trustees, or of the congregation, to alter the designed objects of the institution. *Ibid,* 3 Mer. 400.

8. If land, or money, be legally given, for maintaining and propagating "the worship of God," without more, a court of equity will execute the trust in favor of the established religion of the country; but, if the purpose be clearly expressed to be that of maintaining dissenting doctrines, which are not contrary to law, although at variance with those of the established religion, it would be the duty of the court to carry the trust into execution, according to the express intention: and where, as in this case, the intention clearly appears aliunde, though not expressed in the instrument creating the trust, the court will also carry the manifest design into execution, so far as is consistent with law. *Ibid,* 3 Mer. 409.

9. It is incumbent on persons meaning to create a trust for charitable purposes, to make their intention clear by the deed creating the trust; and if it is not so, the court has no other means of carrying it into execution, than by collecting the intention from inference and fair presumption. *Ibid,* 3 Mer. 410.

10. Where two parties are seeking the benefit of a trust for charitable purposes, and differ as to the mode of carrying it into effect, one party being in support of the original system, the other for some proposed alteration to be made in it, the leaning of the court must be to the former, however useful it may judge the proposed alteration to be. *Attorney General* v. *Pearson,* 3 Mer. 418.

11. When the court is called upon to execute a trust for the establishment of a dissenting meeting-house, without regard to any particular tenets, it must be shewn that it is a meeting-house that can be legally sanctioned and established; and for this purpose the question of religious belief is relevant. *Ibid,* 3 Mer. 415.

12. Charity estate given for the maintenance of ten decayed householders, was applied to the poor of the parish generally; whether this would be a breach of trust, if, among the poor maintained, there have been as many as ten who would have been proper objects of the charity—*Quære.* *Ex parte Fowlser,* 1 J. & W. 70.

13. The court will not interfere to regulate a voluntary charity supported by contributions, where some of the trustees complain of the acts of the majority of them, as being adverse to the intention of the founder, and others of the contributors: where the conduct of the acting trustees is free from positive im peration.

Where there is a trust deed in such cases, the court will not vary its terms on the application of persons suggesting that they are not such as all the contributors intended they should have been.

A proviso in such a deed, that *gratuitous* teachers should attend to instruct the school, and that no doctrines should be taught there contrary to those of the church of *England,* held not to be contravened by the appointment of a *dissenting* minister, at a *salary,* to read lectures in the school-room (part f the building erected by the original trustees, for the purposes of the charity,) when not used as a school, the subscribers contributing the amount of his salary. *Ex parte Pearson,* 6 Price, 214.

14. In the case of a parish charity, semble, that proof of the general, though not universal, approbation of the parish, is sufficient to justify the *bona fide* conduct of the trustees, where they have a discretion to exercise; and the court will not interfere where their acts have been so approved. So if, in consequence of the decayed state of an old market-house, built originally on ground given by charter for the purpose, a new one be built with such general consent, the trustees may remove it to any more convenient place, *intra villam.* *In re Chertsey Market.* 6 Price, 261. Dan. 175.

(c) *Property and Revenue.*

1. Upon an information as to the management of the estates, and the application of the income of Harrow school, inquiries were directed to ascertain whether the estates were properly, and advantageously managed, with a view to prospective regulation. The application of the income to purposes partly specified by the founder's rules, and partly left to discretion, not being in all respects agreeable to the directions of the founder, must be ascertained by a scheme; paying due regard on the one hand, to the founder's

directions, and, on the other, to the alteration of circumstances, which might render a literal adherence to his rules adverse to their general object and spirit. *Attorney General* v. *Earl Clarendon*, 17 Ves. 491.

2. There is no objection to encourage attention to parish scholars, by an allowance to the master for each. *Ibid.*

3. The revenues of a charity-school, for the time past, were given to the master and usher, according to their title, under a decree, though considered a proper subject of review as to the future; and notwithstanding the objection of non-residence, not acted upon by the visitor as a cause of removal. *Ex parte Berkhampstead School*, 2 V. & B. 134.

4. A grant to trustees and their heirs, of lands in Surrey and Hertford, in trust, out of the rents and profits, to raise and pay certain annual sums for the benefit of the rector and scholars of Exeter college, and as to the residue "after taxes, charges of repairs &c. deducted," to be yearly paid to and among the vicars, for the time being, of four several parishes, for the augmentation of their respective livings, they the said vicars, to collect the rents, and account with the trustees; to view the estates, and take care that the same be kept in good repair by the tenants; with a declaration that it should not be lawful for the trustees, during forty years, to cut timber, except such as should be wanted for the necessary repairs of mills, &c., and other appurtenances belonging to the estates, and except such young slabs and tillers in the woods in Hertford, as should be necessary for selling the underwood; and after the expiration of forty years, then that the trustees should have power to cut as they should think fit, and pay the produce to the said rector, &c. of Exeter college, as a fund for the augmentation of the library. Held, that by the construction of this deed, the estates were given as one fund for the benefit of two equally permanent institutions: the whole to be managed for the benefit of both, in a due course of provident ownership. The words "charges for repairs," and the power of cutting timber for sale after the forty years, must not be construed as restraining the trustees, after the expiration of the forty years, from cutting timber for the purposes of repairs, nor from cutting timber on one part of the estates for repairs on another part, nor from selling timber when cut, and making necessary repairs with the produce, such being subject to the fair exercise of their discretion; but the trustees must cut no more timber on the whole property than the repairs on the whole property require. The power of cutting young slabs and tillers also still continued, with the qualifications annexed to it. *Attorney General* v. *Geary*, 3 Mer. 513.

5. In the case of a breach of a trust, created for the benefit of a charity, by pulling down a chapel, selling the materials, and converting the burial-ground to other houses: the court, upon petition, under the 52d. Geo. 3, c. 101, s. 12, ordered the corporation, who were trustees, to convey, at their own expense, to new trustees; to account for the materials of the chapel, the pews, and bells, and pay the value; and directed an inquiry into the expense of restoring the chapel and burial-ground. *Ex parte Greenhouse*, 1 Mad. 92.

6. Residuary estate bequeathed to the minister and church-officers of a parish in Scotland, for charitable purposes, was directed to be invested in stock, in the name of the Accountant General, and the dividends to be paid, from time to time, to the minister and church-officers of the parish; but the courts of Scotland having jurisdiction to administer the charity, an order confirming the Master's report in approbation of a scheme, was reversed. *The Attorney General* v. *Lepine*, 2 Swan. 181. 19 Ves. 309.

7. An account cannot be decreed against a parish; and a parish cannot, therefore, be made responsible for charity property applied during a long period to parish purposes, under orders of the vestry. *Ex parte Fowlser*, 1 J. & W. 70.

8. Money bequeathed to trustees, to lay out the same, and pay the interest and dividends to the poor inhabitants of a parish, for ever, by half-yearly payments, claimed under a local act of parliament, enacting, that all gifts, donations, benefactions, and sums of money, which should thereafter become payable, to the use of the poor of the parish, not being directed, or liable to be applied for the support of any private or particular poor, or charity, or by the respective donors, or otherwise particularly appropriated, and not being sacramental mo-

ney, should be paid into the hands of the treasurer of the guardians of the poor, thereby appointed in aid of the rate, with power to appropriate it to indigent persons who had not become chargeable. This legacy was held, on a claim by such guardians of the poor, to be within the exception of the private act of parliament, as a gift "already particularly appropriated" by the testatrix. *The Attorney General* v. *Freeman.* 5 Price, 425. Dan. 117.

(*d*) *Increase of Revenue.*

1. Charitable bequest to the congregation of Presbyterians, to which testator belonged, to put out as apprentices, two poor boys of such as were members of the said congregation, and lived in the parish of St. Martin's, New Sarum.

The surplus rents applied on the principle of cypres to placing out: 1st. Sons of members of the congregation within the parish. 2d. Sons of such members in other parishes. 3d. Daughters of such members, in the same manner. 4th. Sons of Presbyterians generally. *Attorney General* v. *Wansey*, 15 Ves. 231.

2. On an information as to the application of the income of Harrow School, it was held that, the expenditure was not to be measured by the number of parish boys who were to be immediately benefitted by it, if fairly referrible to the purposes of the school. A considerable allowance, therefore, to the master towards repairs, and a considerable expenditure in enlarging and improving his house for the accommodation of boarders, was considered upon the whole not extravagant, as a benefit from the increased revenue in that shape instead of an increased salary; nor improper, with reference to the general advantage of the school. *Attorney General* v. *Earl Clarendon*, 17 Ves. 491.

3. Where a charitable fund was exhausted at the time of the foundation of the charity by the declared object of the founder, a subsequent surplus arising from the improved annual value will be applied cypres by the court. *Attorney General* v. *The Coopers' Company*, 19 Ves. 189.

4. The application of the increase of the revenue of a charity is by way of augmentation to the original objects, the original distribution being in proportions which exhausted the whole fund. *Ex parte Berkhampstead Free School*, 2 V. & B. 139.

5. Where the deed creating a charity began with a declaration, that the whole rents and profits of the land purchased should be applied to the uses thereinafter specified, and to no other uses and purposes, and the then profits were divided into certain parts, to be specifically appropriated, it was held, that as the general purpose of the deed was to apply all the rents and profits of the lands in the charities mentioned, and there was no intimation of bounty to the trustees, the surplus rents belonged to the charities. *Attorney General* v. *The Mayor of Bristol.* 3 Mad. 319.

6. Where, in respect of the increased rents of a charity estate, it is referred to a master to approve of a scheme for their future application, and he recommends an augmentation of a salary given by the will of the founder, he is not, with respect to the augmentation, strictly confined to the provisions of the will of the founder, but may stipulate for an additional advantage in furtherance of the founder's general intention. *Ex parte Lane*, 4 Mad. 479.

(*e*) *Leases of Charity Estates.*

1. A trustee of a charity estate cannot let for ninety-nine years, without an adequate consideration; as, in the ordinary course of a provident management of the estate it is not a proper lease; nor can such trustee let it with a covenant for perpetual renewal, without an equivalent for the inheritance. *The Attorney General* v. *Brooke*, 18 Ves. 326.

2. A lease of charity land for eighty years, supported as to the interest of a sub-lessee, obtained upon a fair consideration thirty-three years before suit brought, and without notice, except that it was a charity estate.

As to the original lease under the circumstances, the length of the time, thirty-five years, the surrender of a former lease having twenty-one years to run, and the terms of which did not appear, the rent reserved, and an expenditure, though not according to the covenant, yet equally beneficial, inquiries were directed, to ascertain whether the lease was reasonable, or unreasonable, in such a degree that fraud could be inferred. *Attorney General* v. *Backhouse*, 17 Ves. 283.

3. The cases have not gone so far as to allow trustees for a charity to make

a mere husbandry lease for ninety-nine years, upon terms, and at a rent adapted to a lease for twenty-one years, nor a building lease for nine hundred and ninety-nine years, upon an expenditure commensurate to a term of ninety-nine years *Ibid*, 17 Ves. 291.

4. The lease of a charity estate may be set aside for under value, if considerable, and clearly established; but an under lease, at a fine, is not conclusive of such under value, part being ascribed to the good will of a trade established, and repairs. In this case an inquiry was directed, whether the rent was fair and adequate, distinguishing how much of the premium on the under-lease resulted from the good-will and repairs: and how much from the value of the lease above the rent reserved to the charity. *Attorney General* v. *Magwood*, 18 Ves. 315.

5. Leases of charity estates for twenty-one years, at a considerable under-value, will be set aside, as breaches of trust, though the lessors are not mere trustees, but have also a beneficial interest. *Attorney General* v. *Wilson*, 18 Ves. 518.

6. A lease to one of the governors of Harrow School of land of the charity, though without fraud, was set aside upon general principles, as inconsistent with his duty, charging him with the full value if the rent reserved fell short of it. *Attorney General* v. *Earl Clarendon*, 17 Ves. 491.

7. The power of leasing in trustees of a charity, will be controlled for the benefit of the charity. *Ex parte Berkhampstead Free School*, 2 V. & B. 138.

8. A tenant of a charity estate, provided he has acted fairly, is not to be turned out of possession, or to have his lease set aside, merely on the ground of inadequacy of the rent to the value of the estate, but there must be evidence or presumption of collusion, or corrupt motive; and that the tenant is a relation of the trustee, is a circumstance to create suspicion. *Ex parte Skinner*, 2 Mer. 453.

9. Lease of a charity estate sought to be set aside, as being a lease granted for a long term, of years, determinable on lives, at a small rent, on the payment of a fine; and also on the ground of under-value. Held, that such lease was not to be disturbed, the corporation, who were trustees of the charity, having been always in the habit of letting their estates according to the same mode, it being also supported by the custom of the country in which the estates were situate, and the evidence not bearing out the charge of under-value. *Attorney General* v. *Cross*, 3 Mer. 524.

10 Though the expediency of letting charity estates for lives, or for a long term of years, determinable on lives in existence, may be questionable; there is no principle or authority for holding that such a lease is, on the face of it, an abuse of trust: for a lease for three lives has been considered by the legislature, in framing both the enabling and disabling statutes, and by many founders of charities, as on a footing with leases for twenty-one years. *Ibid*, 539.

11. In order to set aside a lease of a charity estate already existing, it is not enough to say that the mode of letting is not the best that might be prescribed, but it must be shewn that the mode is so positively bad, that no person, meaning to discharge his trust fairly, could have resorted to it, as in the case of a lease for a long term of years absolute, at a stationary rent. *Ibid*, 540.

12. Leases of charity estates may be set aside on the mere ground of under-value; but then it must be under-value satisfactorily proved, and considerable in amount. *Ibid*, 541.

13. Evidence, as to value, of witnesses, stating opinions formed upon a loose recollection of circumstances at a distant period, is not to be put in competition with that of surveyors actually employed at the time to ascertain the value, and where no bad motive can be ascribed, so as to affect a lease, made upon such survey, and sought to be set aside for under-value. *Ibid*, 542.

V. Commission of Charitable Uses.

1. There are authorities for extending the act 43 Eliz. c. 4. to cases where the governors or visitors are themselves trustees, or are making fraudulent use of their power, even though an information would lie. *Ex parte Kirkby Ravenworth Hospital*, 15 Ves. 305.

2. Power was given by the statute of a charity to the ordinary to interpret and determine doubts upon the statute of amotion, punishment, and appointment; and in certain cases to the dean and chapter of York. The whole visitatorial power, particularly as to the administra-

tion of the landed property, not being intended to be given to the ordinary as visitor. This is not such an appointment of visitor as to exclude a commission under the statute 43 Eliz. c. 4. *Ex parte Kirkby Ravenworth Hospital,* 15 Ves. 305.

VI. Pleading and Practice.

1. Exceptions may be taken to a decree under a commission of charitable uses, as having issued in a case not warranted by the statute 43 Eliz. c. 4. *Ex parte Ravenworth Hospital,* 15 Ves. 305.

2. In a charity cause, costs as between attorney and client are given to the heir, making no improper point. *Currie* v. *Pye,* 17 Ves. 462.

3. The rule in cases of charity is almost that the general prayer is sufficient to obtain the proper relief without a specific prayer. *Attorney General* v. *Brooke,* 18 Ves. 319.

4. After an order, permitting the defendant to re-hear the decree made on his default, setting aside a charity lease, and directing an account of the rents, he was ordered to give security for the sum reported due. S. C. 18 Ves. 496.

5. A bill by the heir, suggesting a secret void trust for charity in the residuary devisees, but with evidence of a trust expressed, or of an engagement expressed or tacit preventing it, will be dismissed with costs; unless the heir will take an issue, to which he is entitled. *Paine* v. *Hall,* 18 Ves. 475.

6. Under stat. 52 Geo. 3, c. 101, for giving jurisdiction upon petition in charity cases, the trustees, not appearing, were ordered to shew cause, on the next day of petition, why the order prayed should not be made. *Ex parte Seagears,* 1 V. & B. 496.

7. An order made under the 52 Geo. 3. c. 101, to remedy the abuse of charities on petition, was discharged by another petition presented under the same act. *Ex parte Brown,* Coop. 295.

8. Petition under the statute, 52 Geo. 3. c. 101, must have the signature of the Attorney General, or of the Solicitor General, in case only of there being no Attorney General at the time: and such signature must not be affixed without the same deliberation as in the case of an information regularly filed. *Ex parte Skinner,* 2 Mer. 453.

9. And where the petition is not so signed, an order obtained upon it is a nullity. *Attorney General* v. *Green,* 1 J. & W. 303.

10. After an order obtained on petition under the statute 52 Geo. 3, c. 101, the subsequent orders may be obtained on motion. *In re Slewringe's Charity,* 3 Mer. 707.

11. On a reference under the statute, 52 Geo. 3, c. 101, the master may receive evidence by affidavits. *Ex parte Greenhouse,* 1 Wil. 18. 1 Swan 60.

12. When an information and petition under the act are proceeding together, and include the same, or part of the same objects, the court will refer it to the Attorney General to consider which should proceed. *Attorney General* v. *Green,* 1 J. & W. 297.

13. In a suit by the Attorney General, respecting a breach of trust, as to property belonging to a charity, the court will permit a reference, if the Attorney General consents; but not if the question is upon the construction of a will. *Attorney General* v. *Fea,* 4 Mad. 274.

14. The court will not entertain charges against one or more of trustees, on the ground of their being the acting trustees, and that they alone are complained of, unless the others, or their representatives, are also brought before the court. *In re Chertsey Market,* 6 Price 261. Dan. 175.

15. The Attorney General is not a necessary party to such a petition; it is sufficient that he certify his allowance of it. *Ibid.*

16. A petition, under the statute 52 Geo. 3, c. 101, held to be vexatious, was dismissed with costs. *Ibid.*

17. The court in regulating a charity, acts without complaint, if there is cause for it. *Attorney General* v. *The Coopers' Company.* 19 Ves. 194.

CHURCH.

1. A faculty for the erection of a gallery in a church, granted; notwithstanding the opposition of the vicar, none of the parishioners appearing. *Tattersall* v. *Knight.* 1 Phil. 232.

2. A possessory right in a pew is sufficient to maintain a suit against a mere disturber. *Pettman* v. *Bridges.* 1 Phil. 316.

CHURCHWARDEN.

1. A court of equity will not decree a rate to be made, to reimburse a former churchwarden monies laid out whilst in office, in pursuance of a vestry order. *Lanchester* v. *Thompson,* 5 Mad. 4.

CLERGY.

I. Bishop, Power and Authority of.

1. A bishop cannot consecrate a chapel, or authorise a person to preach in it, without the consent of the incumbent of the parish. *Carr* v. *Marsh,* 2 Phil. 198.

II. Incumbent, Rights of.

1. The incumbent of the mother church has the right of nominating to chapels of ease; and can only lose that right by agreement between patron, parson, and ordinary, and on a compensation made to him; and in cases of prescription, such agreement and compensation are supposed: and therefore, where a chapel was erected, and endowed by a grant of lands from the lord and freeholders of a manor, and the right of nomination was given by the archbishop in his deed of consecration to the inhabitants, and the vicar of the mother church declared at the time that he had no right to nominate, and the inhabitants had repaired and nominated for ninety years, yet it was held, that the vicar was entitled to nominate. *Dixon* v. *Metcalfe,* 2 Eden, 360.

2. No person can procure divine service to be administered without the consent of the incumbent and the licence of the bishop, (and in some instances, also, the consent of the patron); and the person officiating without such consent is subject to ecclesiastical censures. *Carr* v. *Marsh,* 2 Phil. 206.

III. Right of Presentation or Election.

1. A party having contracted with a person, since deceased, for the purchase of an advowson, but who had taken no steps, till a considerable time after the death of the vendor, to enforce the contract, (objecting to the title on the ground of outstanding judgments and a creditor's bill pending), held not entitled, as against a devisee, to present, if a vacancy occur in the meantime, though he has not renounced his contract, but insists on having it completed. *Wyvill* v. *Bishop of Exeter,* 1 Price, 292.

2. Jurisdiction as to the right of election of the minister of a congregation is generally by mandamus; but, if no ground for that, it may be in equity. *Davis* v. *Jenkins,* 3 V. & B. 155.

IV. Duties and Liabilities.

1. By the canon law the clergy are required weekly to form and sign the registers, and annually to transmit a duplicate to the ordinary. *Lloyd* v. *Passingham,* 16 Ves. 63.

2. A clergyman suspended by the consistory court of Durham *ab officio et beneficio* for three years, and until a certificate of good behaviour and morals, under the hands, &c. should be approved of by the court. Sentence affirmed upon

appeal, but with doubt as to the certificate. *Watson* v. *Thorp*, 1 Phil. 269.

3. In case of the citation of a clergyman for immoral conduct, the proxy given to the proctor is sufficient admission of the fact of his being the rector cited. *Watson* v. *Thorp*, 1 Phil. 269.

4. A clergyman in the performance of divine worship is not at liberty to alter or omit any part of the service. *Newberry* v. *Goodwin*, 1 Phil. 282.

V. Resignation Bond.

1. Whether a bond of resignation of a living in favor of a particular person, and not to accept a bishopric, is valid; or whether to be considered upon the principle of marriage brokage bonds as against public policy, or as a corrupt transaction with reference to which a court of equity would not act—*Quære*. *Dashwood* v. *Peyton*, 18 Ves. 27.

2. A general bond of resignation at the patron's request is simoniacal; and as to the principle of the decision that a bond to resign in favor of a specified person is not bad—*Quære*.
Ex parte Rainier, *Rowlatt* v. *Rowlatt*, 1. J. & W. 280.

3. Whether a bond of resignation of a church living is in any case valid—*Quære*. *Ibid.* 280.

COLONIES.

1. The statute of limitations, or possessory law of Jamaic , 4 Geo. 2, bars not merely the legal remedy, but any suit, claim, or demand, converting seven years' possession into a positive absolute title. No exception in favor of absentees, they not being within the exception expressed, as there was no such exception out of the statutes of limitations in this country, until expressly given by statute 4 Anne, c. 16, s. 19. *Beckford* v. *Wade*, 17 Ves. 87.

2. The exception in the law of Jamaica relating to trustees means actual, not constructive trusts, *Ibid.*

3. The exception as to tenants for life, not applicable where they could convey the fee under a power of sale. *Ibid.*

4. Though the courts of justice were shut up in time of war, so that no original could be sued out, the statute of limitations would continue to run. *Ibid.* 17 Ves. 93.

5. The exceptions out of common law bars or forfeitures, by fine, final judgment in a writ of right, descent after disseisin, copyhold heir not coming in to be admitted upon proclamations, or in favor of infants, persons of non sane memory, or beyond sea, do not extend to the statutes of limitations of Jamaica, 4 Geo. 2, as they are not there expressed. *Beckford* v. *Wade*. 17 Ves. 89.

6. The statute of mortmain does not extend to the island of Grenada, in the West Indies; the object of the statute being wholly political, it having grown out of local circumstances, and being intended to have only a local operation. *Attorney General* v. *Stewart*, 2 Mer. 143.

7. Donations *inter vivos* in mortmain are not prohibited, but regulated by the statute, requiring enrolment in the Court of Chancery, by which is meant the Court of Chancery, in England, where there is an antient office for the enrolment of deeds, and there being no enrolment offices annexed to the Courts of Chancery in the colonies. *Ibid.*

8. Regularly, all questions of title to land in the colonies are to be decided in the first instance by courts of local judicature, from which an appeal lies to the King in council. *Attorney General* v. *Stewart*, 2 Mer. 156.

9 Law of Guernsey as to the descent of real estate, and the distribution of personal estate, of persons dying intestate. 3 Mer. 69.

COMMON HALL.

1. The Common Hall is not a court, except for the purposes for which it is made a court by charter. *Crowley's case*, 2 Swan. 43.

COMPROMISE.

1. A deed of compromise to be binding must be free from fraud. *Roche* v. *O'Brien*. 1 B. & B. 340.

2. So long as a right is in doubt, inequality in a compromise cannot be considered; as it is a sufficient consideration for an agreement. *Ibid.* 1 B. & B. 354.

3. Mere inequality is not a sufficient ground to set aside a compromise. *Ibid.* 1 B. & B. 356.

4. Persons doubting their rights, and compromising, bound by such compromise. *Burke* v. *Crosbie*, 1 B. & B. 504.

5. A compromise of rights, doubtful in point of law, but founded upon a misrepresentation, or suppression of facts, in the knowledge of one of the parties only, cannot be supported: therefore, a deed of compromise, induced by the opinion of counsel upon a case laid before him, prepared by the defendant's agent, but mistaking the tenures under which estates, the subject of the compromise, were held, was set aside. *Leonard* v. *Leonard*, 2 B. & B. 171.

6. The validity of a deed of compromise cannot depend upon a subsequent adjudication of the rights. *Ibid.* 2 B. & B. 179.

7. Equity will not set aside a compromise of doubtful rights, on the ground of its being prejudicial to one of the parties to it. *Ibid.*

8. Distinction between a release and a compromise:—In the former, rights are surrendered by the parties knowing them; in the latter, the agreement is founded on the ignorance of those rights in both parties. A compromise cannot be affected by a subsequent investigation, whether the rights be doubtful in point of law or of fact, if both parties were in equal ignorance. *Ibid.* 2 B. & B. 180.

9. To constitute a fair compromise of right, doubtful in point of law, the fact creating that doubt should be fairly stated. *Ibid.* 2 B. & B. 181.

10. It is essential to the validity of a compromise, that both parties be in equal ignorance. *Ibid.* 2 B. & B. 182.

11. Inadequacy in a compromise, unless it amount to fraud, cannot vitiate it. *Ibid.*

CONDITION.

1. It is now well settled, both with regard to real and personal estate, (clearly as to the former), and where personal estate is given, with an express limitation over, that, if there is a breach of the condition, that limitation over will take effect. *Clarke* v. *Parker*, 19 Ves. 14.

2. Though there can be but one true legal construction of a condition, a court of law cannot hold a condition to be performed in all circumstances in which a court of equity will relieve against the non-performance of it. *Ibid*, 19 Ves. 22.

3. Limitations to testator's children; and, upon their death under the age of twenty-one, then to testator's wife absolutely. The testator died without ever having had a child; but the limitation over to the wife is nevertheless good, the having children not being a condition precedent. *Meadows* v. *Parry*, 1 V. & B. 124.

4. Where money was paid into a banking-house to be placed to the credit of another upon a condition, the money in the meantime to stand in the banker's book in the name of the party paying it in, it is at the risk of the party so paying it, and the loss is his, if the bankers fail before the condition is complied with, though the other had written to desire it to be paid in generally. *Calley* v. *Short*, Cooper, 148.

5. No relief can be given in equity against the breach of conditions in law, even when compensation can be given. *Keating* v. *Sparrow*, 1 B. & B. 373.

CONFIRMATION.

1. A subsequent deed, executed in performance of a covenant for further assurance in an illegal or fraudulent conveyance, and not an independent voluntary transaction, will not operate as a confirmation of the first conveyance. *Wood* v. *Downes*, 18 Ves. 120.

2. A conveyance taken after the grants obtained by an agent and trustee from his principal, the fiduciary relations still existing, and the grantor ignorant of his rights, is a continuation of the fraud, and not a confirmation. *Dunbar* v. *Tredennick*, 2 B. & B. 304.

3. Confirmation to be available, must be by a person acquainted with his rights, and knowing that the transaction was impeachable. *Dunbar* v. *Tredennick*, 2 B. & B. 317.

4. A deed confirming a grant impeached by suit, and compromising the rights, the subject of the suit, obtained from a person apprised of his rights, will be set aside if he be compelled to accede to the terms from distress and poverty, occasioned by the party procuring the confirmation. *Roche* v. *O'Brien*, 1 B. & B. 330.

5. To constitute a confirmation, the party confirming must be fully apprised of his rights. *Ibid*, 1 B. & B. 339.

6. A deed of confirmation must be free from fraud. *Ibid*, 1 B. & B. 340.

7. Equity will not relieve a party, fully apprised of his rights, deliberately confirming former acts. *Ibid*.

8. When a party, *sui juris*, apprised of the circumstances connected w h the execution of a former deed, voluntarily confirms it, the sufficiency of consideration cannot be questioned. *Ibid*, 1 B. & B. 353.

CONSIGNLE.

1. It is the known mode of dealing between planters in the West-Indies, and persons in this country lending them money, that the merchant here making the advances, secures, by covenant, the consignments of the produce of the plantation; the obligation to send the consignments to the mortgagee continues while the money lent is due; but whether it continues for a further period—*Quære*. *Bunbury* v. *Winter*, 1 J. & W. 261.

2. The grounds on which a mortgagee, lending money on a West-India estate, is allowed the benefit of a covenant for the consignments, are, because it furnishes him with a security for his debt, and is supposed to be only a fair compensation for his trouble. *Ibid*. 1 J. & W. 261.

3. Whether a second consignee of a West-Indian estate can be appointed to succeed the first, in the event of his death—*Quære*. *Forbes* v. *Hammond*, 1 J. & W. 88.

4. Where consignee becomes insolvent, the consignor has a right to stop the goods at any time before they come to his hands. *D'Aquila* v. *Lambert*, 2 Eden, 75.

COPYHOLD.

I. Jurisdiction.

1. Writ of *Accedas ad Curiam*, to remove a real action for copyhold estate from the lord's court to the Common Pleas, superseded, the latter court having no jurisdiction as to copyhold estate. *Scott* v. *Kettlewell*, 19 Ves. 335.

II. Surrender.

(*a*) *Construction and Operation of.*

1. Two tenants in common in tail of a copyhold estate, where, by custom, the entail was barred by surrender, pursuant to an agreement for a partition, divide the estate, and then make cross surrenders of the parts allotted to each other. Held, that they only barred a moiety of their respective estates; and that the agreement to divide cannot operate as a partition, particularly in the case of copyholds, as it was without the lord's privity: nor can a defendant, claiming under the entail, be compelled to substantiate the agreement. *Oakeley* v. *Smith*, 1 Eden, 261.

2. Where a father and two sons, A. and B., were successive lives in a copyhold, where, by the custom of the manor, the person first named might dispose of the whole interest; and, upon the marriage of A., it was agreed that the father should have power to appoint, during the life of A., and the widowhood of his intended wife. The father, having afterwards obtained a new grant for the lives of a third son and A. and B., made a will after the death of the third son, in which no mention is made of the copyhold; but the residue of his personal estate is given to B. Held, that B. was not thereby entitled to the copyhold, but that it went to A. as the next life. *Rumboll* v. *Rumboll*, 2 Eden, 15.

3. Copyhold premises, purchased by the lord who was tenant for life of the manor, with remainders over, taking a surrender to him and his heirs, will merge, and, as parcel, are subject to the limitations of the manor. And though under a covenant by the purchaser to surrender them by way of mortgage to the mortgagee and his heirs, he could compel a re-grant by the remainder-man, no regrant having been made, the general devisees of the purchaser have no equity, *St. Paul* v. *Viscount Dudley and Ward*, 15 Ves. 167.

4. Devise of copyhold, supported by an existing surrender to the use of a will, notwithstanding an intermediate surrender to other uses, under which there had never been any admittance. *Vawser* v. *Jeffrey*. 16 Ves. 527.

5. Surrender of copyhold to the use of surrenderor for life; remainder to the use of A. for life; remainder to the use of the child or children of A.; and for want of such issue to the use of B.—Semble, that A. takes an estate for life only. *Widdowson* v. *Earl of Harrington*, 1 J. & W. 532.

(*b*) *Dormant.*

1. A surrender of a copyhold, on condition that the surrenderee should perform the will of the surrenderor, is called a dormant surrender. *Gale* v. *Gale*, 2 Cox, 136.

2. A dormant surrender will vest an estate in the dormant surrenderee, sufficient to support the contingent remainders of the surrenderor's will, without the interposition of trustees for that purpose; and a dormant surrender operates as a severance of a joint tenancy, though

it is revocable during the life-time of the surrenderor. *Ibid.*

(c) *Where presumed.*

1. Semble, that after a long enjoyment under an admittance to a copyhold, a previous surrender not entered on the rolls may be presumed. *Wilson* v. *Allen*, 1 J. & W. 611.

(d) *In what Cases supplied.*

1. The Court of Chancery would hold that there might be a surrender to the use of the will, although no instance could be found upon the records of the manor; or if no such custom, there must be some mode of disposition by deed, as in the case of customary freeholds, the want of which the court would, under circumstances, supply. *Church* v. *Mundy*, 15 Ves. 403.

2. There is a distinction in supplying a surrender of copyholds, by implication from general words, between the cases of creditors and children; in the latter, a freehold estate will answer for provision, it being undefined; but in the case of creditors, the intention is to pay the debts, which is a definite sum, and the intention is to provide a sufficient fund. *Judd* v. *Pratt*, 15 Ves. 390.

3. The general rule is, that wherever it is apparent that the testator meant to include copyhold premises in a devise, in favor of creditors, wife, or children, the court would supply a want of surrender to the use of a will; but where the testator, in the beginning of his will, declared, that "as to all his worldly estate, &c. he disposed thereof as follows:" and then devised all his "messuages, farms, lands, tenements, and hereditaments, with their appurtenances," &c. to his wife for life, remainder to his sons successively, in tail remainder to his wife in fee; the court thought, as there were freehold lands to answer the words of the devise, a surrender as to the copyhold ought not to be supplied. *Milbourne* v. *Milbourne*, 1 Cox, 247.

4. The want of surrender supplied for a widow against a collateral heir, viz. a sister, whether provided for or not. *Fielding* v. *Winwood*, 16 Ves. 90.

5. But as to a son—*Quære*. *Ibid.*

6. In supplying the want of surrender for a widow, it is immaterial how ample or scanty her provision may be. *Ibid*, 16 Ves. 92.

7. Surrender supplied for younger children, the heir having a provision under the will, without regard to the amount. *Garn* v. *Garn*, 16 Ves. 268.

8. The want of surrender supplied in the case of a deed, as well as a will; but upon the same principle as in the case of a will, or the execution of a power, *i. e.* for and against the same persons. *Rodgers* v. *Marshall*, 17 Ves. 294.

9. The surrender of copyholds has been supplied as against a collateral heir, but not against a grandchild unprovided for. *Ibid.*

10. Where, in a suit for supplying a surrender of copyhold lands, the answer stated only, that the heir inherited no other land, an inquiry was directed, whether he had a provision, and as to the nature and extent of it. *Ibid.*

11. There is a distinction as to supplying the want of surrender, in certain cases, to support a devise of copyhold estate, and refusing to aid a defective execution of a devise of freehold. *Brodie* v. *Barry*, 2 V. & B. 130.

12. A surrender will not be supplied for a child under a devise in general terms, not mentioning copyhold estate, and not executed so as to pass the freehold. *Sampson* v. *Sampson*, 2 V. & B. 337.

13. By statute 55 Geo. 3, c. 192, in all cases, where, by the custom of the manor in England or Ireland, any copyhold tenant may, by his or her last will and testament, dispose of or appoint his or her copyhold tenements, the same having been surrendered to such uses as should be declared by such last will and testament, every disposition or charge made by any such last will and testament of any such copyhold tenements, or of any right, title, interest in or to the same, shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the last will and testament of such person as the same would have been, if a surrender had been made to the use of such will.

III. Devise of.

(a) *What is a good Devise of Copyholds.*

1. Any will or testamentary paper which has been proved in the Eccle-

siastical Court, is sufficient to pass copyhold lands surrendered to the use of the will or trusts of copyhold, of which no surrender is necessary. *Cary* v. *Askew*, 1 Cox, 241.

2. Testator gave to his executors all his "goods, estates, bonds, debts, to be sold, &c.," the word estates will pass a copyhold surrendered to the use of the will. *Jongsma* v. *Jongsma*, 1 Cox, 362.

3. Devise of copyhold estate, by the description of copyhold ground-rent. *Walker* v. *Shore*, 15 Ves. 122. 19 Ves. 387.

4. A general devise "as to all such worldly estate and effects as it may please God to bless me withal, as I may leave or be entitled to at the time of my decease, whether real or personal, not before given or disposed of," the reversion of a copyhold estate will pass under this devise, especially if there is no freehold estate, and no custom of surrendering a reversionary interest in copyholds. *Church* v. *Mundy*, 15 Ves. 396.

5. Under a devise of "all my real property," copyhold estate passed to the devisee and his heirs. *Nicholls* v. *Butcher*, 18 Ves. 193.

6. A residuary devise was held to include, under the general words "estates and effects," a copyhold estate not surrendered, it being a devise to a younger son, subject to debts, and there being no other real estate; the will also reciting that the eldest son was provided for. *Pennington* v. *Pennington*, 1 V. & B. 406.

7. The devisee of a copyhold, who has not been admitted, cannot devise the copyhold. *Wainewright* v. *Elwell*, 1 Mad. 627.

8. The testator, after naming his wife as executrix, bequeathed to her "all the property, of whatever description or sort, that I may die possessed of, &c." held, to pass a copyhold estate belonging to the testator, which he had surrendered to the use of his will. *Noel* v. *Hoy*, 5 Mad. 38.

9. The probate of a will is not evidence that copyholds pass by it. *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 570.

(b) *Charged with Debts in a Devise with Freehold.*

1. Where a testator having both freehold and copyhold estates, charges all his real estate with payment of his debts; if the copyholds are surrendered to the use of his will, the freehold and copyhold shall be applied rateably; but if the copyholds are not surrendered they shall not be applied until the freehold is exhausted. *Growcock* v. *Smith*, 2 Cox, 397.

IV. Admittance.

(a) *By suit in Equity.*

1. On a bill to be admitted to a copyhold, for the purpose of trying the right to it, the court will not interfere, when the plaintiff is barred by the statute of limitations, or where he does not shew a *prima facie* title, with a reasonable prospect of success. *Widdowson* v. *Earl of Harrington*, 1 J. & W. 532.

(b) *Fraudulent.*

1. The tenant of a copyhold estate having surrendered it to the use of his will, bequeathed it, in trust for his grandson. The trustees and executors renounced probate, and were not admitted, but the son of the testator, being also customary heir, caused himself fraudulently to be admitted, and then surrendered the estate for a valuable consideration to one, who again sold it to the devisor of the defendant. Held, that the son became, upon his admission, a trustee for the uses of the will; and as the purchasers could, with reasonable diligence, have learnt from the inspection of the court rolls, those circumstances which made the son a trustee, they themselves must be taken to have notice of the trust, and be themselves trustees, although thirteen years had elapsed before the institution of the suit. The defendant was decreed to surrender to the plaintiff, the grandson, and to account for timber cut, and the rents and profits for six years, but without costs, on account of the delay in the institution of the suit. *Pearce* v. *Newlyn*, 3 Mad. 186.

V. Manorial Customs.

1 The custom of a manor was, that if a tenant for life of a copyhold obtains a grant in reversion, in the name of a third person, such person is entitled beneficially, unless a trust is mentioned on the rolls of

the manor. Held, the custom was reasonable, and that the persons who were named in the reversionary grants of the copyholds, were not trustees, but beneficially entitled. *Edward* v. *Fidel*, 3 Mad. 237.

2. It seems there may be, as to timber on copyhold premises, what may exist unquestionably as to mines, a custom that the lord cannot take without consent of the copyholder; and *vice versa*, copyholder may, by custom, have such an interest in the timber, that he may himself cut; so he may have a special interest to prevent the lord's cutting, but such a custom ought to be proved by extremely strong evidence. *Whitechurch* v. *Holworthy*, 19 Ves. 214.

VI. Waste.

1. Though the property in mines or trees may be in the lord of a manor, it does not follow that he can enter and take it without consent of the tenant. *Grey* v. *the Duke of Northumberland*, 17 Ves. 282.

2. The lord of a manor has not by law, independently of custom, any such property or interest in the timber growing on the copyhold premises of a tenant, as entitles him to enter and cut. *Whitechurch* v. *Holworthy*, 19 Ves. 213.

3. Generally, if there is no custom for the tenants of a manor to cut timber, it belongs to the lord, leaving sufficient for repairs. *Ibid.*

4. The lord of a manor is entitled to an injunction and account, in respect of waste by a copyholder. *Richards* v. *Noble*, 3 Mer. 673.

VII. Enfranchisement.

1. Power to tenant for life, lord of a manor, to enfranchise, and for that purpose to convey the freehold to the customary or copyhold tenants, authorises a conveyance of the freehold to one who is equitably entitled, and has been erroneously admitted without a previous surrender by his trustee. *Wilson* v. *Allen*, 1 J. & W. 611.

2. The heir of a copyholder may accept enfranchisement before admittance. *Ibid.*

3. Whether the surrenderee or devisee of copyhold lands can accept enfranchisement before admittance—*Quære.* *Ibid.*

COPYRIGHT.

(*See also* Injunction.)

1. The subject matter of two literary productions may be the same as in books of roads, and yet a new and distinct idea may be exhibited in an exposition of it, so as to make it a new and original work; but if the mode of exhibiting the information to the public is substantially and fundamentally the same in the second published work as in that first published, with minute differences, so as not to amount fundamentally to a different project of exhibition, the court will interfere by injunction. In this case it was referred to the master, to ascertain whether the books were the same, or whether that of the defendant differed from that of the plaintiff, so as to render it a new and original work in any and what particulars. *Carnan* v. *Bowles*, 1 Cox, 283.

2. Injunction was obtained against pirating a court calendar. It was held that the individual work created a copyright, though the general subject, as in the case of a map or chart, is open to all. *Longman* v. *Winchester*, 16 Ves. 269.

3. In cases of copyright a court of equity acts with a view to make the legal right of the plaintiff effectual by preventing the publication altogether; and where a fair doubt appears as to the legal right, the court directs it to be tried at law. *Wilkins* v. *Aikin*, 17 Ves. 422.

4. One man has the right of publishing a work perfectly similar to the work of another already published, as a map, or book of roads, if it is the produce of his own skill and labor, and is not a copy of the work first published or identified with it; and though a man cannot, under pretence of quotation, publish the whole or part of another's work,

he may use fair quotation from it; and what is fair quotation, is generally for the consideration of a court of law. The publication may be prejudicial to the work of another, and yet no breach of his legal right. In this case an action was directed, to try whether a work on architecture was an original work, with the fair use of another work by quotation and compilation, which use was acknowledged, and the injunction which had been granted maintained in the mean time: but the work was permitted to be sold, the defendant undertaking to account according to the result of the action. *Wilkins* v. *Aikin*, 17 Ves. 422.

5. An author has a property in an unpublished work, independently of the statute. *Southey* v. *Sherwood*, 2 Mer. 435.

6. Music is the subject of copyright, and may be protected by injunction. *Platt* v. *Button*, 19 Ves. 447. Coop. 303.

7. There may be a copyright in private letters, and it remains in the writers after transmission. *Lord and Lady Perceval* v. *Phipps*, 2 V. & B. 19.

8. There is a copyright in translation, whether produced by personal application and expense, or gift, and it will be protected by injunction. *Wyatt* v. *Barnard*, 3 V. & B. 77.

9. There is no copyright in the specifications of patents. *Ibid.*

CORONER, REMOVAL OF.

1. Confinement in prison out of the county is a sufficient ground for the removal of a coroner from his office, although, during his absence, another coroner of the same county has performed his duties. *Ex parte Parnell*, 1 J. & W. 451.

2. The Great Seal has power, independently of the statute 25 Geo. 2, c. 29, to remove coroners from their office for neglect of duty. *Ibid.*

3. Notice to a coroner of a petition for his removal is not necessary. *Ibid.*

4. The practice is, to issue the writs *de coronatore exonerando*, and *de coronatore eligendo* at the same time: the latter is dated last; but it is not irregular to execute it before a return is made to the former. *Ibid.*

CORPORATION.

I. Jurisdiction.

1. There is jurisdiction in equity against a corporation in the nature of a partnership, in favor of a member, as well as of a stranger, by an account of the profits, where there is no remedy, or not a complete remedy at law; and the difficulty of executing the decree, from the peculiar circumstances and nature of the property, will not prevent it, though that may be a ground for some modification;—for instance, not recalling profits already distributed, as an account is directed in a limited way, dispensing with vouchers, &c. upon the objection from length of time. *Adley* v. *The Whitstable Company*, 17 Ves. 315. 19 Ves. 304. 1 Mer. 107.

2. Whether a court of equity has jurisdiction in the case of a corporation misapplying its own funds—*Quære*. *Attor-*

ney General v. *The Corporation of Carmarthen*, Coop. 31.

II. Liability of.

1. Whether a corporation, as the Foundling Hospital, consisting of numerous governors, would be bound by the acquiescence of some standing by and permitting expenditure, &c. — *Quære*. *Macher* v. *Foundling Hospital*. 1 V. & B. 188.

III. Grants by.

1. Corporations, of whatever nature, have a general right at law to alienate their lands held in fee; subject, as to ecclesiastical corporations, to the restraining statutes: and there is no instance of a trust attached upon the ground of misapplication, as not to corporate purposes, except in the case of corporations holding to charitable uses. *Mayor, &c. of Colchester* v. *Lowton*, 1 V. & B. 226.

2. Whether such a jurisdiction prevails in other cases upon an application to purposes clearly not corporate—*Quære*. *Ibid.*

3. A bill, impeaching securities, as obtained under a breach of trust, by the select body of the corporation of Colchester, using the common seal for raising money to defray the expense of actions against the mayor and town clerk, relative to the election of the recorder and a representative of the borough in parliament, was dismissed, the securities having been confirmed by various subsequent transactions; especially an award binding the corporation at large, through the select body, acting with authority, and upon a fair question, whether the purpose was corporate or not. *Ibid.*

IV. By-laws.

1. A by-law of the corporation, the company of Whitstable fishermen, to the effect,—that any freeman, engaging in any other oyster fishery, on the coast of Kent, should forfeit £10; and until payment, should be excluded from all share of the profits, which should in the meantime be divided, as if he had wholly ceased to be a freeman. The Lord Chancellor doubted the validity of this by-law, and whether such suspension was not open to a mandamus as a temporary disfranchisement, and a trial at law was directed. *Adley* v. *Whitstable Company*. 17 Ves. 315.

2. In an action brought by a freeman, such by-law was held to be void. *Ibid.* 19 Ves. 34. 1 Mer. 107.

3. There is no instance of a by-law restraining the individual members of the corporation from being concerned, either in any other place, or within given limits, in the same trade. *Ibid.* 17 Ves. 322.

4. Where there is a custom to make by-laws, even in restraint of trade to a certain extent, which would not have been good under the authority of charter, that may be good by custom. *Ibid.*

COVENANT.

I. Where, and on whom binding.

1. John Earl Gower, having, by his marriage settlement, a power of appointing portions for daughters, to the amount of £16,000, under a term of years created for that purpose, appointed, among four of his daughters, upon their respective marriages, £13,000, in part thereof, and took assignments from them of their interests in the said term; he afterwards, in the marriage settlement of his eldest son,

joined such son in a covenant, in the fullest and most extensive terms, that the settled estates were free from all incumbrances, done by either of them; and by will appointed the residue of the £16,000 to another daughter, and died. In a suit to compel the trustees to raise the £16,000, out of the term of years, it was held, that the evident intention of Earl Gower to keep the term on foot for his benefit, would clearly entitle his executors as against those claiming under his own marriage settlement; but that his covenant would bar him, and all claiming under him, as against those claiming under the settlement of the son; and consequently, the son himself, who, notwithstanding his joining in the covenant, so far as his interest in that settlement, must be considered as a purchaser under it, and consequently a covenantee. *Countess Dowager Gower* v. *Earl Gower*, 1 Cox, 53.

2. Where a man borrows money, and pledges land as security for the payment in his hands, the land is a collateral security; the debt is the principal contract: but if the estate subject to the charge goes to another, and the personal property of the original debtor is by any means discharged from the obligation, the debt becomes only a charge on the land. So where the testator mortgaged lands to A., and S. joined in an assignment of the mortgage to B., and the interest being reduced to four per cent., S. covenanted for payment of such principal and interest; and afterwards, upon an agreement to raise the interest to five per cent., S. covenanted to pay interest at that rate, and died, leaving an arrear of interest due. This not being originally the debt of S., his covenants are only collateral, and his personal estate is not primarily liable to discharge any part, either of principal or interest, due on the mortgage. *Shafto* v. *Shafto*. 1 Cox, 207.

3. A lessee under an express covenant to pay the rent, and perform the covenants, is liable during the whole term, notwithstanding assignments; but the assignee is liable during his possession only. *Staines* v. *Morris*, 1 V. & B. 11.

4. Where a remainder-man, without consideration, endorsed on a lease to which he was not a party, his consent to the term granted, this does not bind him to a performance of a covenant for renewal contained in such lease. *Dowling* v. *Mill*, 1 Mad. 541.

5. Merchants in England agreed to become sureties for a West India planter, on being secured by a conveyance of his plantation in trust, with a covenant that they should be continued as consignees till the expiration of five years after the reimbursement of what they might advance: they were held to be entitled to the benefit of this covenant. *Bunbury* v. *Winter*, 1 J. & W. 255.

II. Illegal or void.

1. The property tax act, 46 Geo. 3, c. 65, s. 112 & 115, in declaring covenants to pay the same void, has a retrospective operation; therefore, covenants entered into before the act passed are void. *Buxton* v. *Monkhouse*, Coop. 41.

2. Whether a covenant to continue a mortgagee as consignee, after payment of the debt, is valid—*Quære*. *Bunbury* v. *Winter*, 1 J. & W. 255.

III. Construction or operation of.

1. A covenant in a lease to renew under the same covenants, is exclusive of the covenant of renewal. *Tritton* v. *Foote*, 2 Cox, 174.

2. Covenants restraining lessee from alienation without licence, construed strictly. *Church* v. *Brown*, 15 Ves. 258.

3. Covenant restraining assignment of a lease, will not prevent under-letting. *Ibid.*

4 Covenant to leave a portion of the personal estate, as upon an intestacy, does not prevent the covenantor's expending the whole, nor admit his reserving part for his own benefit, nor consequently investing it in land. *Cochran* v. *Graham*, 19 Ves. 66.

5. A father, under covenant for equal distribution at his death, of all the property he should die seised or possessed of, between his two daughters or their families, though he retains the power of free disposition by act in his lifetime, cannot defeat the covenant by a disposition in effect testamentary, as by reserving to himself a life interest. *Fortescue* v. *Hannah*, 19 Ves. 67.

6. In the case of a covenant against using premises as a shop or warehouse

for any trade, without previous consent in writing, or permitting any thing which may grow to the annoyance or damage of the lessors, or any of their other tenants. A breach, though not a nuisance in law, public or private, yet being an annoyance, will not be protected by injunction; there being no consent in writing: and permission of one trade is not to be construed a general licence for any trade, nor will the court enter into a comparison of which trades are more or less offensive. *Macher* v. *The Foundling Hospital,* 1 V. & B. 188.

7. Under a right of re-entry upon under-letting, an advertisement to underlet does not work a forfeiture; though it will be made the ground for imposing terms upon dissolving an injunction. *Gourlay* v. *Duke of Somerset,* 1 V. & B. 68.

8. A covenant not to assign without licence, being once dispensed with, the condition is gone, both in law and equity; but the principle is questionable, and not to be extended. *Macker* v. *The Foundling Hospital,* 1 V. & B. 191.

9. A joint covenant of indemnity will not be extended in equity beyond its legal operation, where there is no ground on which to infer mistake in the nature of the instrument, or no previous equity entitling the covenantee to a several indemnity from each of the covenantors. *Sumner* v. *Powell,* 2 Mer. 30.

10. It has never been decided, that every joint covenant shall in equity be considered as the several covenant of each of the covenantors. *Ibid.*

11. When the obligation exists only by virtue of the covenant, its extent can be measured only by the words of the covenant; but it is otherwise, where the obligation is independent of the particular contract, as in the cases of partnership debts, bonds, &c. *Ibid.*

12. Lease from dean and chapter, with covenants on the part of the lessors, not to make sale of, or take any timber trees growing, or to grow on a certain part of the premises, save for the necessary building, or repairing, &c. of their cathedral church, or of the church-buildings thereto belonging, this covenant does not extend to deprive the dean and chapter of the right to cut the whole of the timber, if wanted, for the purpose of repairs, which is a right they might have exercised independently of the covenant. *Withers* v. *The Dean and Chapter of Winchester.* 3 Mer. 421.

See also *Herring* v. *The Dean and Chapter of St. Paul's,* 2 Wil. 1.

13. A covenant in a lease for ninety-nine years, determinable on three lives, that upon the death of either of the lives, on request and payment &c. to grant a new lease for another term of ninety-nine years, determinable with the life of a new person to be named, under the same yearly rents, covenants, &c. whether the lessee, under this covenant, is entitled to a covenant for renewal in such new lease—*Quære. Dowling* v. *Mill,* 1 Mad. 541.

14. A widow entitled to a church lease of lands in Ireland, as administratrix of her deceased husband's property, for the benefit of her children, grants a sub-lease at a fixed rent, with covenant for perpetual renewal, under a penalty of £70. The option to pay the penalty must be taken as of the essence of the contract: and semble, that by a contract so grossly improvident, she could not have bound the children even to the payment of the penalty. *Macgrane* v. *Archbold,* 1 Dow, 107, 110.

IV. Executed or satisfied.

1. Where a man covenants to do an act, and he does an act which may be converted to a completion of his covenant, it shall be supposed that he meant to complete it. So where the husband, by marriage settlement, covenants, in consideration of the marriage portion, to pay to trustees the sum of £2000, at least, to be by them laid out in land in the county of D., and settled to the uses of the marriage, and the husband dies intestate, without having paid the money; but after having purchased an estate in the county of D., in fee simple: such lands will be considered as purchased by the husband, in pursuance of his covenant, and be liable to the trusts of the settlement. *Sowden* v. *Sowden,* 1 Cox, 165.

2. The testator having, by marriage articles, covenanted that his executors should, within three months after his decease, pay to his wife £3000; afterwards, by his will gave all his property to his executors in trust, after payment of his

debts, at the expiration of three years from his decease, to divide "in such ways, shares, and proportions, as to them should appear right:" on his death, during the lifetime of his wife, the executors having died or renounced, his property becomes divisible according to the statute of distribution, and the widow's distributive share exceeding £3000, is a performance of the covenant in the marriage articles. *Goldsmid* v. *Goldsmid*, 1 Swan. 211. 1 Wil. 140.

V. Breach of, Equitable Relief against.

1. Where a particular estate is covenanted to be conveyed, and is not so conveyed, the breach of the covenant is in damages; and such damages are money, not land, in the hands of the party injured. *Wade* v. *Paget*, 1 Cox, 74.

2. The Lord Chancellor doubted, if the court could give relief against an ejectment by a landlord, for breach of a covenant to repair. *Hill* v. *Barclay*, 16 Ves. 402.

3. Common covenants in husbandry leases are not, as specific covenants, subject to the jurisdiction of a court of equity; therefore, a landlord cannot maintain a suit for the specific performance of covenants contained in a lease which has expired, to repair hedges and mansion-house, and also for an account of loppings and dung, cut or removed by the tenant. *Rayner* v. *Stone*, 2 Eden, 128.

4. Equitable relief against forfeiture of a lease for breach of covenant, is not extended beyond the case of payment of money, as in the instance of rent, to the other covenants, as to repair. *Hill* v. *Barclay*, 18 Ves. 56.

5. The statute, 4 Geo. 2., cap. 28., regulates the relief of a tenant, against a forfeiture for breach of a covenant, by non-payment of rent. *Ibid.* 18 Ves. 60.

6. Equity will relieve against breach of covenant by non-payment of rent. *Lovat* v. *Lord Ranelagh*, 3 V. & B. 30.

7. No relief can be given against forfeiture by breach of covenant not to assign without licence. *Hill* v. *Barclay*, 18 Ves. 63.

8. Where a lease does not contain a clause of re-entry, whether the court, seeing a gross case of waste, and breach of covenant, not to be indemnified by damages, would leave the tenant to law, refusing relief—*Quære*. *Gourlay* v. *The Duke of Somerset*, 1 V. & B. 68.

9. Equity will not relieve against a forfeiture for breach of covenant to keep insured. *White* v. *Warner*, 2 Mer. 459.

Rolfe v. *Harris*, 2 Price, 206 (*n*).
Reynolds v. *Pitt*, 2 Price, 212 (*n*).

10. In general, equity will not relieve against a breach of covenant to repair; but, on the peculiar circumstances of this case, where there was nothing amounting to neglect, surprise, or fraud, and there having been no waver or abadonment on the part of the defendants, the lessors, the court upon terms restrained proceedings at law for the forfeiture. *Hannam* v. *South London Water Works*, 2 Mer. 65.

11. The court will not give relief in equity against a lessor's right of re-entry, for a forfeiture by breach of a covenant, to lay out a sum of money on the premises, in repairs, within a given time. *Bracebridge* v. *Buckley*, 2 Price, 200.

12. And that, notwithstanding there have been no requisition made by the landlord for performance of the covenant, and although he have suffered the tenant to continue in possession of the premises for three years after the breach of covenant, but have not received rent from him in the meantime, or otherwise recognized the subsistence of the tenantcy. *Ibid.*

13. Nor is it enough to show that no damage has been sustained by the delay, and that the premises may be put into as good, or better condition than they would have been, if the covenant had been punctually performed: or even that by a mistake of the solicitor who prepared the lease, the limitation of the period for performance of the covenant had been introduced, although not warranted by the previous agreement, or so understood at that time by the parties themselves, if that be denied by the answer. *Ibid.*

14. The ground on which the court refuse to relieve in such a case is, that they have no effectual means of ascertaining, or of making compensation to the covenantee. *Ibid.*

15. The time within which the covenant was to have been performed having been limited by the lease, is equivalent to a specific requisition of performance by

the lessor; and a neglect on the part of the tenant, is tantamount to a refusal in law. *Ibid.*

16. None of the Irish cases have gone the length of giving relief to a tenant, under a lease for lives, with covenant for perpetual renewal, where there appeared to be gross, wilful, and obstinate neglect. *Mountnorris* v. *White*, 2 Dow. 473.

VI. Specific Performance of.

1. Bill for a specific performance of a covenant for renewal dismissed, it being either a covenant for perpetual renewal, and if so, obtained without consideration from the lessor, or else founded upon a mistake; but there being no proof of its having been improperly obtained, a cross bill to have it declared void, was dismissed with costs. *Redshaw* v. *Bedford Level Company*, 1 Eden, 346.

2. Covenant in marriage settlement, that the settler would surrender certain copyholds, which were intermixed with his freeholds, to be settled upon the issue of the marriage, with limitations to collateral branches of the family; his eldest son, upon his marriage, covenants to suffer a recovery of the freehold, which was done accordingly, and to settle the copyhold, to which he was admitted in fee. Though the consideration of marriage extends to collaterals, yet the son, by the covenants on his marriage, and by his admission in fee, took the copyholds discharged of the specific limitations; and therefore a bill by the nephew of the first settler, upon failure of issue of the marriage, praying a specific performance of the original covenant, was dismissed. *Hale* v. *Lamb*, 2 Eden, 292.

3. Covenant for perpetual renewal may be carried into execution. *Willan* v. *Willan*, 16 Ves. 84.

4. But not a covenant to repair. *Hill* v. *Barclay*, 16 Ves. 405.

5. A covenant upon a conveyance in fee with the grantors, lessees of water-works, not to sell or dispose of water from a well, to the injury of the proprietors of the said water-works, their heirs, executors, administrators, and assigns. Whether this is a covenant which runs with the land, so as to bind, and be enforced by assignees; whether it is contrary to the policy of the law, and as to the effect of a renewal of a lease upon it—*Quære*. An injunction was refused upon this covenant from the inability to enforce it. *Collins* v. *Plumb*, 16 Ves. 454.

6. Renewal decreed against a tenant under a bishop's lease, without any contribution from his sub-lessee; he having covenanted, that, as often as the bishop should renew, he would renew, without fine, with his sub-lessee. The tenant and his lessor are necessary parties; the sub-lessee deriving his title from their covenants. *Revell* v. *Hussey*, 2 B. & B. 280.

7. Covenant in an Irish lease for lives, renewable for ever, that on the dropping of any of the lives the tenant should renew and pay a fine within a limited time, or pay interest on the fine, if he refused; doubtful, whether the meaning of that could be that the tenant should have the option to renew or not, while any of the lives remained in existence; but if such was the meaning, it was a covenant which equity would not specifically execute. (Per Lord Eldon.) *Jackson* v. *Saunders*, 2 Dow, 437, 452.

7. Lessee of a church lease makes a sub-lease, and covenants to renew as long as he can procure a renewal of his own lease from the lessors, and covenants to make all proper applications to procure such renewal; the sub-lessees covenanting to pay double the rent which should be demanded by the dean and chapter, and to pay £300 of the fines on each septennial renewal. After renewals for 130 years at the old rent, and increasing fines, the sub-lessees agree to advance something more than the £300 towards the fines, and take a covenant that in case of too great an advance of rent, they should have the option to refuse the renewal. The immediate lessee endeavours to procure a renewal from dean and chapter at a small fine and increased rent. On bill by sub-lessees, a renewal decreed to be made at the old rent and large fine, (the dean and chapter being willing so to renew,) apparently on the ground that such was the true intent and meaning of the parties in entering into the covenants. Affirmed on appeal. *Hone* v. *Davis*, 2 Dow, 346.

CROWN.

I. Rights of.

1. An inquisition will not entitle the crown to seize, where there is a legal title in possession. *Burgess* v. *Wheate*, 1 Eden, 188.

2. The crown takes an estate by forfeiture, subject to the engagements and incumbrances of the person forfeiting. *Ibid.* 1 Eden, 203.

3. The crown has title only where new land is recovered by the sudden dereliction of the sea. *Ex parte Lord Gwydir*, 4 Mad. 281.

II. Grants by.

1. Whether, under a mere reservation of royal mines, without a right of entry, the crown can grant a licence to enter on the land for the purpose of working them —*Quære*. *Seaman* v. *Vawdrey*, 16 Ves. 393.

2. If a grant by the crown of tithes cannot be shewn to have ever been acted upon, it is no defence against a claim by a vicar for tithes. To make it so, perception under it must be proved. *Scott* v. *Lawson*, 7 Price, 267.

3. Estates granted by the crown for the maintenance of dignities, with reversion in the crown, have the usual incidents, and may be taken in execution. *Davis* v. *Duke of Marlborough*, 2 Swan. 136. 2 Wil. 130.

4. Crown grant, in 1631, of soil between high and low water marks, along the coast of county of Southampton; but there was no possession under the grant until 1784, when the persons claiming, erected a wharf, dock, &c. between high and low water marks, in Portsmouth harbour: held, that no good title was made under the grant to this particular spot, the crown having been in possession for about 150 years from date of the grant, which created a presumption against its own grant, and twenty years not being a sufficient adverse possession on part of the claimants. *Parmeter* v. *Attorney General*, 1 Dow, 316—323.

5. A grant from the crown, of an advowson excepted in a former grant under general words, will be presumed, after a possession evidenced by title deeds for one hundred and thirty-three years, and three presentations. *Gibson* v. *Clarke*, J. & W. 159.

III. Debts to.

1. Where the debt to the crown is not of a public nature, the crown process should not issue, as the form of the security does not alter the nature of the debt. *Ex parte Usher*, 1 B. & B. 199.

2. A recognisance entered into by a guardian in the matter of a minor, is not a debt due to the crown. *In the matter of Burke, a minor*, 1 B. & B. 74.

CUSTOM.

1. This court has jurisdiction to decree an account against persons acting in breach of a custom previously established; and therefore a bill was entertained for an account of tolls due by custom in respect of a mill, although such custom had been established by a former suit. It appearing, however, that the questions whether the custom was destroyed by the conversion of old water-mills and horse-mill into a steam mill, and whether crushing malt was not within the custom of grinding, were questions merely of law. The court retained the bill, with liberty to the plaintiff to bring such actions at law as he should be advised. *Duke of Norfolk* v. *Myers*, 4 Mad. 83.

CUSTOM OF LONDON.

1. Whether a husband has the power to release the orphanage share, to which his wife is entitled by the custom of the city of London, as the child of a freeman—*Quære;* though the court inclined to think he bad. *Salkeld* v. *Vernon*, 1 Eden, 64.

2. Covenants in the marriage settlement of a freeman of London, that the husband may dispose of the wife's share, and that her executors should release and convey all her interest, &c. to the husband, operate as a bar of the widow's claim under the custom, and the statute of distributions; and the wife's share is thus brought into the general personal estate of the husband, and as such, is subject to the customary claim of the children. *Knipe* v. *Thornton*, 2 Eden, 118.

3. The custom of London attaches only on the property the freeman has at his death; but a disposition not to take effect until after his death, though by an irrevocable instrument, is a fraud upon the custom. *Fortescue* v. *Hennah*, 19 Ves. 72.

DEBTOR AND CREDITOR.

I. Debtor.

(a) Death of, when it extinguishes the Debt.

1. Death of the debtor in prison, by commitment of a court of equity for breach of an order of payment under an award, does not extinguish the debt as on a writ of *capias;* the former not, as the latter, excluding other remedies; and the statute, James I. preventing satisfaction. *Mildred* v. *Robinson*, 19 Ves. 585.

II. Creditor.

(a) Rights and Liabilities.

1. There is a great difference between the effect of a judgment as attaching upon the land, and a special agreement by a creditor, for a security upon the land. *Mackreth* v. *Symmons*, 15 Ves. 354.

2. A separate execution may be had under a joint judgment. *Ex parte Wilson*, 18 Ves. 441.

3. Creditor without notice of a dormant partner, has the option to consider himself a joint or separate creditor. *Ex parte Hodgkinson*, 19 Ves. 294. Coop. 101.

4. Whether the wilful concealment by the creditor of his debt from the parent of a woman upon a treaty of marriage between her and the debtor, is alone sufficient to vitiate the debt—*Quære. Scott* v. *Scott*, 1 Cox, 366.

5. A creditor, by suppressing the fact of his debt, inducing another person to enter into a contract, will not be permitted to set up the debt even against the person in whose favor and at whose instance

he made the suppression. *Dalbiac* v. *Dalbiac*, 16 Ves. 125.

6. A person dealing with another for a composition, shall not be bound by a concealment or representation of the amount of his debt, if the plan under which the concealment or representation takes place is not carried into effect. *Ex parte Oakley*, 1 Rose, 138.

(b) *Rights under Decree.*

1. Creditor was allowed, on motion, to prove his debt under a decree upon a creditor's bill, though the money had been apportioned among the creditors, and transferred to the Accountant General, upon affidavit of the creditor that he was not aware of the decree, and his paying the costs of the motion, and of re-apportioning the funds. *Angell* v. *Haddon*, 1 Mad. 529.

2. The court will not, on motion of a creditor, coming in under a decree directing a sale of lands for payment of debts, set aside a lease obtained *pendente lite* from the devisee under the will with a leasing power. *Moore* v. *Macnamara*, 2 B. & B. 186.

3. Judgment creditors coming in under a decree, and proving debts in the Master's office, are not entitled to interest beyond the penalty. *Moore* v. *Macnamara*, 1 B. & B. 309.

4. The only inconvenience to a judgment creditor not proving before the Master under the decree, is, that he loses the benefit of having his debt discharged out of the produce of the sale under the decree. *Barrett* v. *Blake*, 2 B. & B. 357.

5. Decree, though equal to a judgment as to personal estate, does not affect land. *Mildred* v. *Robinson*, 19 Ves. 585.

6. Right of creditor by decree, or judgment, to come in under a general decree, without reviving. *Ibid.* 19 Ves. 585.

(c) *Preference, or Priority of Payment.*

1. It is neither illegal nor immoral for a debtor to prefer one creditor to another. *Grogan* v. *Cooke*, 2 B. & B. 234.

2. A judgment creditor in possession, under an *elegit*, buying up other judgments, cannot apply the rents to discharge the interest of all the securities in the first instance. *Spirrett* v. *Athy*, 1 B. & B. 430.

3. The rents must go to pay the interest on the first judgment, then to discharge the principal of it, and so on in the order of the judgments. *Ibid.*

III. Composition with Creditors.

1. If a creditor accepts of a composition, and signs the composition deed, but secretly takes a promissory note for the remainder of his debt, the court will restrain him by injunction from proceeding at law on such security, although there is no stipulation in the composition deed that all the creditors should accede to it within a given time, and though, in fact, they do not all come in. *Constantein* v. *Blacke*, 1 Cox, 287.

2. Upon a composition with creditors, a private agreement to have additional security, though not for a greater amount, is fraudulent and void. *Ex parte Sadler*, 15 Ves. 52.

3. If creditors act under a composition, they are as much bound by it as if they had signed the composition deed. *Ibid.*

4. A private agreement by parties to a composition for a greater sum, or better security, is void, being a fraud both upon the debtor and other creditors. *Ibid.*

5. An agreement for a composition generally is not binding on the creditor, unless absolutely and strictly fulfilled; but a bond creditor, party to such an agreement, the composition being secured by notes, was, with reference to the interests of the other creditors, restrained from taking execution in an action upon the bond, on non-payment of the notes beyond the terms of the composition. *Mackenzie* v. *Mackenzie*, 16 Ves. 372.

6. A deed of composition by creditors, not signed by all the creditors within the time stated in it, though void at law, yet, if the creditors who have not signed act under it, it is good in equity; therefore a plea of two creditors not having so signed it, is bad. *Spottiswoode* v. *Stockdale*, Coop. 102.

IV. Property.

(a) *What available to Creditors.*

1. Where a person has an absolute and general power of appointing a fund as well in his life time as at his death, and there is no gift over, yet if no appointment be made, his administrator cannot claim the fund, nor even his creditors, without some

step taken towards an appointment; though where any such appointment is made, the court will arrest the fund *in transitu* for the benefit of creditors. *Harrington* v. *Harte*, 1 Cox, 131.

2. Whether a court of equity can give any relief to a judgment creditor, as against the money of the debtor in the public funds—*Quære*. *Dundas* v. *Dutens*, 2 Cox, 235.

3. Stock standing in a trustee's name, or debts being choses in action, not subject to an execution at law, nor in equity can be made available to pay debts. *Grogan* v. *Cooke*, 2 B. & B. 233.

4. A mansion-house excepted from the leasing power of the tenant for life, is subject to execution at the suit of his creditors during his life. *Davis* v. *Duke of Marlborough*, 2 Swan. 121. 2 Wil. 145.

5. The act of the 47 Geo. III. sess. 2, c. 74, which subjects the real estates of traders to the payment of simple contract debts, applies only to persons who were traders at the time of their decease; and not to persons who have discontinued trade before their death. *Hitchon* v. *Bennett*, 4 Mad. 180.

6. A judgment creditor has at law execution against the equitable freehold estate of the debtor in the hands of his trustee, provided the debtor has the whole beneficial interest; but if the debtor has only a partial interest in such estate, the judgment creditor has no execution at law, though he may come into a court of equity and claim the same satisfaction out of the equitable interest as he would be entitled to at law, if it were legal. *Forth* v. *Duke of Norfolk*, 4 Mad. 503.

7. A chose in action is neither subject to an execution at law, nor to be attached in equity by creditors in the life-time of the debtor. *Grogan* v. *Cooke*, 2 B. & B. 233.

8. The half-pay of an officer is not assignable or attachable, on principles of public policy. *M'Carthy* v. *Goold*, 1 B. & B. 389.

(*b*) *Fraudulent Alienation.*

1. No man has so absolute a power over his own property, as that he can alienate it, where such alienation directly tends to delay, hinder, or defraud his creditors, unless it be made on good consideration, and *bona fide*. *Partridge* v. *Gopp*, 1 Eden, 167.

2. By the 13 Eliz., the only consideration as to the validity or invalidity of such alienations, depends on the intent and conduct of the party making them, and not on the motive with which they are received. *Ibid.*

3. Volunteers are, by the statute, made responsible to the creditors of the giver, though not to the giver himself. *Ibid*, 168.

4. Release from one brother to another of certain premises that had been devised to him by his father, executed in consequence of a threat to file a bill, and of assurances that a favorable opinion had been given by counsel, set aside in favor of creditors. *Peat* v. *Powell*, 1 Eden, 479.

5. Assignment of property, where the assignor retains possession, is fraudulent against creditors, *Dutton* v. *Morrison*, 17 Ves. 197.

6. An insolvent, a short time before his death, sold an estate to his nephew and customary heir at a price, the adequacy of which was disputed, held not to be within the statute 13 Eliz., c. 5. there being no evidence that the vendee knew of the insolvency of the vendor, that the relationship had any effect upon the contract, or any fraud on either side; and the price not being so grossly inadequate, as to imply fraud, the court refused, after a lapse of twenty-five years, to inquire what was the value of the property at the time of the sale. *Copis* v. *Middleton*, 2 Mad. 410.

6. A father and mother, upon the marriage of their daughter, and in consideration of the settlement to be made by the husband, joined in conveying a small estate, out of which the mother was dowable, to the husband in fee, but of which no fine was levied; and also in settling another estate, of which the father was seized in fee, on the father for life, remainder to the mother for life, remainder to the uses of the marriage. This being a fair and reasonable family settlement, and not made with any view to defeat creditors, the limitation to the mother for life is not fraudulent as against creditors, within the statute, 13 Eliz.; although the father was indebted, by specialty, at the time of making the settlement, and the more especially, as the mother had joined in conveying the small estate in fee to the husband. *Jones* v. *Boulter*, 1 Cox, 288.

7. An assignment of personal property for a consideration clearly inade-

quære, in fraudulent as against creditors, under 13 Eliz.; nor will natural love and affection, though a meritorious consideration, weigh against the claim of creditors; but copyholds not being subject to debts, an assignment of them cannot be fraudulent against creditors. *Matthews* v. *Feaver*, 1 Cox, 278.

8. Assignment of furniture, &c. by a debtor to his creditors, in satisfaction of their debts, but the debtor retaining possession, under a demise, at a rent, and afterwards taking a re-assignment from some on payment of their debts, with interest, though it would be void, as against third persons, was established, as between the parties, even against the answer of the debtor, insisting, that the deed, though absolute upon the face of it, with a fraudulent purpose, was intended only as a security, and the circumstances precluding any legal remedy. *Baldwin* v. *Cawthorne*, 19 Ves. 166.

9. Whether assignments of policies of insurance, which could not at the time be brought within the reach of creditors, and upon which the assignor could recover nothing, can be said to be made with intent to delay or defraud creditors, within the meaning and provisions of the 10 Car. 1.—*Quære*. *Grogan* v. *Cooke*, 2 B. & B. 230.

10. Asssignments by a person much in debt of policies of insurance, effected by him on his life, to relatives to whom he was indebted, not fraudulent as against his other creditors. *Ibid.*

11. Limitations of the money, after the death of the assignee, to children, not postponed to the creditors of the assignor as voluntary, there being sufficient consideration for the purchase of the policies in the debts due to the assignee, under whom the children were considered as purchasers. *Ibid.*

11. A person being indebted at the time of making a voluntary conveyance, is an argument of fraud. *Ibid.*

2 B. & B. 234.

(c) *Appropriation, as against general Creditors.*

1. Power of attorney to a creditor to receive a debt, but not accompanying any assignment of it, nor making part of any security given, but with parol declarations that it was to enable the creditor to apply the money to the payment of his debt: held, not an appropriation, and therefore failed by the death of the debtor. *Lepard* v. *Vernon*,

2 V. & B. 51.

2. Power of attorney to a creditor to receive money, though made irrevocable, will not be effectual against the general creditors after the death of the debtor. *Ibid.* 2 V. & B. 53.

3. In case of a banking account, where there has been a continuation of dealings, the appropriation, in the absence of express declaration, can only be made on the ground of presumption, arising from the priority of receipts and payments. If any other appropriation is to be made, it is incumbent on the creditor to declare his intention at the time of payment. *Devaynes* v. *Noble*,

1 Mer. 608.

4. Application of indefinite payments by the rules of the civil law: giving the first option to the debtor, the second to the creditor, to be expressed at the time of payment; but if no express declaration by either, presuming an intention in favor of the debtor, or if the debts are equal in their nature, then applying the payment according to priority. *Ibid.*

1 Mer. 605.

5. There are cases in which our courts appear to have extended the rule of civil law, so as to give the creditor, in the absence of express appropriation by the debtor, an indefinite right of election; and other cases, which seem to recognize the strict rule of the civil law, limiting the creditor's option to the time of payment. *Ibid.* 1 Mer. 606.

6. H. and Co. of Madras, make a consignment of pearls to B., with directions to sell, and pay the proceeds to P. (to whom H. and Co. at the time were indebted) on account. B. acknowledges the receipt of the consignment, and undertakes to pay the proceeds according to these directions, but no notice is given by either party to P. H. and Co. subsequently write to B., requesting the pearls to be sent to America, as to a better market, and there disposed of: and afterwards, H. and Co. being insolvent, make an assignment of all their effects in trust for the benefit of their creditors. Held; that the directions accompanying the assignment did not constitute an appropriation, but amounted to no more than a mere mandate, revocable at the pleasure of the consignor, and which was actually re-

voked by the subsequent disposition of the property. P. had no express notice of the consignment, but on receiving information of it after he knew of the failure of H. & Co., and had executed the trust deed as a creditor, he laid an attachment on the pearls in the hands of B., proceeded to judgment, and actually sold the pearls under it. Held, that the assignment having been executed before any third person had acquired an interest in the pearls, they passed under such assignment, and that P. was bound to account with the trustees for the proceeds. *Scott* v. *Porcher*, 3. Mer. 652.

(*d*) *Assignment for the Benefit of Creditors.*

1. Trust deed for payment of creditors, to which no creditor was a party, not made by agreement with any creditor, nor was there any release or other consideration moving from any creditor: the debtor afterwards executes other deeds, varying the trust of the first. Held, that the first deed of trust, being merely voluntary, could not be enforced against the debtor, and therefore a motion for an injunction, by a creditor under that deed, who had filed a bill, to restrain the trustees from executing the trusts of the subsequent deeds, till they had raised money to answer the first, was refused. *Wallwyn* v. *Coutts*, 3 Mer. 707.

2. Where, after a docket struck, but no commission issued, the bankrupt agrees to assign all his property to the creditors who struck the docket, upon their desisting from proceeding with the commission; such agreement, though not within the letter, is contrary to the spirit of the 5 Geo. 2, c. 30, s. 24, and cannot be the foundation of any equitable relief. *Cory* v. *Gertcken*, 2 Mad. 40.

DEED.

I. VALIDITY OF.

1. Sealing and delivery are essential to a deed, which, if delivered, may be a good deed, whether signed or not; and if the deed is to be executed under a power, with signature and sealing, both are required. *Wright* v. *Wakeford*, 17 Ves. 459.

2. Deed cannot be represented as sealed, until the seal is put by the party to the way of wafer. Whether, having sealed, he can be heard to say he had not delivered—*Quære*. *Ex parte Hodgkinson*, 19 Ves. 296.

3. A voluntary deed, once perfected, cannot be revoked at pleasure, though the maker has retained it in his own custody; and where the deed is in execution of a power, the mere attempt to vary its dispositions, cannot of itself prove that the omission of a power of revocation in the deed, was occasioned by fraud or mistake. *Worrall* v. *Jacob*, 3 Mer. 270.

4. In deciding whether a conveyance be voluntary, courts of law have always disavowed inquiring whether the consideration be equivalent; and, if the transaction be honest, will not weigh it in very nice scales. *Grogan* v. *Cooke*, 2 B. & B. 234.

II. ENROLMENT OR REGISTRATION OF.

(*a*) *What a good Enrolment.*

1. Clerical mistakes do not vitiate enrolment under the registry act. *Wyatt* v. *Barwell*, 19 Ves. 435.

2. A deed of bargain and sale en-

rolled under the statute, held to have been rightly enrolled as of the day when it was brought into the enrolment office, although delivered to a porter in attendance there after office hours, and not minuted by the clerk, nor in fact received by him till two days afterwards. *Rex* v. *Hopper*, 3 Price, 495.

3. A memorial of registry containing the substance of a covenant in a lease, though not expressly setting forth a proviso in it, is a good registration, the proviso being implied in it. *M'Alpine* v. *Swift*, 1 B. & B. 285.

4. Whether, in order to constitute such a registration as would, under the registry act (6 Anne, c. 2.) give a deed priority, a certificate of the deed having been produced to the officer at the time of registry, should be endorsed then, or at a subsequent period—*Quære*. *Eyre* v. *Dolphin*, 2 B. & B. 290.

(b) *Effect of Enrolment.*

1. To affect a registered deed by notice of a prior unregistered deed, the policy of which has been much doubted, actual notice must be clearly proved, amounting to fraud. *Wyatt* v. *Barwell*, 19 Ves. 435.

2. *Lis pendens* is not notice for the purpose of postponing a registered deed. *Ibid*, 19 Ves. 439.

3. Registration in Ireland gives a preference in law and equity against all subsequent deeds. *Daly* v. *Kelly*, 4 Dow, 436.

4. The registry of a deed gives priority, but does not affect a party with notice. *Pentland* v. *Stokes*, 2 B. & B. 75.

5. A plea of purchaser for valuable consideration, without notice, cannot avail against a prior duly registered deed; and whether a legal or equitable title be conveyed, the deed will have priority from its registration. *Eyre* v. *Dolphin*, 2 B. & B. 300.

6. A person having notice of a prior unregistered deed, cannot avail himself of the registry of a subsequent deed to defeat the priority of the other; for it would be a fraud to take a conveyance to defeat a prior deed of which there was notice. *Ibid*, 2 B. & B. 302.

III. Mistake in, when rectified.

1. In the case of a lease of a lodge for seven years, with a covenant for renewal, and also the deputation of a keepership, with a memorandum to renew concurrently with the lease; a few days before the expiration of the term, the deputation was renewed, but by mistake such renewal was for the residue of the whole instead of the new term: this was held to be a mistake, which ought to be rectified by the court; and though there was a covenant in the lease not to assign, yet as that covenant would not at law have prevented an under-letting, the same relief was given to an under-tenant, as the original lessee would have been entitled to. *Jalabert* v. *Duke of Chandos*, 1 Eden, 372.

2. The court will reform a deed entered into under a previous agreement, by ordering a fresh conveyance to be executed, from which a covenant, complained of as not being the intention of the covenantor at the time of agreement, nor inserted therein by his direction, will be directed to be omitted, although such covenant has been introduced by the attorney of the covenantor, but without his express authority, on its being shown that the party had not considered himself liable to such covenant, by the terms of the agreement. *Rob* v. *Butterwick*, 2 Price, 190.

IV. Construction or Operation of.

1. Appointment to all and every the daughters and daughter of A., and the heirs of their body and bodies, and in default of such issue, over: there being only two daughters, one of whom died under twenty-one, without issue, the surviving daughter is entitled to the whole, though there is no cross remainders. *Wright* v. *Lord Cadogan*, 2 Eden, 239.

2. A deed must receive its construction as from the moment of execution, and not by any subsequent events. *Balfour* v. *Welland*, 16 Ves. 156.

3. As to extending or reducing, by implication, an express limitation in a deed—*Quære*. *Wykham* v. *Wykham*, 18 Ves. 422.

4. An instrument, though void at law, may be sustained in equity. *Ibid*, 18 Ves. 423.

5. Proviso in a deed of separation, that the wife, surviving, shall be entitled to her dower and thirds of all real and personal estates, whereof the husband

shall die seised or possessed, must be construed not as a covenant to leave her such a portion of the personal estate as she would be entitled to under the statute, had he died intestate; but, that living separate, she should be in the same situation as if not separate, as to dower and thirds, *i. e.* the actual share by the law or custom not interfering, therefore, with his testamentary disposition. *Cochran* v. *Graham*, 19 Ves. 63.

6. Distinction between a voluntary deed, which must have its legal effect, and a marriage settlement, or will, in which, upon the contract and clear intention, the legal effect is controlled. *Sidney* v. *Shelley*, 19 Ves. 366.

7. In the construction of an instrument, the recital must be taken to control the operative part. *Oliver* v. *Daniel*, 1 Mer. 500.

8. A deed is to be expounded according to the intention of the maker; but the court will not new-model the deed itself, or alter dispositions, which are in themselves clear and unambiguous, because they happen to be ineffectual to the end proposed. *Marquis Cholmondeley* v. *Lord Clinton*, 2 Mer. 343.

9. If the words of a deed are in themselves of doubtful signification, or there is no person to whom, in their strict technical sense, they can apply, it is a subject for inquiry, whether they may not be understood in a different sense. *Ibid.* 2 Mer. 344.

10. In the construction of a deed relating to equitable estates, although the general words, taken by themselves, would be sufficient to pass the whole interest which the party has to convey; yet, where it is clear that those words were used, and understood by all the parties to the deed, only in subservience to a particular purpose, they will not be held to have an effect beyond the particular purpose so intended. *Ibid.* 3 Mer. 351.

11. A court of equity is not bound to find an equitable effect for a clause in a deed, because the construction put upon it at law would leave it inoperative. *Gladstone* v. *Birley*, 2 Mer. 404.

12. Where a limitation in a deed is perfect and complete, it cannot be controlled by intention collected from other parts of the deed. *Marquis Cholmondeley* v. *Lord Clinton*, 2 J. & W. 84.

13. An imperfect limitation must be controlled by the meaning and intention collected from the whole of the deed taken together. *Ibid*, 89.

14. In construing a deed, legal presumption can only prevail in the absence of a contrary intention, or where that is not manifested with sufficient clearness. *Ibid.*

15. Words of description to be construed according to the intention, if clearly manifested on the face of the deed, though contrary to their correct technical sense. *Ibid*, 93.

16. The rule in construing a deed is to collect the intention from the entire of the instrument, and not from any detached part. *Crone* v. *Odell*, 1 B. & B. 480.

17. When instruments, containing words of present demise, have operated as actual leases, although something further was covenanted to be done, all the terms of the contract were specified and ascertained, and nothing but a more regular conveyance was wanting. *Pentland* v *Stokes*, 2 B. & B. 73.

V. Where set aside or relieved against.

1. A release *ex vi termini*, imports a knowledge in the releasor of what he releases; and if there is any material *suppressio veri* on the part of the releasee, equity will relieve against it: as where executors obtained from a freeman's daughter and her husband a general release, without rendering an account of the personal estate so as to enable them to elect to her orphanage-share, or communicating an opinion of counsel which they had taken; such release was set aside, and the executors decreed to render an account of the personal estate, so as to enable the parties to elect, notwithstanding length of time and alleged loss of vouchers. *Salkeld* v. *Vernon*, 1 Eden, 64.

2. Length of time will not purge a fraud; and therefore a fraudulent conveyance from the *cestuis que trust* to their trustee, set aside as against a purchaser with notice, notwithstanding upwards of thirty years had elapsed since the original transaction. *Alden* v. *Gregory*, 2 Eden, 280.

3. A deed will be set aside as improvidently obtained, where so obtained for an inadequate consideration from persons in low circumstances, and unapprised of their right until the time of the transaction, when the consideration is offered to them, though no misrepresentation or

actual fraud has been made use of, but upon the principle that the party being taken by surprise, was not equal to protect himself. *Evans* v. *Llewellin*, 1 Cox, 333.

4. Where a release of a legal demand has been improperly obtained, a court of equity will set aside the release, but will not decree payment of the legal demand. *Pascoe* v. *Pascoe*, 2 Cox, 109.

5. A tenant, by collusion with the steward of the landlord, fraudulently obtained a renewal of a lease for lives, by representing that one life instead of two had dropped, whereby the fine payable on such renewal was diminished. He was decreed to pay the value of the lease beyond the fine actually paid, with interest from the time of the execution of the lease; and was held not to be entitled to the option of delivering up the new, and abiding by his former lease. *Earl of Abingdon* v. *Butler*, 2 Cox, 260.

6. Lease set aside with costs, where obtained by the contrived and habitual intoxication of the lessor on the day of his coming of age, and at a very inadequate rent: and acts of confirmation not available. *Say* v. *Barwick*, 1 V. & B. 195.

7. Tenant for life, with remainder to his son in tail, with remainder to himself in fee, devises "all his estate" to his daughters. The surviving daughter executes a general release to her brother, (the tenant in tail), in words sufficient to pass the reversion in fee. A bill being filed by her to set aside this release, upon the ground that it was meant only for a particular purpose, Lord Chancellor King at first decreed in favor of the plaintiff; but afterwards, on a re-hearing, altered the decree, and directed issues to try, first, whether, at the time of the execution of the deed, she knew, or was apprised of, her title under the will; secondly, whether she intended, by the release, to pass that reversion. And, on appeal, this decree was affirmed. *Farewell* v. *Coker*, 2 Mer. 354. 2 J. & W. 192.

8. A party called upon to join in a conveyance, for the purpose of obviating a specified objection to title he will not be bound as to any other interest of which he was not apprised: but if he consents to join in the conveyance, upon being told generally there are objections to the title, he must be taken to have inquired into the nature of the objections, and cannot afterwards raise a question as to the extent of his information. *Marquis Cholmondeley* v. *Lord Clinton*, 2 Mer. 355.

9. A vicar and vestrymen, under an unlimited power of leasing given by Act of Parliament, granted leases for 999 years, and 1000 years. These leases, if executed according to the provisions of the Act, are valid, and equity will not set them aside on the ground of their unreasonable length, where they had been acquiesced in for a century; and the rent reserved, was, at the time of the grant, probably advantageous to the lessors. *Attorney General* v. *Moses*, 2 Mad. 294.

10. A deed of gift was ordered to be delivered up, as obtained by undue influence over the donor, where it appeared that the donor was, at the time of executing the deed, eighty-four years of age, and nearly blind, and the parties in whose favor it was executed were her niece and niece's husband, who were the persons in whom she had entire confidence, and upon whose kindness and assistance she depended. Parties standing in this relation cannot maintain a deed of gift, unless they can establish that it was the result of the donor's own free will, and effected by the intervention of some indifferent person; which in this case they failed to do. *Griffiths* v. *Robins*, 3 Mad. 191.

11. Whether a bill by a remote remainder-man to set aside a deed executed by the tenant for life, who was also trustee, and by the first remainder-man in tail of an estate *pour autre vie*, be maintainable during the life of the tenant for life — *Quære*. *Osbrey* v. *Bury*, 1 B. & B. 53.

12. A lease deliberately executed cannot be set aside on the ground of mistake, from omitting a covenant of a general warranty, such not constituting part of the agreement between the parties. *Legge* v. *Cooke*, 1 B. & B. 506.

13. From the obscurity and inaccuracy of a deed, fraud and inadequacy of consideration will not, after the death of the parties, be presumed when not proved; therefore a bill by mortgagor to set aside a deed executed by him and the mortgagee of the mortgaged premises, excepting a part the mortgagee had, with the privity of the mortgagor, agreed to assign to another, which the purchaser covenanted to ratify, dismissed. *M'Namara* v. *Brown*, 2 B. & B. 1.

14. A grant from a distressed man in

prison for debt to his attorney, set aside as fraudulent in favor of children, though deriving as volunteers, yet having as fair a claim to be relieved against fraud as the heir at law. *Falkner* v. *O'Brien.* 2 B. & B. 214.

15. A lease obtained *pendente lite* set aside. *Ibid.*

See also *Gaskell* v. *Durdin,* 2 B. & B. 169.

16. Grants in reversion obtained by an agent and trustee from his employers and *cestuis que* trust, by fraud and misrepresentation, and afterwards assigned for valuable consideration to a purchaser having notice of the facts and nature of the title, set aside. *Dunbar* v. *Tredennick,* 2 B. & B. 304.

17. A person executing a deed for the purpose of defrauding the law cannot come into equity for the purpose of setting it aside, even though the instrument has never been made use of; and, therefore, if A. convey an estate to B., as a qualification to kill game, equity will not compel a reconveyance. *Roberts* v. *Roberts,* 1 Dow, 143.

18. K. holding certain premises under a lease, made in 1769, for three lives, at £300 rent, in 1802 obtains from G., tenant for life of the premises, with power of leasing at the best rent, then under age, and in embarrassed circumstances, by the offer of immediate payment of a year's rent then due, but, by the custom of the country, not payable till half a year after, and by a promise to plant on the premises 10,000 trees for the benefit of the landlord, and to make over to him those already planted, a new lease of the lands at the old rent, substituting, instead of two of the old lives, two young lives; the lease, however, containing nothing about the trees planted, and no covenant to plant the 10,000 trees, but only an agreement to plant them endorsed on the lease. The old lease still retained by K. and no trees planted by him. But immediately after execution of the new lease of 1802, he assigns that lease upon trust, to secure a provision for a wife whom he then marries; and soon after by will secures the provision upon other property, in case the lease should be evicted. G., after he came of age, accepts the rent, and gives receipts for it. K. dies. Bill against his son, the widow, and her trustees, by G. and his trustees, the remainder-men not made parties, to have the new lease delivered up to be cancelled, as being fraudulent and void. The bill was dismissed below; but the decree reversed by the House of Lords declaring that the lease, as between the lessor and lessee, was such as ought to be cancelled; but remitting to the court below to proceed with respect to relief as against the widow and her trustees, as should be just. *Knatchbull,* v. *Kissane,* 5 Dow, 389.

19. The second of three brothers died, and upon misrepresentation of the law of succession by a third person, the elder, to prevent litigation, conveyed to the younger brother a share of the deceased brother's estate; such conveyance was ordered to be delivered up to be cancelled, on the ground of mistake, though obtained without fraud. *Lansdowne* v. *Lansdowne,* 2 J. & W. 205.

20. Lease by an administrator to a party having notice that a sale was required by the persons beneficially interested, set aside. *Drohan* v. *Drohan,* 1 B. & B. 185.

VI. Lost, Relief upon.

1. Where a lease and release were made to create a tenant to the *præcipe* in a recovery, and the lease was lost, the recovery having been suffered more than twenty years, it was held to be a case to which the relief given by the 14 Geo. II. c. 20, s. 5, applies. *Holmes* v, *Ailsbie,* 1 Mad. 551.

VII. Void, when delivered up.

1. Equity has jurisdiction to order a deed forming a cloud upon a title to be delivered up, though void at law. *Hayward* v. *Dimsdale,* 17 Ves. 111. *Mayor of Colchester* v. *Lowton,* 1 V. & B. 244.

2. There is a great difference between directing an instrument to be delivered up, and making it effectual in equity. *M'Leod* v. *Drummond,* 17 Ves. 167.

DEVISE.

I. WHAT MAY BE DEVISED.

1. Contingent and executory estates, and possibilities accompanied with an interest, are devisable. *Moor* v. *Hawkins*, 2 Eden, 342.

2. A possibility is a present interest, and capable of devise. *Perry* v. *Phelps*, 17 Ves. 182.

II. WHO MAY TAKE AS DEVISEES, AND WHAT INTEREST VESTS IN THEM.

1. A devise of all testator's real estate, to trustees for a term of 500 years, to raise £200, for the purposes in the will mentioned, and after the determination of that term, and subject thereto to other trustees for a term of 1000 years in trust, to pay out of the rents certain annuities, and subject to the said two terms; testator gave the premises to all and every child and children of his brother, and the heirs of their bodies, &c. The testator's brother had two children at the death of the testator, and one born afterwards, but before the death of the annuitants. This is an immediate devise, and the last-mentioned child, being born after the testator's death, is not entitled to any share of the premises. *Singleton* v. *Gilbert*, 1 Cox, 68.

2. An immediate devise to great grandchildren will not include a great-grandchild in ventre sa mere at the testator's death. *Freemantle* v. *Freemantle*, 1 Cox, 248.

3. Devise to the testator's sister A., then unmarried, for life, remainder to her first and other sons in tail male; to her daughters in tail as tenants in common; to his sister B., then married, for life, and to her first and other sons in tail; remainder to the first and nearest of his kindred, being male, and of his name and blood, that shall be living at the determination of the estates before devised, and to the heirs of his body: the devisee, to claim under the last limitation, must be of the name as well as blood of the devisor; and the name taken by the King's licence previously to the determination of the preceding estates, will not satisfy the qualification. *Leigh* v. *Leigh*, 15 Ves. 92.

4. The rule that a man cannot make his right heir a purchaser, is confined to the estate of which he is seised. *Robinson* v. *Knight*, 2 Eden, 159.

5. Devise and bequest in trust, subject to a life interest, to transfer to the testator's nephew and nieces, equally, at twenty-one; with survivorship in case any should die before his or their shares should become payable; and a limitation over, in case all should die. These are vested instruments at the age of twenty-one, during the life of the tenant for life. *Halifax* v. *Wilson*, 16 Ves. 168.

6. Devise in remainder to "the said T. B. for life," and after his decease to "the said T. B., son of my nephew," and his heirs. Besides this great nephew, the testator left also a nephew of the same name, "T. B.," but who was not before mentioned; and as in every other

instance the devisee was pointed out by reference and particular description of the degree of relationship, the great nephew was held to be intended in both limitations. *Chambers* v. *Brailsford*, 18 Ves. 368. 2 Mer. 25.

7. A devise to a stock, or family, or house, shall be understood of the heir principal of the house. *Counden* v. *Clarke.* 19 Ves. 300.

8. A will devising real estates for life, with remainder "to my family," the heir at law is entitled under that term. *Wright* v. *Atkyns*, Coop. 117. S. C. 19 Ves 299.

9. A devise of estates in fee simple, in possession, to all and every, the child and children of the testator's daughter S. M. for life, and after the decease of such child and children, to the lawful issue of such child and children, to hold to such issue, his, her, and their heirs, as tenants in common; and, in default of such issue, then over. S. M. had nine children, four born in the testator's lifetime, and five after his decease. Held that all the children were entitled under this devise as tenants in common in tail, with cross remainders. *Mogg* v. *Mogg*, 1 Mer. 654.

10. Other estates in fee simple were devised to trustees, during the life of I. H., upon certain trusts, with remainder to the children of I. H., and their issue, in the same words as the above devise to the children of S. M.; and in default of such issue, to all and every the child and children of S. M., &c. *ut ante:* and I. H. died without issue. Held that only six of the nine children of S. M. were entitled under this devise; viz. five who were born, and one *en ventre sa mere*, at the death of I. H. *Mogg* v. *Mogg*, 1 Mer. 654.

11. Devise of estates in fee simple, to the testator's widow for life, and after her decease to the same uses as in the last devise: held that all the nine children of S. M. were entitled, they being all born in the widow's lifetime. *Mogg* v. *Mogg*, 1 Mer. 654.

12. A devise of fee simple estates to trustees during the life and lives of the child and children &c. of S. M., in trust, to apply the rents for their maintenance, and after the decease of such child and children, to the lawful issue of such child and children, &c. *ut ante:* held that all the nine took equitable interests for their lives and the life of the survivor; and that, on the decease of the survivor, the estate would go to the issue of the four born in the testator's lifetime, by purchase, as tenants in common in fee. *Ibid.*

13. But as to leasehold for lives and years, given in the same manner, the legal estates being in the trustees, held, that all the nine took, in equal shares, absolute interests in the leaseholds for years, and estates in the nature of estates tail, in the leaseholds for lives; and that the limitations in the latter property were barred by deeds executed by some of the children. *Ibid.*

14. Generally, a gift to A. for life, with remainder to his children, includes all the children, both those born before and those born after the testator's death. *Leake* v. *Robinson*, 2 Mer. 382.

15. A devise of estates in the county of M., to the eldest son of the testator's son, for life, and of estates in the county of H., to the second and other sons: if but one, then all the real estates to him for his life, and, "for want of heirs of him," to the right heirs of the testator, "his son excepted." Testator died, leaving a son and daughters. Held by the court of K. B. that the daughters took, as *personæ designatæ;* but the judgment was reversed on writ of error. *Doe* d. *Bailey* v. *Pugh*, (cited) 2 Mer. 348.

16. Devise to testator's wife for life, and after her decease that the estate "should be settled by counsel, and go to and amongst testator's grand-children of the male kind, and their issue in tail male," in such proportion &c. as the wife should by deed or will, &c. appoint, with remainder over. One grandchild was born at the date of the will, and two were born after testator's death, but before the death of the testator's wife. As the only mode of giving an estate tail to the issue, was by giving an estate tail to the parent, the court held upon the clear intention that this devise gave an estate tail male to all the grand-children, the proportion to be settled by the widow. *Marshall* v. *Bousfield*, 2 Mad. 166.

17. Devise to trustees of all testator's freehold and copyhold estate, upon trust, to the use of the children of the body of testator's sister, lawfully begotten, and their heirs for ever; and in case such children should all die before they respectively attain twenty-one, to the use

of the children of E. C., with a direction that the trustees should receive the rents, issues, and profits, and place the same out at interest, to the use of his said sister's children till twenty-one, and then to divide the same among them, share and share alike, and pay to each his o her share at twenty-one; and in case all the children die before they attain twenty-one, then to divide the same among the children of E. C.; held that the devise was confined to the children of the sister living at the death of the testator; and as but one such child attained twenty-one, he was entitled to the rents and profits accumulated before that period. *Scott* v. *Harwood*,

5 Mad. 332.

18. Construction of a will and settlement as not comprehending great grand-children under the description of children and grand-children. *Earl of Orford* v. *Churchill*, 3 V. & B. 59.

19. Where there is a total want of persons properly answering the description, others who do not so completely answer the description, may be let in, as grand-children under the description of children, but never if there are children. *Ibid.*

20. Devise of residue of real and personal estate to the children of testator's brothers and sisters, "as aforesaid," previously named as legatees, who shall be living at his decease, at twenty-five, equally; but in case of the decease of any of the aforesaid brothers and sisters, having issue, then the child or children to have the same share as if the parent had been living, at his decease, with maintenance and survivorship, in case of the death of any unmarried and without issue: Held that the first clear designation of nephews and nieces living at his death, as the sole objects of his bounty, was not altered or controlled by the subsequent designation of the brothers and sisters; but as to after-born children—*Quære.*

Barker v. *Lea*, 3 V. & B. 113.

21. Where a devise is in terms immediate, and the description of the persons to take is general, those answering the description on the testator's death can alone take; and after-born children will be excluded. *Crone* v. *O'Dell.*

1 B. & B. 459.

22. When the enjoyment of a thing devised is postponed to a particular period, or until a particular event happen, those persons then answering the description will take, and after-born children will be included. *Ibid.*

23. When a life estate is interposed between the death of the testator and the enjoyment by the children of the tenant for life, and nothing to limit the general description, after-born children will be included. *Ibid*, 1 B. & B. 462.

24. When there is an immediate devise to children and grand-children generally, vesting in possession on the death of the testator; after-born children are excluded. *Ibid*, 1 B. & B. 483.

25. But if the vesting in possession be postponed, then after-born children in case at the time of distribution, are entitled, though the devise be immediate. *Ibid.*

26. In the construction of a devise to children, the courts go as far as they can to comprehend every child. *Ibid*,

1 B. & B. 485.

O'Dell v. *Crone*, 3 Dow, 74.

27. A devise of the entire residue, real and personal, to A., B., and C., (children of the testator) "and all their "younger children, their heirs, executors, "administrators, and assigns for ever: "A., B., and C. to receive the yearly "interest for their respective lives, of "such parts thereof as were intended for "their respective younger children. And "in case of the death of A., B., and C., "the share of any of them so dying, to "go to his or her younger children; and "in case of the death of A., B., and C., "or any of them, without leaving young- "er children, the share of such child so "dying to go to the survivors and their "younger children." With powers of appointment amongst their respective younger children. "And in case of the "death of any of the younger grand- "children before twenty-one, or days of "marriage, the shares of such to go to "the brethren of the child so dying." At the time of making the will, and of the testator's death, A. had one younger child, B. several, and C. none: each had several since. On a bill by after-born grand-children, it was held:—

1st. That the residue was divisible into three parts, the yearly interest of each to go to A., B., and C., for their respective lives.

2ndly. That after-born grand-children were entitled, subject to the power of appointment in their parents.

3rdly. That the share of a younger child dying under twenty-one and unmar-

ried, goes over to the brothers and sisters of such child.

4thly. That the share of A., B., or C., dying without leaving younger children, goes over to the survivors, for the same estate as their own original shares.

5thly. That a younger grand child, dying in the lifetime of its parent under twenty-one, and unmarried, had not a vested interest in its share transmissible to its representatives. *Crone* v. *O'Dell*, 1 B. & B. 449.

Affirmed on appeal. *O'Dell* v. *Crone*, 3 Dow, 61.

28. Devise upon trust, to convey in strict settlement, with a proviso, that if any of the tenants for life should become possessed of the family estate, the devise, or limitation directed, should thereupon cease and become void, or not take effect; and the persons next in remainder, under the said limitations or directions, should become entitled to the possession. The first tenant in tail will be entitled, under this proviso, notwithstanding the descent of the other estate upon his father, the first devisee for life. *Stanley* v. *Stanley*, 16 Ves. 491.

III. What Property passes by.

1. Testator having both freehold and leasehold property, the leasehold was held to pass under a general devise, applicable to freehold, where the intention of the testator, as collected from the will, was, that it should so pass. *Lowther* v. *Cavendish*, 1 Eden, 99.

2. Devise of all testator's real estates, wheresoever situate, lying, and being, held, not to include leaseholds as well as freeholds. *Whitaker* v. *Ambler*, 1 Eden, 151.

3. Testator devised a freehold estate to his wife for her life, and then directed that she should dispose of the same amongst the testator's children by her at her decease, as she should think proper. The wife neglecting to execute the power, the children took no interest in the estate under the will. *Crossling* v. *Crossling*, 2 Cox, 396.

4. A. by will, devised all his lands, &c. in the county of L. to his wife B., and her heirs, provided she paid his debts, and raised a sum of £4000 for the portion of his daughter. Afterwards, on the marriage of the eldest son C., part of the lands in L. were (with the concurrence of B.), settled to the uses of the marriage: and as to the other part of the said devised estate, it was declared, by the marriage settlement, to remain to B. in fee, subject to the debts and legacies of A., with a proviso, that if the same should not be sufficient to answer such debts and legacies, and also a further sum of £2000 to be charged thereon; then B. should be at liberty to raise the deficiency out of the premises so settled to the uses of the marriage. B., by will, gave all her estate, real and personal, charged with the debts and legacies of A., to C. his heirs, &c. with a request, on failure of issue of his body, to settle the same upon her daughter. C. by will, "as to his real estate in Y. and L., which were unsettled at his marriage, and were then absolutely in his power," devised the same to D. for a term of years in trust, to raise portions for younger children, and to pay debts; and after the expiration of the term, to the use of the sons of his son E. &c. Held, that such part of the estate of which the fee was, by the settlement, again given to B. must be considered as "lands unsettled at the marriage" of C. notwithstanding the charge on them by A.'s will; and the notice taken of such charge in the settlement as a further security for raising money payable to younger children. *Bland* v. *Bland*, 2 Cox, 349.

5. A devise of real estate, though in form residuary, is specific. *Hill* v. *Cock*, 1 B. & B. 175.

6. A devise to trustees, their heirs, &c. for the life of the devisor's son, to support contingent remainders, in trust to permit him to receive the rents for life; and, after his decease, to his first and other sons in tail. This is an equitable estate in the son, the legal estate in the trustees, with a legal remainder to the first and other sons. *Biscoe* v. *Perkins*, 1 V. & B. 485.

7. Devise of "my estates at S., which were devised to me by, or purchased from A." if the fact prove otherwise, it is not an intended restriction, but an erroneous description, and the estate will pass if otherwise sufficiently described. *Welby* v. *Welby*, 2 V. & B. 191.

8. Construction of a devise as to whether it applied to the body of the estate, or merely to a reversion, which was all the deviseable interest the testator actually had in it, from the combination of it with other estates, the general inaptitude of the

limitations, the words of description, &c, *Ibid*, 192.

9. Qualification in a devise of lands restrained to the last antecedent. *Ibid.*

10. A devise of the profits will pass the land. *Allan* v. *Backhouse*, 2 V. & B. 74.

1.. The will of mortgagee disposing of the mortgage money carries his interest in the land. *Silberschildt* v. *Schiott*, 3 V. & B. 49.

12. A will was construed as passing an estate originally on mortgage, but foreclosed, the testator's intention appearing in his will to dispose of all his interest, though very inaccurately mentioned, both as land mortgaged, and as money due on mortgage. *Ibid.* 3 V. & B. 45.

13. The testator being seised and possessed of considerable freehold, copyhold, and leasehold estates in the county of H., and in possession as mortgagee, of certain leasehold houses in K., in the county of M.; but having no other property in the county of M., and having other estates vested in him as mortgagee, besides those at K. devised "all his freehold, leasehold, and copyhold, messuages, &c. in the county of H , and in the town of K." to A. W. for life: and, after his death, "all and singular other his freehold, copyhold, and leasehold messuages," &c. in the counties of H. and M. or elsewhere, to E. W. and A. T. for their joint lives, and the life of the survivor; and, after their several deceases, he gave "all the said freehold, leasehold, and copyhold messuages," &c. unto, and equally, amongst their children ; and gave to A. W. all the residue of his real estate not before disposed of; and all other his estates and interests whatsoever vested in him as mortgagee "or trustee," &c. "and all the residue of his personal estate, ready money, and securities for money," &c. subject to the payment of debts and legacies. Held, that the mortgaged premises at K. passed under the devise of "all freehold, copyhold, and leasehold messuages, &c. in the county of H. and in the town of K." *Woodhouse* v. *Meredith*, 1 Mer. 450.

14. An estate, which a testator holds in mortgage, will not pass under a general devise of all lands to uses in strict settlement, although the testator, at the time of making his will, had obtained a decree for an account in a bill of foreclosure; for the estate does not lose the quality of a mortgage until the final order of foreclosure. *Thompson* v. *Grant*, 4 Mad. 438.

15. A testator may give, by his will, all his interests in mortgages to which he may be entitled at the time of his death; because a mortgage is in substance a chattel interest: but where the mortgages subsequently become the fee simple estates of the testator by a final order of foreclosure, they cannot pass under such antecedent will. *Ibid.*

16. Devise by very general words, "all messuages, lands, tenements, and hereditaments," will pass money in trust to be invested in land, and settled, though particularly charged on the estates devised. *Green* v. *Stephens*, 17 Ves. 64.

17. Erroneous reasons given for not devising, cannot be taken as amounting to a devise. *Sandford* v. *Raikes*, 1 Mer. 652.

18. A devise of all testator's property, "freehold, leasehold, &c. of which I may be in possession at the time of my decease," will pass real estates, which, at the time of his death, he had contracted to purchase, he having a virtual legal constructive possession of such estate; and the testator's intention being clear, from other parts of the will, that no estates should descend to his heir. *Holmes* v. *Barker*, 2 Mad. 462.

19. Devise of real estate to trustees in trust for testator's brother for life, with remainders over, with a direction that the timber or wood which should be on his real estate, should, from time to time, be used for repairing the houses thereupon, or otherwise for the benefit and advantage of his estate, or that the same should be sold, and the produce of such sale to be applied in the same way as his personal estate. Held, that the devise to the brother carried the underwood upon the estate. *Butler* v. *Borton*, 5 Mad. 40.

20. An estate which the testator had contracted to sell, held to pass by a devise of all his real and personal estate in trust to sell. *Wall* v. *Bright*, 1 J. & W. 494.

21. The circumstance of the testator not having had the legal estate, can make no difference in the construction of a devise. *Jerdoise* v. *The Duke of Northumberland*, 1 J. & W. 573.

22. A devisee takes only what is intended to be given him by the testator. *Secus*, as to the heir at law, who takes whatever is undisposed of, whether in-

tended for him or not. *Tregowell* v. *Sydenham*, 3 Dow, 311.

IV. What Words will pass an Estate in Fee.

1. Devise of the residue of the testator's real and personal estate, to his executors in trust for A, till he should attain twenty-one, and then that the trust should cease, gives the whole beneficial estate to A. *Peat* v. *Powell*, 1 Eden, 479.

2. Devise of all my estate, called &c. to A. for life, remainder to B. and C. is a devise in fee to B. and C. *Price* v. *Gibson*, 2 Eden, 115.

3. Devise and bequest of real and personal estate in trust to pay the rents, dividends, &c. to the separate use of a married woman for life; and after her decease to convey, &c. according to her appointment; with a limitation over, in case of her death in the life of the testatrix, or in default of appointment. This is absolute property in the *cestui que* trust, notwithstanding the indication of an intention that the estate should remain in the trustee for her life, with powers to her inconsistent in a great degree with the supposition of her having, or being able to acquire, the absolute interest. *Barford* v. *Street*, 16 Ves. 135.

4. A fee may pass by will without words of limitation, but whether a description of lands, as in the occupation of a particular tenant, will restrain the legal effect of the word "estate," in a devise to pass the fee—*Quære*. *Chorlton* v. *Taylor*, 3 V. & B. 160.

5. General disposition of all the testator's estates, real or personal, to his wife and two children, to be equally divided amongst them, subject to annuities, which, upon their death, were to devolve to his children equally; the portion of the wife, upon her death, to his children equally; upon their deaths before her, their portion to her during life; with a limitation over upon the death of all, without issue of the children. Whether this gives an estate for life, or absolute to the wife—*Quære*. *Chalmers* v. *Storil*, 2 V. & B. 222.

6. Devise "of all my said manors, lands, tenements, and effects, real and personal," to one for life, and after his decease to his issue male, and the heirs male of such sons successively, one after another; with the remainder to A. "and in default of his issue male as before," then over to B. "and in default of his issue male as before," then to C. for life only, and after his decease, then to the plaintiff. A. is entitled for life under this devise, with remainder to his first and other sons in tail male; B. in remainder in the same manner; and the plaintiff to the ultimate remainder in fee. *Macnamara* v. *Lord Whitworth*, Cooper, 241.

7. The testator devises his real estate to A. for life, without impeachment, &c. with remainder to trustees to preserve, &c. with remainder to heirs of the body of A. By a codicil, reciting the after-purchase of a leasehold estate, he gave and devised the same to his executors and trustees "for such estate and estates, and in such manner and form," as his real estates were given by his will. A. taking an estate tail in the real estates under the will, he will be entitled to the absolute interest in the leasehold bequeathed by the codicil. *Brouncker* v. *Bagot*, 1 Mer. 271.

8. A direction that all testator's children shall share equally in all his property, gives them the real estate in fee. *Patton* v. *Randall*, 1 J. & W. 189.

V. What will pass an Estate tail.

1. The same construction ought to be put upon words of limitations, in cases of trust, as in cases of legal estates, except where the limitations are imperfect, and something is left to be done by the trustees; and therefore, a devise of a trust was held to be an estate tail, from the apparent intent of the testator, and the general words of the will, though there was a limitation to trustees to preserve contingent remainders, a reference to issue male living at the time of the decease of the devisee, a restriction of failure of issue male to the lifetime of persons in *esse*, and a limitation in fee annexed to the words, "heirs of the body." *Wright* v. *Pearson*, 1 Eden, 119.

2. Devise of testator's estate at A., to his eldest son and his heirs, and in default of such, to the heirs of his other children: held to be an estate tail. *Pickering* v. *Towers*, 1 Eden, 142.

3. Devise to trustees to raise by mortgage, or lease, so much money as would pay testator's debts, and afterwards to permit A. to receive the rents and profits for his life; and, after his decease, to permit his eldest son, and the issue male of such eldest son, to receive, &c.; and, for want of issue of A., to B., in like man-

ner; and for want of issue of both, or if their issue should die without issue, then over: held to be a trust estate, and that A. took an estate tail. *Stanley* v. *Lennard*, 1 Eden, 87.

4. Devise of land to trustees in trust to pay annuities, and subject thereto, in trust for A. for life; remainder to trustees to preserve &c., remainder to the heirs of the body of A.; remainder to testator's right heirs; and the residue of testator's personal estate, to be laid out in land, and settled to the same uses: held, that A. was entitled to an estate tail, in the lands to be purchased, as well as in the lands devised. *Austen* v. *Taylor*, 1 Eden, 361.

5. Devise of an estate at A. to I. H. for life, remainder to the issue male of I. H., and to his and their heirs, share and share alike; and for want of such issue, to the issue female of I. H., and to her and their heirs, share and share alike; and for want of such issue, over: of an estate at B., to I. H., for life, remainder to the issue male of his body, and to their heirs, and for want of such issue, over; with a proviso, to charge the premises for such person as would take next in remainder, in case I. H., or his issue alienate, &c. I. H. had two daughters, and suffered a recovery of the estate at B. Held, that he took an estate tail, and that the proviso was repugnant to the estate. *King* v. *Burchell*, 1 Eden, 424.

6. Devise of premises to A., and the issue of his body, and for want of such issue, over, is estate tail in A. *University of Oxford* v. *Clifton*, 1 Eden, 473.

7. Devise to A., and after his death, to his first and other sons, and in default of male issue, then to his eldest and other daughters, and to their heirs male for ever. This is an estate tail male in A. *Wright* v. *Leigh*, 15 Ves. 564.

9. Residuary trust by will, to apply the rents and profits for A. during his life, and afterwards for the heirs of his body, "if any," and in default of such issue then over, gives an estate tail in the real estate, and an absolute interest in the personal. *Elton* v. *Eason*, 19 Ves. 73.

10. Testator devised and bequeathed real and personal estate, to the use of his second son A., for life, without impeachment of waste, and from and after his decease, to the heirs of his body, to take as tenants in common, and not as joint tenants; and in case of his decease without issue, to the testator's eldest son B., his heirs, &c.; and in case both sons should die before twenty-one, then over. This gives an estate tail in the land, and absolute interest in the personalty. *Bennett* v. *Earl Tankerville*, 19 Ves. 170.

11. Where it was clear, from several passages in the will, that the devisor did not intend that his estate should go over from the family of one great nephew to another, unless upon the general failure of issue male of his first great nephew, although in other passages it is provided, that, if the eldest son, or other the sons of the first great nephew, should die in the lifetime of the father, the estate should go over to others, without providing for the event of the deceased son's leaving issue male: the court held, that an estate tail passed to the first great nephew; and that the devisor in the latter limitation, did not refer to the possible contingency of sons dying in the lifetime of their father, leaving sons, not because he meant to exclude such sons, but because that contingency did not happen to occur to him. Where the literal force of expressions differs in a will, it must be a sure rule to seek for the intention of the devisor, rather in a consistent and rational purpose, than in a purpose inconsistent and irrational; and more especially, when the difference may arise only from the devisor not having present to his mind an event, which is not in the usual order of things. *Jenkins* v. *Herries*, 4 Mad. 67.

12. Devise to trustees and their heirs, in trust for A. for life, and after his decease, for his "first and other sons and daughters, now living, successively, for life, as they were in priority of birth; but the sons to be preferred, in succession, to the daughters; and the heirs of the body or bodies of such sons and daughters, respectively, issuing;" and for default of such issue, in trust for testator's own right heirs for ever. After the death of A., his son entered, and suffered a recovery: held, he was tenant in tail, under the will, and the trustees were directed to convey to him in fee, and deliver up the title deeds. *Green* v. *Staples*, 5 Mad. 85.

13. Power to charge portions is not inconsistent with an estate tail. *Jervoise* v. *The Duke of Northumberland*, 1 J. & W. 575.

14. A devise over, to A., B., & C., and their heirs, each in due succession, as named, with usual limitations in failure of D., D. being the first taker: this gives successive estates tail. *Stratford* v. *Powell*, 1 B. & B. 1.

15. A devise of an estate, *pour autre vie*, to "A. for life, with a power to will it to B. and his lawful issue, in such manner as A. should think proper; and in case A. should die intestate, then to B., and his lawful issue," with remainders over, to the plaintiff. This is a vested estate tail in B., liable to be divested by the execution of the power in A. *Osbrey* v. *Bury*, 1 B. & B. 53.

VI. What will pass an Estate for Life.

1. Devise in trust, among other limitations, to the use and behoof of testator's son I. C., and his assigns, for and during the term of ninety-nine years; this term was, "with reference to the true construction of the several parts of the will," considered not as an absolute term, but as determinable on the death of I. C. *Coryton* v. *Helyar*, 2 Cox, 340.

2. Devise of freehold and leasehold estates to devisor's order, and her heirs, for ever, "in the fullest confidence, that after her decease, she will devise the property to my family." This is an estate for life only, to the widow, with remainder in trust, for the devisor's heir, as *persona designata*. *Wright* v. *Athyns*, 17 Ves. 255. 19 Ves. 299. Coop. 111.

3. In a devise of real estate, words of limitation must be added, to give more than an estate for life; as are words of qualification, to restrain the extent and duration of the interest in personal property. *Adamson* v. *Armitage*, 19 Ves. 418. Coop. 284.

4. A devise to the testator's wife, and after her decease, to the heirs of her body, share and share alike, and in default of issue to be lawfully begotten by him, to be at her own disposal. A. dies, and leaves six children by his said wife: held, that the wife took an estate for life only, and each of the children a fee simple in remainder, expectant upon the mother's life estate, in one sixth part, as tenant in common with the other five children. *Gretton* v. *Haward*, 1 Mer. 448.

5. A devise to trustees in trust, to sell, and to pay and divide the produce, unto, and between testator's son and daughter, in equal moieties, share and share alike; the share of her daughter to be for her sole use; and in case of the death of either of them, leaving any child or children, to stand possessed of his or her moiety, to and for the use and benefit of such child or children, when they should attain twenty-one, &c.; and, until they attain twenty-one, the money to be invested in the funds, and the interest applied for maintenance. Held, that testator's children were only tenants for life of the property, with such limitations over, as in the will mentioned. *Farthing* v. *Allen*, 2 Mad. 310.

6. Devise to testator's daughter, and to all and every, the child or children, whether male or female, of her body lawfully issuing; and unto his, her, and their heirs, as tenants in common, gives an estate for life to the daughter, with remainder to her children, as tenants in common, in fee. *Jeffery* v. *Honywood*, 4 Mad. 398.

VII. What will pass a joint Tenancy, or Tenancy in common.

1. Devise to the husbands of testator's two daughters, and their heirs, and in default of such to his other children, held to be a joint estate in fee. *Pickering* v. *Towers*, 1 Eden, 142.

2. Testatrix gave and devised to trustees, their heirs, executors, &c., leasehold, freehold, and copyhold estates, upon trust, to sell and pay debts, &c. and after the payment thereof, to pay and apply the rents &c. to A. for life; and after his decease, she gave, devised, and bequeathed, what should not have been sold, &c. to the heir or heirs at law of B., and the heirs, executors, &c., of such heir or heirs; and directed the trustees to convey and assign them accordingly. The co-heiresses of B., were also the co-heiresses of the testatrix, and they take, as joint tenants, by purchase, and not as co-parceners, by descent, the descent being broken by the devise to trustees. *Swaine* v. *Burton*, 15 Ves. 365.

3. A devise to A. & B. "between them." These words constitute a tenancy in common. *Lashbrook* v. *Cook*, 2 Mer. 70.

VIII. Cross Remainders.

1. Testator devised all his manors, messuages, lands, &c. in trust for A. for life, with remainder to his first and other sons in tail male; "and for want of such issue," he devised all the said manors, &c. to his daughters and grand-daughters *respectively* during their lives; and, after their decease, to the heirs male of their bodies, to take as tenants in common; and, on "failure of such issue," he devised the "remainder of his whole estate to his own right heirs." This devise will create cross remainders amongst the daughters and grand-daughters. *Staunton* v. *Peck*, 2 Cox, 8.

2. Direction in a will to convey lands "to be purchased," to the use and behoof of all and every the daughter and daughters of I. S. &c. and to her and their heirs for ever as tenants in common; and for want of such issue, to the use and behoof of testator's three nieces, and their several and respective heirs for ever as tenants in common. Cross-remainders among the nieces are raised by implication upon the intention, without regard to the words "several and respective," in the limitation to the heirs. *Green* v. *Stephens*, 17 Ves. 64.

3. There is a distinction upon this subject between a devise by a general description, to a class of persons, not ascertaining the number, and a devise to individuals named. *Ibid.*

4. The reasoning in the implication of cross-remainders upon the expression "all the premises," &c. is not satisfactory. *Ibid*, 17 Ves. 75.

IX. Conditional or Contingent.

1. Devise to relations to claim within a year may be established for those claiming within that period. *Walter* v *Maunde*, 19 Ves. 426.

2. Devise of a term upon trust, by mortgage, or out of the rents and profits, to pay debts, and afterwards to pay portions for the testator's daughters, "such portions to become due, and be considered as vested at the expiration of two years next after my decease, if my debts shall then be paid." This is a condition precedent to the portions becoming vested; and one of the daughters having died six years after the testator, but while her portion remained unpaid, upon a question, whether her portion vested in her lifetime, an inquiry was directed as to the time when the debts were, or might have been paid. *Bernard* v. *Montague*, 1 Mer. 422.

3. A testator devised estates to trustees, in trust for his son A, for life, and also made provisions for other members of his family, with a proviso, that if they should respectively "assign or dispose "of, or otherwise charge or encumber the "life estate, the annuities and provisions "so made, to and for them during their "respective lives as aforesaid, so as not to "be entitled to the personal receipt, use, "and enjoyment thereof, then and from "thenceforth the annuity or life-estate, or "interest of him, her, or them respective-"ly, so doing, or attempting so to do, "should, from thenceforth cease and de-"termine, and should immediately there-"upon descend to the person next entitled "thereto, by virtue of the limitations "aforesaid, in case he, she, or they, "were respectively dead." Held, that the life-estate of A. ceased under the proviso: First, by his signing a memorandum, declaring that his life-estate should be chargeable with a debt in case some other property should be insufficient, which event happened.—Secondly, by his executing a power of attorney, authorising a person to receive the rents, and apply them in payment of debts due to himself and others, under which A. was out of the receipt of the rents, and had had no control over them for eleven months.—Thirdly, by borrowing money on the credit of future rents, and delivering to the lender anticipated receipts for the expected rents, and an authority to him to recover and receive such rents for his own use, in satisfaction of the money lent. *Wilkinson* v. *Wilkinson*, 2 Wil. 47.

4. Where a devise is made subject to be reduced to a certain extent on the happening of a given event, the happening of the event is the condition or ground of the reduction; and, if the event never happens, the condition or ground of reduction is gone, and the devise is entire and absolute. *Tregonwell* v. *Sydenham*, 3 Dow, 210.

X. Devise by Implication.

1. Devise to B. after the death of A. B. being the heir at law, a necessary implication for A. for life. *Dashwood* v. *Peyton*, 18 Ves. 40.

2. A devise to the heir of the devisor, after the death of the devisor's wife, raises a necessary implication that the wife shall take for life; but there is no such implication in her favor through the medium of election, if the estate belongs to another man than the devisor. *Dashwood* v. *Peyton*, 18 Ves. 48.

3. The testator gave and devised an annuity of £20 to A. to be paid out of his freehold estate at W. for his life; and then gave the rents and profits of certain houses to B. for her life; and another house, with £10 a year to C. for her life; and all the residue of his estate and effects, after the death of A., B., and C., to D. No estate for life in the residue passes by implication to A., B., and C. *Dyer* v. *Dyer*, 1 Mer. 414. 19 Ves. 612.

4. The mere recital of an erroneous conception of right will not raise a devise by implication. *Dashwood* v. *Peyton*, 18 Ves. 27.

5. Term for ninety-nine years in a will restrained to a life estate, by implication from a subsequent limitation after the failure of that life. *Coryton* v. *Helyar*, 2 Cox, 330. *Wykham* v. *Wykham*, 18 Ves. 421.

XI. Executory Devise.

1. An executory devise transgressing the allowed limits, is wholly void; and not void for the excess merely: but a trust of accumulation is void only for the excess beyond the period to which the act 39, 40 Geo. 3, restrains it. *Leake* v. *Robinson*, 2 Mer. 389.

2. An executory devise is in itself an infringement on the rules of common law, and is allowed only on condition of its not exceeding certain established limits. If the condition be violated, the whole devise is void. *Ibid.*

3 A devise over "to A., B., and C., and their heirs, each in due succession as named, with usual limitations in failure of issue in D." The limitations over to A., B., and C., are good by way of executory devise, these words meaning issue living at the time of the decease of D. the first taker. *Stratford* v. *Powell*, 1 B. & B. 1.

See also XII. (*b*) *infra.*

XII. Illegal or void.

(*a*) *Fraudulent as against Creditors.*

1. If a devise for payment of debts does not provide for such payment in a practicable manner, it is within the statute of fraudulent devises. *Hughes* v. *Doulbin*, 2 Cox, 170.

2. A direction in a will to pay simple contract before specialty creditors, is not void, but is within the exception in the statute of fraudulent devises. *Millar* v. *Horton*, Coop. 45.

3. A devise for payment of debts by rents and profits, is out of the statute of fraudulent devises. *Bootle* v. *Blundell*, 19 Ves. 528.

(*b*) *Where the Limitations are too remote.*

1. Where real estates are by will limited to trustees, to the use in tail of the first and every other sons of tenants for life, a power to the trustees to revoke such uses, and to limit the premises to the use of such sons as they come in *esse* for life only, and to their sons in tail, is void, as tending to a perpetuity, and as repugnant to the estate limited. *Duke of Marlborough* v. *Earl Godolphin*, 1 Eden, 404.

2. Testatrix gave all her estate, real and personal, to her daughter and her heirs, and half the navigation money for her natural life; and in case she died without issue, all to be divided between four nephews and nieces by name, the part of one only for life, and that to be divided between the survivors. The limitation over in case she dies without issue, is too remote, there being no expression or circumstance to limit the generality of the words to a failure of issue at the time of the death. *Barlow* v. *Salter*, 17 Ves. 479.

3. The necessary construction of a devise over, upon death without issue, is an indefinite failure of issue, and the intention of preferring all the issue to the remainder-man, cannot be effectuated in any other way than by an estate tail. *Bennett* v. *Tankerville*, 19 Ves. 178.

4. A trust of a term of years, during the respective minorities of the respective tenants for life, or in tail in possession, &c. to receive and lay out the rents, &c. in stock, to accumulate for such persons as should, upon the expiration of such minorities, or death of the minors, be tenants in possession, or entitled to the rents, and of the age of twenty-one. This trust is void as being too remote; and being void in its creation, is incapable of modification, so as to establish it in the extent, to which it might have been originally carried. *Lord Southampton* v. *the Marquis of Hertford*, 2 V. & B. 54.

5. The testator gave real and personal estate to trustees, upon trust, to apply the rents and dividends (or so much as they should think fit) to the maintenance, &c. of his grandson, W. R. R., until twenty-five; then to permit him to receive the same during his life; and after his death, to apply the same (or so much, &c.) to the maintenance, &c. of all and every, the child and children of W. R. R., until, being sons, they attain twenty-five; or being daughters, they attain that age, or are married with consent, &c.; then upon trust to assign and transfer to such children so attaining twenty-five, or marriage; "and in case W. R. R. should die without leaving issue living at the time of his death, or leaving such, and all die before twenty-five or marriage, as aforesaid," upon trust to pay, &c. unto and among all and every, the brothers and sisters of W. R. R., share and share alike, upon their attainment of twenty-five or marriage, respectively. The testator then gave the residue of his real and personal estate, upon trust, to pay one moiety of the rents, interest, and dividends, to the testator's daughter A. for life; and after her death to her husband for life; and upon the death of the survivor, to the children (except W. R. R.) in the same manner as with respect to the former gift: and, as to the other moiety, upon like trusts for the testator's daughter B., her husband and family, with survivorship between the respective grand-children: and in case of the death of either of the daughters, without leaving issue at her decease, then to the children of the surviving daughter.—Held that the limitation to the brothers and sisters of W. R. R., in default of issue living to attain twenty-five, included all his brothers and sisters living at his death, and was consequently void, as being too remote: that A. having died, leaving issue, the moiety of the residue intended for her children, was also void, as being too remote, and was therefore undisposed of. The other moiety was held to rest in contingency during the life of B.; and if she should die without issue, to be well given over to the children of A. *Leake* v. *Robinson*, 2 Mer. 363.

6. A devise over "to A., B., and C., "and their heirs, each in due succession, "as named, with usual limitations in "failure of issue in D.", does not import an indefinite failure of issue in D. *Stratford* v. *Powell*, 1 B. & B. 1.

DISCOVERY.

I. WHERE IT MAY OR MAY NOT BE OBTAINED.

See also PLEADING, *post.*

1. Where the bill stated that the testator intended to republish his will, but was prevented by the fraud of the heir at law; a demurrer to so much of the bill as required him to discover whether the testator did not intend to republish his will, (although the fraud and obstruction were denied,) was overruled. *Dixon* v. *Olmius*, 1 Cox, 414.

2. Demurrer to so much of a bill as called for a discovery of cases laid before counsel, and the opinions; overruled as covering facts material to the plaintiff's case. *Richards* v. *Jackson*, 18 Ves. 472.

3. A court of equity will not give as-

sistance by bill of discovery in support of an action to recover the expenses of entertainments given by the plaintiff under an agreement with the defendant to introduce him to a woman of fortune, with a view to marriage; and a demurrer to such a bill was allowed without argument. *King* v. *Burr*, 3 Mer. 693.

4. After a verdict at law, a bill, with proper charges, may be sustained for the discovery of documents necessary to a fair decision. *Field* v. *Beaumont*, 1 Swan. 209.

5. In a bill for discovery and relief, a plaintiff not entitled to relief, is not entitled to discovery. *Attorney General* v. *Browne*, 1 Swan. 294. *Hodle* v. *Healey*, 1 V. & B. 539.

6. But the converse of the rule will not hold, because the plaintiff may be entitled to relief otherwise than through the defendant's answer. *Attorney General* v. *Browne*, 1 Swan. 294.

7. Demurrer lies to a bill of discovery merely, unless it is alleged in the bill to be in aid of some other proceeding either pending or intended. *Cardale* v. *Watkins* 5 Mad. 18.

8. Demurrer by an officer of the bank allowed upon the ground that, as to the discovery sought from him, he was merely a witness. *How* v. *Best*, 5 Mad. 19.

9. A defendant in a bill filed for a discovery in aid of an action at law, charging that he had debited the plaintiff with larger sums, as paid on his account by the defendant, than were actually paid by him, is compellable to answer whether that were so or not: and that although the accounts have been settled for several years; for there is no period of limitation in point of time within which such a bill must be filed; and though the defendants (men of good reputation) state a very strong case by their answer, for the facts stated in an answer are not conclusive. *Mant* v. *Scott*, 3 Price, 477.

10. There is no limitation in point of time within which a bill for discovery in aid of an action at law must be filed. *Ibid.*

11. The court will not decree a discovery against bankers suing the plaintiff in equity for the amount of certain cheques drawn on them by him, on the ground of their having been given on a particular account, which the defendants, in equity, deny. *Askam* v. *Thompson*, 4 Price, 330.

12. Nor will they order the defendants to produce the cheques, that the language of them may be discovered; because such discovery could not be of use to the plaintiff in equity on the trial at law. *Ibid.*

13. Where the defendant demurred generally to a bill for discovery, as to whether he had not deeds, &c. in his possession, destructive of his title, there being parts of the bill which, whatever should be the fate of the demurrer, ought to be answered; the demurrer was on that account overruled, and the court gave leave to withdraw and demur particularly, or answer, on payment of full costs, as between party and party. But any demurrer to the discovery will be overruled, a defendant being entitled to avail himself of instruments in the possession of a plaintiff, which may shew that the former has a right, or that the latter has none. *Whyman* v. *Legh*, 6 Price, 88.

II. Costs.

1. The plaintiff, in a bill for discovery only, shall pay the costs. *Butterworth* v. *Bailey*, 15 Ves. 361.

2. The defendant to a bill of discovery is entitled to the costs of the discovery immediately on his putting in a full answer; and his rights to these costs are not waved by his subsequently accepting the costs of an amendment, nor by his neglecting to serve the plaintiff with the order for costs of discovery until after he has himself been served with the order to amend. *Coventry* v. *Bentley*, 3 Mer. 677.

3. The plaintiff in a bill of discovery must pay all costs of the defendant, including those occasioned by resisting motions made in the cause by the plaintiff. *Noble* v. *Garland*, 1 Mad. 344.

4. When a bill is merely for a discovery, a defendant, upon putting in a sufficient answer, may move for his costs; but not when the bill prays relief, although the relief is only prayed as against the other defendants; for the court cannot examine the record to see if the plaintiff, under the general prayer, is not entitled to some relief against such defendant. *Attorney General* v. *Burch*, 4 Mad. 178.

DISSEISIN.

1. There may be a seisin of an equitable estate, but there can be no disseisin of it; because disseisin must be of the entire estate, and also because a tortuous act can never be the foundation of an equitable title. *Cholmondeley* v. *Clinton*, 2 Mer. 357.

2. *Cestui que* trust having a substantive, independent possession may gain the legal estate by disseisin; but a mortgagor cannot disseise his mortgagee, because his possession is that of the mortgagee. *Ibid*, 2 Mer. 361.

3 Where possession can be referred to a good title, it cannot, in a court of equity, be treated as acquired by disseisin. *Conry* v. *Caulfield*, 2 B. & B. 272.

4. Possession and receipt of rent will amount to a disseisin, and give an estate, upon which a fine will operate. *Ibid.*

DISSENTERS.

1. Dissenting establishments will be supported by a court of equity, if the doctrine preached is tolerated by law. *Davis* v. *Jenkins*, 3 V. & B. 158.

2. Dissenters may sue, by information, in the Attorney General's name, for charity estates belonging to them. *Attorney General* v. *Lord Dudley*, Coop. 146.

3. A court of equity is bound to administer trusts for the benefit of Protestant dissenting congregations. *Attorney General* v. *Pearson*, 3 Mer. 396.

4. The policy of the established church, which gives the minister an estate for life in his office, does not extend to the case of dissenters, so as to prevent the court from sanctioning the appointment of a minister to a dissenting congregation, for a limited period, and not for life, provided such be the usage of the members, or the provisions of the trust, which the court is called upon to establish. *Ibid*, 3 Mer. 402.

DOMICIL.

1. Real property must be regulated by the law of the country where the land lies: personal property by that of the domicil. *Brodie* v. *Barry*, 2 V. & B. 131.

2. The intestate was domiciled in England, and left real estate in Scotland; the heir being one of the next of kin, was held entitled to share according to the law of England, without being subject to the condition of collating the real estate according to the law of Scotland. *Ibid.*

3. Where the intestate is domiciled in England, his real estate in Scotland will be charged with a hereditable bond as the primary fund, according to the law of Scotland; and not exonerated by the personal estate according to the law of England. *Ibid*, 2 V. & B. 132.

4. T. P., a native of England, domiciled in Guernsey, died intestate, leaving a widow, and infant children by her and also by a former wife. The Royal Court of Guernsey appointed the widow guardian of her children, and another person guardian of those of the first marriage; and these guardians, under the authority of the Royal Court, sold the property of the intestate, and invested the produce in the English funds: afterwards the widow comes to England with her children, and is domiciled here, and two of the children died. Held that the law of England is to govern the succes-

sion, the domicil of the children being, according to the opinion of foreign jurists, (our own law being silent on the subject), to follow the domicil of the surviving mother, where no fraudulent intention can be imputed: and fraud may be presumed where no reasonable cause appears for the removal; but in this case, the mother being a native of England, her return was natural, and not to be attributed to an improper motive. *Pottinger* v. *Wightman*, 3 Mer. 67.

DONATIO MORTIS CAUSA.

1. There may be a *donatio mortis causâ* of a bond, though not of a simple contract debt, nor by the delivery of a symbol; and where a bond was given *in extremis*, the donor saying, "there, take that, and keep it," and the donor died two days after, it was held to be a *donatio mortis causa*: for if a gift is made in expectation of death, there is an implied condition, that it is to be held only in the case of death; and the bond being given in the extremity of sickness, such a condition is to be inferred. The donee was declared entitled to the bond, and also, indemnifying the executors, to be at liberty to use their names. *Gardner* v. *Parker*, 3 Mad. 184.

DOWER.

I. When barred.

1. A covenant by the husband, that his heirs, executors, or administrators, shall pay the wife an annuity for her life, in full for her jointure, and in bar of dower, though without expressing that it shall be charged on any particular lands, or be secured out of lands generally, is a good equitable jointure, within the statute, 27 Hen. 8. *Drury* v. *Drury*, 2 Eden, 39.
Earl Buckinghamshire v. *Drury*, 2 Eden, 80. 3 Bro. P. C. 492.

2. The husband, previously to the marriage, gave a bond to the wife's mother, conditioned for the settlement of land to the wife, for life, in bar of dower; and after her decease to the uses of the marriage (which settlement was liberal and reasonable, in regard to the wife's fortune): and after the marriage, but during a period of disagreement and separation, the settlement was executed accordingly, the wife being made a party. This shall preclude the wife from her legal claim of dower; and it is no objection that the wife was no party to the bond, or was a feme covert at the time when she joined in the execution of the settlement; and as the bond was good for the issue of the marriage, so it must be for the wife, for it cannot be set aside as to one party, and deemed good as to the other. *Estcourt* v. *Estcourt*, 1 Cox, 20.

3. To bar a widow of her dower, by a provision made by will, there must be a clear indication that such was the testator's intention; or it must appear that some other parts of the testator's disposition of his property would be defeated, by the widow's taking both the provision under the will and dower; and the testator having given all his real and personal estate on trust, in the first place to pay such provision to the wife; and after payment thereof, to pay and apply the residue among his children, is not of itself sufficient to bar dower. *Thompson* v. *Nelson*, 1 Cox, 447.

4. Conveyance to J. R., his heirs, and assigns, to such uses as J. R. should appoint; and in default of appointment to J. R. in fee. J. R., who was married, by lease and release and appointment conveyed to a purchaser. Whether the wife of J. R., if she survived him, would be entitled to dower—*Quære*. *Ray* v. *Pung*, 5 Mad. 310.

II. COSTS OF SUIT FOR.

1. Though by analogy to the law, costs do not follow a decree for dower merely, they are given upon vexatious resistance. *Worgan* v. *Ryder*, 1 V. & B. 20.

EAST INDIA COMPANY.

1. The by-law of the East-India Company, which requires a discovery by answer to a bill in equity, as to transactions upon which penalties were imposed, applies only to the case of a suit by the company. *Paxton* v. *Douglas*, 16 Ves. 239.

ELECTION.

I. PRINCIPLES OF ELECTION.

1. A person is not bound to elect without a knowledge of the fund.
Salkeld v. *Vernon*, 1 Eden, 64.
Chalmers v. *Storil*, 2 V. & B. 222.
Dillon v. *Parker*, 1 Wil. 253.
1 Swan. 359.

2. A devise may be made by raising a case of election expressly, or by clear implication. *Dashwood* v. *Peyton*, 18 Ves. 41.

3. Where a case of election is raised, it does not give a right to retain the thing itself, though it may give a right to compensation out of something else. *Ibid*, 18 Ves. 49.

4. The principle of putting a person to his election under a contract, is, that if he will not give the price the parties meant him to give, he shall not have the thing contracted for. *Green* v. *Green*, 2 Mer. 94. 19 Ves. 668.

5. Question as to election is different where it arises under a will, and where under an express contract, as in the case of a marriage settlement. *Ibid*, 2 Mer. 95.

6. Rule of equity, that a person taking benefits under a will, shall not be permitted to disturb the dispositions made by it. *Rendlesham* v. *Woodford*, 1 Dow, 249, 254.

7. It is not to be supposed, *prima facie*, that a testator disposes of that which is not his own, so as to raise a case of election. It is only by demonstration plain or by necessary implication, meaning by that, the utter improbability that he could have meant otherwise, that the case is raised. And it rests upon those contending for a case of election, to show that there is that manifest plain demonstration, and that utter improba-

bility. *Lord Rancliffe* v. *Parkyns*, 6 Dow, 179.

8. Right of election will be barred by acquiescence. *Tibbits* v. *Tibbits*, 19 Ves. 662, 663.

9. As to the effect of election against the will, whether compensation or forfeiture—*Quære*. *Tibbits* v. *Tibbits*, 19 Ves. 656.
Green v. *Green*, 2 Mer. 93.

II. Who are capable of Election.

1. A lunatic is incapable of election. *Ashby* v. *Palmer*, 1 Mer. 296.

2. An infant cannot make an election. *Forbes* v. *Moffatt*, 18 Ves. 393.
Van v. *Barnet*, 19 Ves. 111.

3. Where infants were bound to elect, to take under or against a will, it was referred to the Master, to inquire which was for their benefit. *Gretton* v. *Haward*, 1 Swan. 413.

III. Under or against a Will.

(a) *By the Heir.*

1. Testator was possessed of freehold estate, and copyhold not surrendered; of which copyhold his mansion-house was part: and after certain legacies, he devises all his real and personal estate to his wife for life; remainder to his heir at law. An expression in the will, "if she should think proper to reside at his said mansion-house," makes manifest the intention of the testator, to devise his copyhold; and the heir, therefore, must be put to his election. *Unett* v. *Wilkes*, 2 Eden, 187.

2. A residuary devise of real and personal estate, part was copyhold, intermixed with freehold, and not surrendered: this not being for creditor's wife or children, is not sufficient to raise a case of election, or the supplying the want of a surrender against the customary heir. *Judd* v. *Pratt*, 15 Ves. 390.

3. Devise of all freehold and copyhold estates; the copyholds were surrendered; but testatrix afterwards exchanged for other copyholds, which were not. The heir claiming beneficially under the will was put to his election. *Frank* v. *Lady Standish*, 15 Ves. 391 (*n*).

4. Heir at law, of heritable property in Scotland, who is also a legatee of personal property in England, will be put to his election. *Brodie* v. *Barry*, 2 V. & B. 127.

5. As to the reason of the distinction between conditions implied and expressed, with reference to election, as applied to freehold and copyhold estates against the heir—*Quære*. *Ibid*, 2 V. & B. 130.

6. The question, whether an instrument of any given nature or form, is to be read against an heir at law, for the purpose of putting him to an election, as belonging to the law of real property, must be determined by the statute regulating devises of land. *Ibid*, 2 V. & B. 132.

7. Election against a Scotch heir, claiming under an English will, is not controlled by the law of death-bed. *Ibid*, 2 V. & B. 134.

8. Heir put to his election, between estates devised to him, and estates descended: the devisor having been tenant in tail of some, and tenant for life, with the reversion in fee, of others, but a recovery suffered of some estates: held, to be no election. *Welby* v. *Welby*, 2 V. & B. 187.

9. The ground of election against the heir, not only is an implied condition, that he shall confirm the whole will but also the intention, that if the condition shall not be complied with, to give the disappointed devisees, out of the estates over which the devisor had a power, a benefit correspondent to that of which they are deprived, by such non-compliance; and the construction of the will is, therefore, to the heir absolutely, he confirming the will; but, if not, then in trust for the disappointed devisees, as to so much of the estate given to him, as shall be equal in value to the estates intended for them. *Ibid*, 2 V. & B. 190.

10. Though at law, a devise in fee to the heir is inoperative, it would, in equity, be subject to the doctrine of election. *Ibid*.

11. A. by will, not attested to as to pass real estate, devised lands to B., who receives the rents; and by a will, also not attested as to pass real estate, gives the lands, together with a legacy, to the heir at law of A. The heir will not be put to his election, but may receive the legacy, and also call for an account of the rents received by B., in her lifetime. *Gardiner* v. *Fell*, 1 J. & W. 22.

12. Testator makes his will, and gives various legacies to his heir at law. Subsequently to the date of the will, he contracts for the purchase of several freehold estates; which, as was clear on the face

of the will, he intended should not go to the heir at law, but to the executors, for the purposes of the will. The heir at law will not be permitted to take the estates, as heir at law, and also the benefits given him under the will, but must elect between them. *Rendlesham* v. *Woodford*, 1 Dow, 249.

13. Where, in a devise to a son, who was heir at law, words of recommendation were construed as amounting to a trust for others, the heir was put to his election. *Tibbits* v. *Tibbits*, 19 Ves. 656.

(*b*) *By the Widow.*

1. A devise of all testator's freehold estates, subject to an annuity, during widowhood, to his wife: the intention is manifest, that the annuity is in bar of dower, and she will be put to her election. *Arnold* v. *Kempstead.* 2 Eden, 236.

2. Where the testator directed all his real and personal estate to be equally divided between his wife and two children: such disposition being inconsistent with the claim of dower, the widow was put to her election. *Chalmers* v. *Storil*, 2 V. & B. 222.

3. A widow will not be put to her election, by a devise to her for life of a mansion-house, and fifty acres held with it, being part of the same estate, out of which she claimed dower. *Lord Dorchester* v. *Earl of Effingham*, Coop. 319.

4. To put the wife to her election, there must be a clear intention to exclude her from dower, either expressed or implied; and such an intention is not to be implied either from the gift of particular messuages and hereditaments to the wife, for life, or from an annuity being provided for her: but where, in addition, the testator directed the trustees, to whom he devised in general all his real estate, to permit his daughter to use, occupy, and enjoy, a certain freehold house for life, intending a personal use, occupation, and enjoyment of the house, inconsistent with the widow's right to dower out of it, the direction would have been in vain, unless he had previously given such an estate to the trustees, as would enable them to secure such occupation and enjoyment; and as this house was but a part of a general devise of all his real estate, the testator would not have given it free from dower, unless he had also so given his whole real estate. The court held, therefore, that from evident intention of the testator, the wife should be put to her election. *Miall* v. *Brain*, 4 Mad. 119.

5. The testator devises to trustees and their heirs, his farm of one hundred and thirty-six acres, upon trust, to carry on the business thereof, or let the same on lease during the minority of his daughter, and for her benefit. The widow, a devisee, is put to her election, in respect of her dower out of this farm; because, the testator's intention was, that the trustees should be possessed of the entire farm, and her title to dower would disappoint that intention. *Butcher* v. *Kemp*, 5 Mad. 61.

6. When A. by deed conveys property to his wife, and then by will devises the same, with other property, to her for life, the wife must elect. *Stratford* v. *Powell*, 1 B. & B. 1.

(*c*) *By Devisee.*

1. Part of testator's estate being in settlement, he devised all his estates, &c. in general words: this was held not to be such an indication of the testator's intention to dispose of that over which he had no power, as to induce a court to compel the devisee to elect. *Forrester* v. *Cotton*, 1 Eden, 532.

2. As to implied election, the will imposing an express election in favor of another person—*Quære.* *Dashwood* v. *Peyton*, 18 Ves. 27.

3. An unattested will is so totally void as to freehold estates, that the court cannot look into it so as to raise a case of election. So, where the testator had executed a will, devising his real estate to all his daughters, and afterwards gave instructions for another will, by which he gave his real estate to his two eldest daughters, and a pecuniary legacy to the third, but died before such second will could be executed, and the ecclesiastical court granted probate of the written instructions: held, that the testator's third daughter took her share of the real estate under the first will, and the legacy under the second, without being put to her election. *Cary* v. *Askew*, 1 Cox, 241.

4. A. being tenant for life, under his marriage settlement, of certain estates, with remainder to his first and other sons, in tail, with remainder to himself in fee; and being in embarrassed circumstances,

entered into some agreement with B. his only son; of which the particulars did not appear; but by virtue of which B. entered into possession of the limited estates. B., by his will, devised to A. all his personal estate, and also appointed him executor; and further devised to him all his estates in general terms for life; and from and after his decease the settled estates by name; and also other estates of which he was seised in fee, to C. and D., his sisters of the half blood, as tenants in common in fee: he also by a codicil devised to A. an after-purchased freehold, and died. A., the father, proved the will, and entered into possession of all the devised premises, and subsequently mortgaged the freehold estate so devised by the codicil. By his will, dated six weeks after his son's death, he devised the settled, and all his other estates, to trustees, for a term, to raise money for the payment of his debts, renewal of lives, &c. with remainder to C. and D. as tenants in common for life, remainder to their issue in strict settlement, with an ultimate remainder to F. for life. On A.'s death, C. and D. entered into possession, and continued for fourteen years, when C. died without issue, having, by will, devised all her estates to D. in fee. D. continued in possession during her life for twenty nine years, and frequently and distinctly recognized her father's will, and recited the powers thereby given her to charge the settled estates with fine, &c. and died without issue, leaving G. her heir at law; and, after having by will devised part of the settled estate to G. in fee, the residue to E. in fee, but who died in her lifetime, gave a legacy to F. of £500, and also appointed him her executor. On a bill filed by G. against F. who claimed an estate for life under the limitation in A.'s will, praying a declaration that A., by accepting the benefits under B.'s will, had elected to take by such devise, and to conform to its provisions; and by a supplemental bill, praying also that F. might elect to take under or against the will of D.: Held, that the plaintiff, calling upon the court to deprive the defendant of his legal estate, was bound to establish an indisputable title; that acts of a party to constitute election must imply a knowledge of the rights between which he elects, and an intention to elect, of which, in this case, as to A.'s election, there was not sufficient evidence, possession under the circumstances being equivocal as referrible to either right; but that the execution of deeds, containing recitals of the characters of devisee, in which the daughters claimed, and the exercise of a power to dispose of the estates in that character, amounted to conclusive evidence of their election to take as devisees for life under the will of the father, by which election the plaintiff was bound; but that he was entitled to put F. to his election, to take either the legacy under D.'s will, or the part of the settled estate under the limitation, and which had been devised to G. *Dillon* v. *Parker*, 1 Wil. 253. 1 Swan. 359.

5. By the will of S., A., his widow, took a life interest, and his six children the remainder in fee, as tenants in common, in his real estates, of the annual value of £870: A., having, under the erroneous expectation of acquiring an absolute power of disposition, levied a fine of her husband's estates, devised a portion of them, worth about £135 per annum, to G., her grandson, in fee; another portion of like amount, together with an estate of her own at N., of the annual value of £115, for the benefit of the widow and children of W., her eldest son; and the residue, worth about £600 per annum, to her daughter E. in fee: W. being entitled under the will of S., as one of his children, to one-sixth, and, as heir to three of his brothers who died without issue, to three-sixths of his father's estates, devised all his real estate for the benefit of his widow and children, and died shortly before his mother A. The widow and children of W. electing to take under the will of S., and in opposition to that of A., and by that election frustrating, to the extent of £155 per annum, the disposition of the latter in favor of E., E. is entitled to the estate at N. in partial compensation. *Gretton* v. *Haward*, 1 Swan. 409.

6. Father seised in fee of a manor and lands, &c in R., by settlement on his second marriage, limits estates tail to the sons of the marriage, in his lands, &c. in R., without mentioning the manor, with the ultimate remainder in the lands to himself and his heirs. The father having still the manor of R., and the reversion in fee of the lands, &c. and having two sons of the marriage, afterwards makes a will by which he devises all his manor and lands, &c. in B. and R. to his sons for life, with

remainders to their sons in tail. There were expressions in the will from which it might have been inferred that the testator intended to devise immediate estates for life to his sons, not only in the manor which was his own, but in the lands, &c, in P., in which they had estates tail under the settlement, and thereby to raise a case of election: but that in the will he expressly ratifies and confirms the settlement, and every thing therein contained. Held by the Court of Chancery that this was not a case of election, and the judgment affirmed in *dom. proc.* *Lord Rancliffe* v. *Parkyns*, 6 Dow, 149.

7. A case of election cannot be raised against the express declaration of intention to the contrary, as in this case the confirming the settlement by the will; and it is difficult to apply the doctrine to any case where the testator has a present interest in the estate devised, although it may not be entirely his own. *Per Lord Eldon*, *Ibid.*

8. The taking possession alone in ignorance of the rights devised, is not sufficient evidence of an election. But when such devisee takes defence to an ejectment brought for the devised estates, and there is a continuance in possession for a year, and a declaration of an intention to abide by the will; this is sufficient to prove an election made. *Stratford* v. *Powell*, 1 B. & B. 1.

IV. Under a Settlement.

1. Partial accession at the age of twenty-one to a settlement by a female infant, will be construed an election to abide by the whole. *Milner* v. *Lord Harewood*, 18 Ves. 277.

2. By settlement made upon the marriage of E. G. with the plaintiff, certain estates to which E. G. was entitled as tenant in tail in remainder, were settled as to part to the use of E. G. for life; remainder to the plaintiff for life; remainder to the first and other sons of the marriage in tail: and as to part to the use of E. G for life, remainder to the first and other sons in tail, immediately on the determination of his life estate. Other estates, to which the plaintiff was entitled in fee simple, were, by the same settlement, conveyed to similar uses, as were the preceding after the death of E. G. and the plaintiff. Upon the death of E. G., the defendant (his only son and heir at law) enters on the last mentioned estates, to which he was entitled as tenant in tail under the settlement, and brings ejectments to recover possession of those to which his father was entitled as tenant in tail at the time of the execution of the settlement, and into which the plaintiff had entered on his death as tenant for life under the settlement, the estate tail of the father not having been barred, and therefore the estate not duly conveyed to the uses of the settlement. An injunction was granted, on the ground of election, to restrain the defendant from proceeding in these ejectments. *Green* v. *Green*, 19 Ves. 665. 2 Mer. 86.

3. When a party elects under a settlement to take one of two beneficial interests, whether he is bound in equity only to make compensation to those whom the election disappoints, or to give up the other absolutely—*Quære.* 2 Mer. 93.

V. In judicial Proceedings.

1. Where the fact, that the defendant is doubly vexed, by suits in equity and at law for the same matter, is disputed, it is ascertained by reference to the master. *Boyd* v. *Heardzelman*, 1 V. & B. 381.
Mousley v. *Burnet*, *Ibid.*
Young v. *Lucas*, 1 V. & B. 383.

2. A plaintiff suing in Chancery, and in a foreign court of law, will be put to his election. *Paters* v. *Thompson*, Coop. 294.

3. An order, to put the plaintiff to his election, to proceed at law or in equity, is of course; but if such order is obtained upon a false suggestion, that the suits are for the same matter, and such plainly appears, the court will discharge the order without a reference; but if there is any difficulty, it is referred to the master, and all proceedings, in both courts, are stayed in the meantime. *Mills* v. *Fry*, 3 V. & B 9.

4. After an order for the plaintiff to elect, to proceed at law or in equity, a receiver appointed by the court cannot distrain for rent without the plaintiff's undertaking to proceed in equity only. *Mills* v. *Fry*, 19 Ves. 277. Coop. 107.

5. Where the plaintiff in equity is also proceeding at law, and it clearly appears, or is admitted, that the object of the two proceedings is substantially the same, the defendant, on putting in his answer, may, at the same time move for an order that the

the plaintiff may elect, and an injunction to stay proceedings at law until election. *Hogue* v. *Curtis*, 1 J. & W. 449.

6. Upon an application to discharge an order, made on the plaintiff, to elect, whether he shall proceed at law or in equity, the court will itself, if there is fact enough before it, decide, whether it be a case of election or not, without sending it to the master. —— v. ——, 2 Mad. 395.

7. The plaintiff is entitled to a complete answer before he can be put to his election, to proceed at law or in equity; therefore, it is irregular to obtain an order to elect, before the common time for filing exceptions is expired; and where exceptions are filed, the defendant cannot move that the plaintiff may elect, till such exceptions are answered or disposed of. *Browne* v. *Poyntz*, 3 Mad. 24.

8. A plea in bar to part of the relief sought by the bill, and an answer to the remainder, is not such an answer as to entitle the defendant to an order, to put the plaintiff, suing at law, to his election: neither can a plea be considered as an answer for such a purpose. *Fisher* v. *Mee*, 3 Mer. 45.

9. The defendant, under an agreement to take a lease from the plaintiff, was let into possession. The plaintiff filed a bill for a specific performance of the agreement, and brought an action for use and occupation. The master, upon a reference, reported, that the defendant was proceeding at law and in equity, for the same matter: exception to the report was overruled; since, if the court should decree a specific performance, it would of course decree an account of rent, due under the agreement. *Carrick* v. *Young*, 4 Mad. 437.

10. Where the plaintiff is proceeding against the defendant for specific performance of an alleged agreement for a mortgage, entered into by the defendant's testator, for securing money advanced to him on such agreement, and other debts; and also for an assignment of a bond, alleged to have been satisfied by the plaintiff's testator, and constituting part of the plaintiff's demand, the court will compel him to elect one of such objects of the prayer of his bill, on the ground of inconsistency in the application for both at the same time: and in this case, the plaintiff having elected to pray an assignment of the bond, a reference to the deputy remembrancer was ordered, to ascertain the fact of the payment of the debt; and if paid, the nature of it. *Jackson* v. *Radford*, 4 Price, 274.

11. After answer put in, if the plaintiff proceeds at law, the defendant may call on him to elect in which court he will sue. *Mocher* v. *Reed*, 1 B. & B. 318.

12. Proceeding at law and in equity for the same demand, at the same time, would occasion a clashing of jurisdiction, inconsistent with the ends of justice. *Ibid.* 319.

13. A party cannot proceed, both at law and in equity, for the same matter, but must make his election. *Bernal* v. *Marquis of Donegal*, 3 Dow, 147.

ERROR, WRIT OF.

1. Writ of error generally stays execution in civil cases but not in criminal. *Huguenin* v. *Baseley*, 15 Ves. 180.

2. Attachment by the plaintiffs in the Lord Mayor's Court on property of the defendant in the hands of a garnishee. Defendant, residing at Hamburgh, is not summoned, and a verdict is obtained by the plaintiffs; by virtue of which the money is paid them, on their giving security to restore the same in case the defendant shall within a year and a day appear to, and give bail to answer, &c. according to the custom. Defendant appears and pleads to the jurisdiction; plaintiffs reply: and defendant joins issue as to part and demurs to the other part of the replication, and obtains judgment both on argument of the demurrer, and afterwards on trial of the issue. In the interval between the two judgments, plaintiffs present a petition to the Lord Chancellor for a commission and writ of error, which are granted. On motion of the defendant, both the commission and writ are superseded on the ground of misrepresentation in the petition on which they issued; by

which it was alleged that the defendant had been summoned, when no summons had issued; that the validity of the defendant's plea had been argued on a demurrer to the replication, making no mention of the defendant having joined issue as to part, which issue had not been tried at the time of presenting the petition, and other misrepresentations. The motion was further supported on the ground of the commission and writ having been sued out merely for delay, as was manifest from the plaintiffs not having proceeded therein; it being also contended, that if the court would not supersede, then the defendant ought to be at liberty to take out execution notwithstanding, such proceedings not amounting to a *cesset executio*; but as to the latter point—*Quære*. *Traub* v. *Schmidt*, 3 Mer. 632.

ESCHEAT.

1. The right of escheat is not founded on want of an heir, but of a tenant to perform the services. *Burgess* v. *Wheate*, 1 Eden, 201, 235.

2. An escheat was in its nature feudal, and in default of heirs the land strictly speaking reverted. *Burgess* v. *Wheate*, 1 Eden, 191.

3. The legal right of escheat arises under the law of enfeoffment, by which the lord gave the land to the tenant and his heirs, under a tacit condition to revert, if he died without heirs; and the latitude afterwards given to the donee to hold to himself, his heirs and assigns, reduced the condition of reverter to the single event of *defectum tenentis de jure*. *Ibid*, 241, 242.

4. The law of escheats had no regard to the tenant's right to the land, but only to his right of seisin. *Ibid*, 243.

5. Confiscations are repugnant to the genius of a free country, and confined to the single case of a vacant possession. *Ibid*, 253.

II. Rights and Estate of the Lord.

1. The crown takes an estate by forfeiture, subject to the engagements and incumbrances of the person forfeiting; but in general an escheat is taken, free from any equitable claim; and the opinion that the lord takes the escheat, subject to the trust, seems not warranted. *Burgess* v. *Wheate*, 1 Eden, 203.

2. For the purpose of binding the lord in escheat, deeds have been held good against him, which would have been void in other respects. *Ibid*, 209.

3. So far is the lord from being entitled to a benefit as heir or assignee, that he is distinguished from both; and excluded from the privilege which the heir had by common law, and the assignee by statute. *Ibid*, 208.

4. In the case of a purchase, and the money paid by the purchaser, who dies without heir before any conveyance, the M. R. thought that the lord could not pray a conveyance. *Ibid*, 211.

5. If a mortgagor were to die without heirs, and mortgagee in possession were to come against the personal representatives for the mortgage money, the Master of the Rolls thought the court would compel him to reconvey, not to the lord by escheat, but to the personal representatives. *Ibid*.

6. The escheat has no necessary but only a casual dependence upon the old use, which may be determined, and no new one raised, and yet the lord have no claim to his escheat. *Ibid*, 258.

7. The reason why there was no escheat in equity on the death of *cestui que* use without heirs was, that on such event no use remained, and consequently no grounds for the subpœna. *Ibid*, 244.

8. In the case of attainder of the *cestui que* use, the crown at law is not entitled

to the escheat; and according to the analogy between trusts in equity and uses at law, neither will the crown be entitled in case of a trust in equity. *Ibid*, 199.

ESTATE.

I. Vesting.

1. It is a general rule that leasehold estate, limited with freehold, vests absolutely upon the birth of the first tenant in tail of the freehold, subject to the intention, expressed or implied, that they shall go together as long as the rules of law and equity permit. *Lord Southampton* v. *Marquis Hertford*, 2 V. & B. 63.

2. In all cases of grants of estates in lands, there must be a person in *esse* to take when the estate vests by the grant. *Crone* v. *Odell*, 1 B. & B. 458.

3. The same principle applies to the case of a will. *Ibid.*

II. Conversion of.

See also Trust, resulting, *post.*

1. Where part of an infant's real estate was settled in jointure upon her mother; who being distressed, and about to sell her interest, a petition was presented, and the infant, upon a reference to the master, and under an order of court, purchased it; and afterwards attained twenty-one, received a year's rent, and died: held that the purchase, though made during infancy, was to be considered as real estate. *Inwood* v. *Twyne*. 2 Eden, 148.

2. Where by marriage articles real and personal estate was to be settled to the uses of the marriage, but the articles did not empower the husband to convert the money into land, or the land into money; a real estate purchased by him with part of the personal estate, must be considered as personal estate. *Lowther* v. *Earl Westmorland*, 1 Cox, 64.

3. Lessor endorsed upon the lease an agreement to sell the inheritance of the premises to the lessee, if within a limited time he should be desirous of purchasing. Lessor dies, lessee assigns the agreement, and the assignee claims the right to purchase. The purchase money is personal estate, and must be considered as such under the will of the lessor. *Lawes* v. *Bennett*, 1 Cox, 167.

4. By marriage settlement £500 was assigned to trustees in trust, to lay the same out in land, with the consent of the wife, and to pay the rents to the wife for life, for her separate use; remainder to the husband for life; and after the death of the survivor in trust, to convey the same as the wife should by deed or will appoint; and in default of appointment, in trust for the right heirs of the wife for ever: proviso, that until such purchase should be made, the trustees should invest the money in the public funds, with the consent of the wife, and pay the dividends to the wife for life, for her separate use; and after her death, to such persons as the rents of the lands to be purchased would go to, according to the limitations of the estate to be purchased; and to pay or transfer the principal sum of £500, or the stock in which the same should be invested, to such persons as, according to the limitations of the real estate, would be entitled to the inheritance of such lands. The money was never paid to the trustees, but remained in the hands of the husband at the death of the wife; and she having made no appointment, it vested in her heir at law, (subject to the life interest of the husband); but the heir took it as money, and therefore at her death it passed to his personal representatives. *Russell* v. *Smythies*, 1 Cox, 215.

5. Devise of real estate in trust to sell, if the conversion to personal property is only for partial purposes, as the payment of debts, the surplus will be a resulting

trust for the heir; but if for the general purposes of the will, though it might result to the heir, it would do so as personal property. *Wright* v. *Wright*, 16 Ves. 188.

6. Conversion directed by will of real estate into personal, not to all intents, but for the purpose only of answering legacies and annuities; the real estate subject to such charge, is a resulting trust for the heir, and cannot be affected by an unattested codicil bequeathing a lapsed share of the residue. *Hooper* v. *Goodwin*, 18 Ves. 156.

See also *King* v. *Dennison*, 1 V. & B. 272.

7. Conversion of real estate into personal, complete for all the purposes of the will, is not a conversion for the next of kin in case of lapse, they not taking under the will. *Hooper* v. *Goodwin*, 18 Ves. 165.

8. Real estate cannot be converted into personal by will, so as to enable the testator to make a direct disposition of it by an unattested codicil. *Hooper* v. *Goodwin*, 18 Ves. 166.

9. A. conveyed his copyhold estate in trust to sell, the money to be deemed part of his personal estate; and in trust for such uses as he should by deed or will appoint; and in default of appointment, for his right heir. A will executed on the same day, but not referring to the deed, directed a sale of other property, and disposed of the personal estate in general terms; this disposition is not applicable to the copyhold estate conveyed by the deed, which went to the heir, even if converted, no use being declared by any subsequent instrument. *Lowes* v. *Hackward*, 18 Ves. 188.

10. Testator gave all his real and personal estate to his executors in trust, to pay legacies; and, after a particular disposition, gave the residue of his property in trust for his next of kin; directing his executors to pay any debts upon any evidence they might think proper, except the claims mentioned in the margin: held a general conversion into a mixed fund applicable to all debts, none being mentioned in the margin, on evidence satisfactory to the executors, although not strictly legal. *Mildred* v. *Robinson*, 19 Ves. 585.

11. Where the testator gave the residue of his real and personal estate for such of his relations and kindred as his trustees and executors should think fit, and the trust was disappointed by the death of the trustees, without executing the power: held, that the next of kin should take such of the real estate as remained unsold, as land, the will not operating as a conversion out and out. *Walter* v. *Maunde*, 19 Ves. 426.

12. Real estate converted into personal out and out, under a trust to sell for the payment of debts, and to pay the residue to the grantor, his executors, &c. and falling thus impressed with the character of money to one who died an infant, and therefore incompetent to elect to have it reconverted. It was held to have passed to his administratrix. *Van* v. *Barnett*, 19 Ves. 102.

13. A very slight declaration by a competent proprietor of money, directed to be laid out in land, will take from it the character so impressed on it by the instrument. *Ibid*, 19 Ves. 109.

14. It is a clear rule in equity, that where real estate is directed to be converted into personal for a purpose which fails either wholly or partially, so far as it fails, the money is considered as real estate. *Hill* v. *Cock*, 1 V. & B. 174.

15. When a testator means to convert real estate into personal for a particular purpose which cannot be served, the court will not infer any other purpose not expressed. *Ibid*, 1 V. & B. 175.

16. Properly, nothing is the personal estate of a testator that was not so at his death, he may, however, so express himself as to shew something else was intended; but where there is nothing but a direction to sell land, with an application of the money to a particular purpose, there is no instance of holding the surplus, after that purpose was answered, to form part of the personal estate, so as to pass by the residuary bequest. *Maugham* v. *Mason*, 1 V. & B. 416.

17. Devise of real estate in trust to sell, and out of the money so raised, and with the rents and profits till sale, to pay debts, &c. and with the surplus to maintain and educate the daughter of the testatrix till twenty-one, or marriage: but if she should die unmarried under twenty-one, all such money as should remain in the hands of the trustees, or such parts of the real estates as should remain unsold, if any, to be to the use of testatrix's sister. The daughter lived to attain twenty-one. This is a conversion out and out; and the real estate remaining unsold at her

death, goes to her personal representative. *Ashby* v. *Palmer*, 1 Mer. 296.

18. Land once impressed with the character of money, must remain so impressed until some person elects to take it in its original character as land. *Ibid*, 300.

19. Property must be taken not as it is, but as it ought to be, at the death of the party from whom the representatives claim. *Ibid.*

20. By articles of settlement made previous to the marriage of F. N. and E. S., the wife grants to trustees, &c. an undivided sixth part of certain estates for eighty years, if S. N. should so long live; and then, upon trust, (so soon as convenient after the death of S. N. and after settlement made by the husband of an estate called the F. estate, and of a rent charge of £260, to which he was entitled in reversion, expectant on the death of S. N.) absolutely to sell and dispose of the same, and apply the money arising from the sale thereof, and of the other premises after mentioned, upon the trusts after mentioned. By the same articles, the husband covenants, within two years, to convey the F. estate to the same trustees upon the like trusts as were declared as to the said undivided sixth; and likewise covenants, within six months after the death of S. N., to settle upon them the said rent charge upon the trusts mentioned. The trusts of the monies to arise by sale of all the premises directed to be sold, are therein declared to the husband for life, then to the issue of the marriage; and, in default of issue, as the husband should by deed &c. appoint. The husband dies in the lifetime of S. N., without issue, having by his will, after confirming the marriage articles, given to his wife all the real and personal estate to which he became entitled by his marriage, and which should remain undisposed of at his death, and the residue of his personal estate; and appointed her his executrix; and having devised all other his real estate to his wife for life, with remainder to the defendant. No sale took place at the death of S. N., and no settlement was made of the F. estate, according to the articles. The widow enters into possession of the estate, conceiving herself to be only entitled as tenant for life, under the will of her husband; and upon her death the defendant entered as entitled in remainder under the same will. Held that the executor and residuary legatee of the widow is entitled to have the F. estate sold, under the covenant in the marriage articles, and the produce paid to him as part of the personal estate of the widow: for the covenant to convey, being absolute and unqualified, the estate must be considered as having been converted into personalty by the marriage articles; the testator could not be held to have elected to take it otherwise, the period of sale not having arrived when he died, and his will affording no evidence of an intention to pass it as real estate; and the widow could not, by any conduct of hers tending to show in what light she considered it, at all affect the question. *Stead* v. *Newdigate*, 2 Mer. 521.

22. The testator devised and bequeathed certain of his real, and all his personal estate to trustees upon trust, to sell, and after payment of his debts and legacies, to pay the residue to testator's wife. 2dly. testator devises certain other real estates to his said trustees, upon trust, to pay the rents and profits to his wife for life, and after her decease, to his son Thomas, for life; and after his decease, to sell the same, and apply the produce to and among the son of his said son Thomas, and all other his said son's children to be begotten, equally; to be vested interests in them, as and when they respectively attain twenty-one; but if they should all die before twenty-one, unmarried, and without issue, then such monies to be in trust for the testator's other sons, Joseph and Robert, equally. 3dly, the testator devised certain other freehold and leasehold estates, to the same trustees, upon trust, to pay an annuity to his said son Thomas, and subject thereto to pay the rents and profits to his son Robert for life; and after his death, to sell the same, and apply the produce for the benefit of Robert's children, and if Robert should have no children, then to divide the money between testator's sons, Thomas and Joseph, in equal shares, their executors, &c. The testator's wife, his son Robert, and the son, being the only child, of his son Thomas, died in the testator's lifetime; and the testator's personal estate, by the lapse of certain pecuniary legacies, became more than sufficient to pay his debts and the legacies which were payable. Held, that under the first devise the whole interest resulted to the heir, and as real estate, the devisor's pur-

pose of sale being for a distribution, which had no application in the events that had happened; that under the second devise the heir became entitled, by lapse, to the moiety of the produce intended for Thomas's son; but there being an obvious purpose of sale, for the conveniency of division between the children of Thomas, or failing them, between the testator's sons, Joseph and Robert, which convenience still applied, such moiety was not land, but personal estate of the heir; and, that also under the third devise, the same purposes and principles applied to make it go to the heir as personal estate. *Smith* v. *Claxton*, 4 Mad. 484.

23. Where a devisor directs his real estate to be sold, and the produce applied to particular purposes, which partially fail, the heir is entitled to the part of the produce thus undisposed of; and under every will, where the question is as to taking it as real or personal estate, the true inquiry is, whether the devisor has expressed a purpose that, in the events which have happened, the land shall be converted into money. If it be the purpose of the devisor to give land to the devisee, the land will descend to his heir; but if to give the price of land, it will, like other money, be part of his personal estate. *Ibid.*

24. Real property devised to trustees to be sold, and the profits to be deemed part of the residue of the testator's estate, and to go in aid (if necessary) of the rest of his property, in discharge of his pecuniary legacies, given either by his will or any codicil thereto, would be considered in equity as personal property, and would go, in case of the legatee's death, to personal representatives, although the residuary legatee took the property in *statu quo*, and the trustees did not convert it into money, by sale, according to the directions of the will, there being no claim to render such sale necessary. *Attorney General* v. *Holford*, 1 Price, 426.

25. Where money is directed by will to be turned into land, or land into money, they shall be considered as that species of property into which they are directed to be turned. *Tregonwell* v. *Sydenham*, 3 Dow, 207.

III. Real, Charge upon.

(*a*) *Where created.*

See also Tenant for Life, *post.*

Tenant in tail, *post.*

1. Where a debt exists, and the real estate is charged with the payment of it, the personal estate is still the primary fund to be resorted to for payment; but where a power is created of charging a real estate, and the party charges it not in satisfaction of an existing debt, but in favor of a particular person, the real estate must be resorted to. So where a remainder-man in fee, expectant on an estate tail, limited such remainder to himself for life, remainder to trustees for a term of years, on trust, among other things, to raise and pay such sums of money as he should by deed or will appoint, and afterwards by deed appointed, that, when the term came into possession, the trustee should raise and pay £2000 to W. and covenanted, that if the remainder should come into possession in his own lifetime, he would pay the £2000; but if not, and he should revoke the term, then that his heirs, &c. should pay the £2000, with a proviso that if the tenant in tail should, by recovery, bar the remainder, the £2000 should not be payable; and such remainder-man afterwards, by will, revoked the uses of the first settlement, "to all intents and purposes whatsoever, as if the same had never been limited;" and devised all the said premises "subject, nevertheless, to payment of the said sum of £2000," and died. Held that the £2000 remained a charge on the devised premises, after the death of the tenant in tail, notwithstanding the revocation of the term, and that the personal estate of the remainder-man was not applicable to the payment of it. *Wilson* v. *Earl Darlington*, 1 Cox, 172.

2. A mortgaged estate descended to the heir, who made a further mortgage of the premises, for payment of the simple contract debts of the mortgagor. This is not a debt to which the personal estate of the heir is primarily liable, but both the mortgages are charges, in the first instance, on the land. *Earl of Tankerville* v. *Fawcett*, 1 Cox, 237.

3. Devise to trustees for a term of years in trust to raise money for payment of all the testator's debts and legacies, and

subject to that term, testator limited the estates in strict settlement, with the ultimate remainder to his own right heirs. By the falling in of the intermediate limitations, A. and B. became entitled to the estate as right heirs of the testator. The testator's debts and legacies remaining unsatisfied, A. and B. executed joint bonds for the amount of them, and then A. died These bonds are collateral securities only, and not debts of A., to which his personal estate is primarily liable; but they must be borne in the first instance by the devised estate. *Basset* v. *Percival*, 1 Cox, 268.

See also *Shafto* v. *Shafto*, 1 Cox, 207.

4. Where a creditor takes a personal security, with a power of calling for a real security, but neglects to avail himself of such power, the debt is not a charge upon the land. *Williams* v. *Lucas*, 2 Cox, 160.

5. Distinction extremely nice, perhaps not easy of application, between a charge on a devised estate to be created by the act of another, and a charge created by the devisor; to the extent of that charge, the intention appearing, on the face of the will, not to give to the devisee: in the former case the heir has no claim; in the latter, the particular object failing, he takes to the extent of the charge. *Sidney* v. *Shelley*, 19 Ves. 363.

6. A devise after a direction that all the testator's just debts shall be paid, or satisfied, amounts to a devise, subject to, and chargeable with debts. *King* v. *Denison*, 1 V. & B. 174.

7. There is a great difference between a devise upon trust, and a devise subject to a charge, though they are enforced in equity much in the same way. *Ibid*, 1 V. & B. 276.

8. Real estate in Scotland belonging to an intestate domiciled in England, will be charged with heritable bonds as the primary fund, according to the law of Scotland, and will not be exonerated by the personal estate according to the law of England. *Brodie* v. *Barry*, 2 V. & B. 132.

9. After a general direction, that debts, funeral, and testamentary charges shall be paid, and a bequest of the personal estate subject to the payment of those charges, the testator, in case his personal estate should not be sufficient to discharge "the same," charged his freehold estates with payment "thereof," and, "subject thereto," gave all his freehold and copyhold estates, which he had surrendered, or intended to surrender, to the use of the will. The copyhold estates are charged. *Noel* v. *Weston*, 2 V. & B. 269.

10. A covenant, "that notwithstanding any former grant of £1500, charged upon the whole estate of the covenantor, that the lands of Black Acre and White Acre shall stand exonerated therefrom; and that all his other lands and estates shall stand charged therewith, creates a charge on the lands of which he was then seised or possessed, though not specified by name. *Falkner* v. *O'Brien*, 2 B. & B. 214.

11. Distinction between a covenant, that all the estates of the covenantor are charged with a sum of money, and that he will charge his estates: the former is a charge upon all covenantor's lands, the latter is not. *Ibid*, 2 B. & B. 223.

12. Money laid out by an heir in completeing a contract entered into by his ancestor, but not binding on him, a charge on the purchased lands. *Savage* v. *Carroll*, 1 B. & B. 265.

(*b*) *Where extinguished.*

See also MERGER, *post.*

1. Where lands were devised, subject to and charged with a sum not exceeding £10,000, which testator afterwards directed to be paid to charities, and which was therefore void by the statute; held that the charge sunk for the benefit of the devisee. *Jackson* v. *Hurlock*, 2 Eden, 263.

2. There being a provision in a settlement of £5000 for a child at twenty-one, the father by will added £5000 more, and charged both sums upon the residue of his real estate. He subsequently charged the residue of the real estate with the payment of debts and legacies in aid of his personal estate: held that the providing a real fund as auxiliary to the personal estate, must be intended for such payments as would not naturally fall on the real fund; and that therefore the charged of the £10,000, being a valid charge upon the land, was not affected by the subsequent clause in the will. *Ward* v. *Lord Dudley*, 1 Cox, 438.

IV. PERSONAL, WHEN EXONERATED FROM PAYMENT OF DEBTS.

1. Devise of real estate to testator's wife, her heirs, and assigns, in trust, by sale of so much and such parts of the pre-

mises as should be necessary, to advance and raise so much money as would fully pay off and satisfy all his just debts and funeral expenses, and all the residue to his wife for life; remainder to testator's heirs on her body begotten: testator gave to his uncle his tobacco-box, and all the residue of his personal estate whatsoever to his wife for ever, and appointed her executrix: this is not sufficient to exonerate the personal estate from the payment of debts. *Stephenson* v. *Heathcote*, 1 Eden, 38.

2. A devise of all the testator's real estate to trustees, upon trust, to sell a competent part thereof, and in the first place, pay and discharge all his debts and legacies, and in the next place, reimburse themselves the costs of the trust; and after such payments, such part as should remain unsold to be settled: and he declared his meaning to be, that the whole money to be raised by such sale should be deemed and taken to be part of his personal estate, and he bequeathed all the residue of his personal estate, of what nature and kind soever, after payment of his debts, funeral expenses, and legacies. This is a charge of debts and legacies upon the real estate, but is not sufficient to exonerate the personal estate from being first applied in the payment of the debts and legacies. *Earl Inchiquin* v. *French*, 1 Cox, 1.

3. Devise "subject to mortgage," not sufficient to exonerate personal estate. *Astley* v. *Earl of Tankerville*, 1 Cox, 82.

4. Testator devised a part of his real estate in trust, to sell and pay certain scheduled debts, and gave all his personal estate to his wife, "fully and clearly exonerated from all the debts in the schedule specified;" he then settled the residue of his real estate on his wife and child. The trust estate not being sufficient to pay the scheduled debts, the settled estates must be applied in exoneration of the personal estate. *Morrow* v. *Bush*, 1 Cox, 185.

5. Testator devised his real estate to trustees in trust, to sell, and to apply the purchase money, in the first place, in payment of all the charges, and all other his debts and legacies; and as to the residue of the purchase money, to pay one moiety to his daughter M., and to lay out the other moiety in government securities, and to pay the dividends for the maintenance of the three sons of his daughter A., until they should attain their respective ages of twenty-four years, and then that moiety to be equally divided among them; but if they should all die under twenty-four, then such moiety to sink into and be deemed part of the residue of his personal estate, and be applied in such manner as his personal estate was therein given and disposed of. He then gave several specific legacies; and the residue of his personal estate he gave to his daughter A. and to H., equally to be divided between them. The debts and legacies are payable in the first instance out of the purchase money of the real estate. *Webb* v. *Jones*, 1 Cox, 245.

6. Testator having by his will limited his estate in Essex to several persons in succession, devised his estate in Suffolk in trust to sell, and out of the purchase money to pay all his debts, legacies, and funeral expenses: but if the Suffolk estate should happen to be deficient for those purposes, the deficiency to be made good out of the Essex estate: and after several specific and pecuniary legacies, he gave all his personal estate, not therein before disposed of, to his wife. After making this will, the testator sold the Suffolk estate, and received the purchase money. The debts, legacies, and funeral expenses, shall be raised out of the Essex estate, in exoneration of the personal estate. *Williams* v. *Bishop of Landaff*, 1 Cox, 254.

7. The personal estate being the proper and primary fund for the payment of debts and legacies, can be exempted only by express declaration, or plain and unequivocal manifestation of intention; and neither a charge nor a direction to sell, nor the creation of a term for payment, will exempt the personal estate. *Tower* v. *Lord Rous*, 18 Ves. 132.

8. The circumstance that the residuary legatee is the first taker of the real estate, has sometimes been held a ground for exempting the personal estate. *Ibid*, 18 Ves. 140.

9. To exonerate the personal estate from the payment of debts, there must be upon the will a clear manifest intention, either expressed or necessarily implied, not only to charge the real estate, but to discharge the personal and this implication need not be such as that every person reading the will must agree to, but it must be sufficient to convince the mind of the judge; and such intention may be inferred from circumstances: but the same person being appointed both trustee of the real estate, and executor; or the personal estate being given as a residue, or as personal estate generally; or after an

enumeration of particulars; or the residuary legatee being also devisee of the real estate, or of part for life, or otherwise, &c.; are circumstances entitled to consideration only in reference to the context of every particular will in which they occur. *Bootle* v. *Blundell*, 1 Mer. 193. 19 Ves. 494.

10. Testatrix having made several specific bequests of stock, gives the residue of her funded property, after payment of her debts and legacies, to A.; she gave the residue of her real and personal estates to others; and directed one particular legacy to be paid out of the stock. Held that the residue of the stock was the primary fund for the payment of the debts and legacies. *Choat* v. *Yates*, 1 J. & W. 102.

11. The testator, after exempting his personal estate from the payment of the incumbrances which might be on his real estate at the time of his death, devised certain mortgaged estates " subject to the incumbrances which might affect the same at the time of his decease;" other estates descended to the heirs at law. It was held that the descended estates, and not the devised estates, should satisfy the mortgage debts. The personal estate being the primary fund, and the descended estates the secondary, for the payment of the mortgages; and the testator had expressly directed that the primary fund should not be so applied, but had given no such directions to the secondary; and to exonerate the descended estate, there must be not only a clear intention to subject the devised estates to the payment of the mortgage debts, but also a clear intention that the descended estates should not be subject to such payment. *Barnewell* v. *Lord Cawdor*, 3 Mad. 453.

12. The order of the court directing a receiver to keep down the interest of incumbrances, has not the effect of an appropriation of the rents and profits to that specific purpose, such direction being given without the least view to the interests of the real and personal representatives, but to prevent the incumbrancers from being prejudiced by the court's taking the estate into its custody, and also to protect the estate from hostile proceedings on the part of the creditors. The incumbrancers may or not avail themselves of the order. The court neither forces payment upon them, nor sets apart any portion of the rents and profits to answer unclaimed interest; therefore, where the receiver, so ordered, kept down the interest of all but one mortgage, the interest of which belonging to infants, was never applied for, except a small portion for maintenance; and the receiver paid the residue of the rents and profits into court, to the credit of the cause: the court held such fund to be personal estate, and that the person taking the real estate, after the death of the tenant in tail, could not claim it to be applied in exonerating the real estate from the burden of that interest; and also that the tenant in tail not having applied after he came of age to get the fund out of court, made no difference, as that could not change the actual character of the property. *Bertie* v. *Lord Abingdon*, 3 Mer. 560.

13. A gift of the testator's personal estate, without more, is a gift subject to the charges which by law are incident to it, as the payment of the debts, and the expenses of the funeral and probate; and a devise to trustees, subject to the payment of debts and funeral expenses, does not necessarily import more than that recourse should be had to the real estate, if the personal estate should be insufficient; but where the testator afterwards directed the trustees to proceed to a sale of the real estate with all convenient speed after his death, and out of the monies to arise by such sale to pay and satisfy all debts due by him on mortgage, bond, or simple contract, and also his funeral expenses, &c.; and to lay out the residue in government or real securities for the benefit of his wife for life, with remainder to his children: such a direction coupled with a gift to the wife, for her sole and separate use, of all the testator's personal estate and effects, indicates a clear intention that the real estate should be applied as a primary fund to the exoneration of the personal estate. *Greene* v. *Greene*, 4 Mad. 148.

14. Bequest of " all and singular the testator's plate, linen, china, household goods, and furniture and effects that he should die possessed of," and a devise in trust of a real estate; and out of the monies to arise from the sale thereof to pay funeral expenses, money due on mortgage, and all other debts, and the residue among the testator's children. Held, that the word " effects," coupled with the context, operated as a specific bequest of the personal estate, and that the same was not liable to the payment of debts. *Michell* v. *Michell*, 5 Mad. 69.

15. Personal estate, bequeathed in trust for testator's daughter, was held to

be the primary fund to pay debts charged on the real estate, there being no words, or apparent intention in the will to exempt it. *Aldridge* v. *Lord Wallscourt*, 1 B. & B. 312.

16. To discharge the personal estate, as the primary fund, from debts, the intention must clearly appear from the will, and not from extrinsic circumstances, but an express declaration is not necessary. A charge on the real estate, or a mere gift of the personal, is not sufficient. *Ibid.*

16. A devise of real estate to be sold, to pay particular debts and legacies out of the produce; held not to be a general exoneration so far of the testator's personal estate in all events, but a partial exemption only, in favor of the person to whom he had bequeathed the residue of his personal estate; and the bequest of such residue having become lapsed, by the death of the legatee in the testator's lifetime, the residue was held to be no longer exonerated on behalf of the testator's next of kin, but had again become chargeable with such particular debts and legacies, thereby again exonerating the real estate, devised to be sold in favor of the trust created on behalf of the residuary legatees, of the produce arising from the sale of the devised estate. *Noel* v. *Lord Henley*, 7 Price, 241.

EVIDENCE.

I. RECORDS AND JUDICIAL PROCEEDINGS.

(a) *Conviction.*

1. A defendant having been convicted, principally on the evidence of the plaintiff, of perjury in denying a parol agreement, in his answer to a bill for specific performance: the court refused leave to file a supplemental bill, upon the ground that the record of the conviction was not evidence. *Batlet* v. *Pickersgill*, 1 Eden, 515. 1 Cox, 16.

2. On a plea of plaintiff's conviction of felony, the record of the conviction is sufficient proof, without stating the identity upon oath. ——— v. *Davies*, 19 Ves. 81.

3. A conviction for a nuisance in stopping a way, is not conclusive evidence of the right; cannot be pleaded in bar; and would not bind the party convicted, if he brought an action of trespass. *Legge* v. *Croker*, 1 B. & B. 515.

(b) *Sentence of Ecclesiastical Court.*

1. Sentence of Ecclesiastical Court admissible, though not conclusive evidence in a Chancery suit. *Bateman* v. *Countess of Ross*, 1 Dow, 244, 245.

(c) *Probate of Will.*

1. Probate of a will is not evidence that copyhold estates will pass by it. *Jervoise* v. *The Duke of Northumberland*, 1 J. & W. 570.

(d) *Bill in Equity.*

1. Where a bill has been amended, the amended bill is the only one upon record. The original bill, therefore, cannot be read as evidence to prove what a plaintiff considered his right to be at the time of filing it.
Hales v. *Pomfret*, } 1 Dan. 141.
Pomfret v. *Hales*, }

(e) *Answer.*

1. An answer to a mere bill of discovery, if read at law, is read as evidence, and the whole must be laid before the jury. *Butterworth* v. *Bailey*, 15 Ves. 362.

2. Answer read as evidence contrasted with the other evidence, but not for the purpose of discrediting it.
Savage v. *Brocksopp*, } 18 Ves. 335.
Brocksopp v. *Lewis*, }

3. Distinction at law and in equity as to reading the answer: at law the whole must be read. *Ibid*, 18 Ves. 336.

4. The answer of a peer on his protestation of honor may be read on the question of costs. *Dawson* v. *Ellis*, 1 J. & W. 524.

5. An answer, though not evidence in the cause, may be read as to costs; but a deposition cannot be read as to costs, when it has not been read as evidence in the cause. *Howel* v. *George*, 1 Mad. 13.

6. Where the answer admitted the written agreement charged in the bill, but alleged the true intention of the parties to have been otherwise: upon a motion for an injunction to stay proceedings at law, upon the equity confessed in the answer, the court held, that upon such an application, the answer was evidence for the defendant, as to all facts to which other testimony could be received; that other evidence could not be received to contradict the parol agreement, and therefore the answer could have no weight for that purpose. *Bott* v. *Birch*, 4 Mad. 255.

7. The answer to a cross bill not allowed to be read, though the original bill and answer were read, there having been no further proceedings on the cross-bill and answer. *Bennet* v. *Neale*, Wigh. 324.

8. Whether an answer may be used, or may be useful if used, in a court of law, is for the consideration of the court. *Mant* v. *Scott*, 3 Price, 477.

9. An answer by a former rector to a bill filed to establish a modus of a certain measure of meal as to one farm, admitting that the parish is exempt in consideration of a commutation for meal, is not only admissible, but strong, to prove a district modus. *De Whelpdale* v. *Milburn*, 5 Price, 485.

10. The reading of admissions from an answer in a tithe cause, to prove occupation, confined to that part which related to lands in defendant's occupation at the time of filing the bill; and plaintiff not allowed to read that part which related to lands of which the defendant l came subsequently possessed.
Rumney v. *Beale*, } 1 Dan. 36.
Rumney v. *Morgan*, }

11. Where the answer of a party in another cause is resorted to as evidence, the whole of it is admissible both at law and in equity. *Boardman* v. *Jackson*, 2 B. & B. 386.

II. Baptismal or Marriage Register.

1. A copy of register of baptism in the Island of Guernsey, is not sufficient evidence here of a party being of age. *Huet* v. *Le Mesurier*. 1 Cox, 275.

2. The book of Fleet marriages cannot be read as a register, not having been compiled under public authority, and therefore not legal evidence. *Lloyd* v. *Passingham*, Cooper, 155.

3. Though the Fleet register is not evidence as a register, it may be as a declaration upon the fact. *Ibid.* 16 Ves. 59.

4. As to admitting in evidence a parish register not kept according to the canon, requiring weekly entries, or a copy, without proof that the original is not to be found—*Quære*. *Walker* v. *Wingfield*, 18 Ves. 443.

5. Parish register admissible evidence, notwithstanding the loss of a leaf, when such loss does not destroy the series of entries. *Ibid.*

6. Entry of birth of a dissenter's child in a register kept for that purpose at a

public library, not evidence. *Ex parte Taylor,* 1 J. & W. 483.

III. Private Books and Writings.

(a) *Where Evidence.*

1. An agreement for the sale of a house cannot be given in evidence in defence of an action of ejectment, if there is the least doubt possible, whether a court of equity would execute it. *Denton* v. *Stewart,* 1 Cox, 258.

2. The books of a banker, not communicated to those dealing with him, are no evidence against those dealing with him, though they may be evidence for them. *Ex parte Pease,* 19 Ves. 25. 1 Rose, 239.

3. A bill of sale having been executed by a testator, and subsequently delivered to A., on a question whether it was intended as a gift, an entry in the testator's book, made between the period of the execution and the delivery, is admissible evidence. *Ryle* v. *Haggie,* 1 J. & W. 234.

4. Partnership articles, containing special clauses for taking the accounts, on which the parties have not acted, may be read in a court of equity as if those clauses were expunged. *Jackson* v. *Sedgwick,* 1 Swan. 469. 1 Wil. 307.

5. Both at law and in equity, a party producing a letter or other document in evidence, cannot use it partially, but makes the entire of it evidence. *Boardman* v. *Jackson,* 2 B. & B. 386.

6. It seems it is not the practice in Ireland, in conveyances by lease and release, to make a lease for a year, the recital in the release being conclusive evidence of the lease. *Daly* v. *Kelly,* 4 Dow, 435.

7. If the entire of a correspondence be not produced, no reliance ought to be placed upon detached parts of it. *Blennerhasset* v. *Day,* 2 B. & B. 120.

(b) *Hand-Writing.*

1. A comparison of hand writing, though lately admitted as evidence, if confirmed by contents of correspondence, was refused, where there was but a single letter, for the purpose of commitment. *Wade* v. *Broughton,* 3 V. & B. 172.

2. Deposition, that a certain book (offered to be given in evidence) belonged to the defendant, F. S., from whom he received it; and that he believed the whole of the writing in the said book to be in the hand-writing of W. S., who was, as deponent had been informed and verily believed, rector of the parish, from 1690 to 1729; and that the deponent was the better enabled to state of whose hand-writing he believed the said book to be, from his having compared the writing in the said book, with the original will of the said W. S., in Doctor's Commons, which appears to be wholly in his own hand-writing; and that he believed the said book and the said will, to be written by one and the same person. This does not furnish such proof of the hand-writing of W. S., as to be evidence, that the book was in point of fact written by him, because the witness does not state that he has any reasons for believing, or means of knowing, that either the book or the will is of the hand-writing of W. S., as from having corresponded with him, or having seen him write, &c.; for that the terms of the deposition are merely matter of inference in form, and do not warrant the conclusion in substance. *Randolph* v. *Gordon,* 5 Price, 312. 1 Dan. 88.

IV. Parol or extrinsic, to explain, alter, or vary written Instruments.

(a) *Deeds.*

1. Whatever is wanting to shew the consideration, and from whom it moves, may be supplied by evidence *dehors* the deed, where such evidence does not contradict the deed. *Hartopp* v. *Hartopp,* 17 Ves. 192.

2. Parol evidence, to shew that a deed was not intended to be in execution of the power, inadmissible, as going to contradict it. *Blake* v. *Marnell,* 2 B. & B. 35.

3. Where a deed is in writing it cannot be altered by parol evidence. *Ibid,* 2 B. & B. 47.

4. Fraud in procuring a deed, and the circumstances attending it, may be proved by parol evidence. *Ibid.*

5. Parol evidence is admissible to shew under what circumstances a bond or deed was executed. *Stratford* v. *Powell,* 1 B. & B. 14.

(b) *Wills.*

1. Parol evidence will not be admitted to prove the testator's intention to

give his personal estate, except from debts. *Stephenson* v. *Heathcote*, 1 Eden, 38.

2. Extrinsic evidence was admitted in the case of a doubtful description of a legatee. *Hussey* v. *Berkeley*, 2 Eden, 194. *Eade* v. *Eade*, 5 Mad. 118.

3. Legacy to "James the son of Thomas A., of Eastcheap, printer," there was no person of that description, but there was a Thomas, son of James A., of Eastcheap, printer: though, as James A. had a son James, the court would not receive evidence to shew a mistake in the description. *Andrews* v. *Dobson*, 1 Cox, 425.

4. The court cannot go into the circumstances of evidence to raise a construction in a will, as that illegitimate children were intended to take under the word children. Extrinsic evidence can be received only for the purpose of collecting who had acquired the reputation of being children of the person named. *Swaine* v. *Kennerley*, 1 V. & B. 469.

5. Where there are not, nor ever were, nor can by possibility be any persons strictly answering the description of children in a will; what persons answer that description must necessarily be matter of extrinsic evidence. *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419.

6. Under a bequest by an unmarried man, "to my children the sum of pounds sterling, 5000 each;" parol evidence was allowed to shew who the testator considered in the character of children: and illegitimate children having obtained a name by reputation, were admitted to take as a class. *Beachcroft* v. *Beachcroft*, 1 Mad. 430.

7. Legacy to A., if in the testator's service at the time of his decease, parol evidence may be admitted to shew that though A. had quitted the house of the testator, he continued, and was considered by him as in his service. *Herbert* v. *Reed*, 16 Ves. 481.

8. Parol evidence is not admissible to alter the effect of a will. *Ibid.*

9. Extrinsic evidence cannot be admitted to construe a will, but it may be to show with reference to what the will was made. *Bengough* v. *Walker*, 15 Ves. 514.

10. Satisfaction of a legacy by a parent to a child, by a portion to the same amount, though with some circumstances of difference; whether parol evidence can be admitted originally of an intention to substitute the one provision for the other, or only where it is first offered against the presumption, it is clearly admissible to show that the father was the author of the portion: viz. by stipulating, on joining in the marriage settlement of his eldest son, for a charge, and giving up interests in consideration of it. *Hartopp* v. *Hartopp*, 17 Ves. 184.

11. Where the executor took by the will general and specific legacies, but not for his care, &c. Parol evidence will be admitted as to the intention, that he should take the residue beneficially. *Langham* v. *Sanford*, 17 Ves. 435. 2 Mer. 6. 19 Ves. 641.

12. A legacy to an executor, expressly for his pains and labor, is a declaration of intention, that he is not to have the benefit of the estate; therefore, evidence of intention that he should take the residue beneficially, would be to contradict the will, and cannot be admitted. *Ibid*, 17 Ves. 443.

13. If, on the face of the will, there is no apparent intention to exclude the executor from the residue, parol evidence of such intention is not admissible. *Ibid*, 19 Ves. 643. 2 Mer. 17.

14. Parol evidence is not admissible to contradict a will; but where there is no express declaration in the will, making the executor a trustee of the residue, and circumstances afford an inference or presumption of trust, parol evidence is admissible to rebut such inference or presumption. *Gladding* v. *Yapp*, 5 Mad. 58.

15. Rules for construction of wills: the intention, if possible, to be collected from the words, not from circumstances *dehors;* upon general principles and established rules, not by conjecture; and without inquiring whether the personal estate is sufficient for the debts. *Bootte* v. *Blundell*, 19 Ves. 521.

16. It is not without great difficulty the court is ever prevailed upon to admit extrinsic evidence as to the state of the testator's property, in order to explain his intention. *Attorney General* v. *Grote*, 3 Mer. 319.

17. A will is not to be construed by any thing *dehors*, as by the state of the property, where there is no latent ambiguity. *Page* v. *Leapingwell*, 18 Ves. 466.

18. Whatever is the inadequacy of a testator's property to satisfy the terms of the will, and whatever may be the conviction of the court, as to his intention to execute a power by the will, the state of his personalty at the time of his will, or his death, cannot be examined for the purpose of collecting evidence of such intention; but with regard to real estate, the court is permitted to resort to extrinsic evidence. *Jones* v. *Curry*,
1 Wil. 24. 1 Swan. 46.

19. The court will not direct an inquiry as to the *quantum* of personal property, to determine whether a gift by will is, or is not, in execution of a power: *Secus* as to an inquiry whether there be any thing but copyhold estate to answer a devise of land; the question there being, whether there is any thing for the will to operate upon at the time when it was made; whereas a will of personalty speaks at the death, and therefore does not furnish the same evidence as to the intention. *Jones* v. *Tucker*,
2 Mer. 537.

20. Where parol evidence is let in to explain a will, the first evidence is that of declarations made at the time of executing it: the evidence of declarations made before and after is entitled to little attention in comparison. *Langham* v. *Sanford*, 19 Ves. 649. 2 Mer. 23.

21. The acts and declarations of a testator at the time of executing the will, to show what he meant by a particular expression, admissible in evidence. *Blake* v. *Marnell*, 2 B. & B. 41.

22. To have recourse to the declarations of a testator as operating on his will, is considered dangerous; and if he has made different declarations at different times, little reliance can be placed on them. *Dwyer* v. *Leysaght*,
2 B. & B. 162.

23. Parol evidence to explain a will, is inadmissible, where the presumption is not raised. *White* v. *Williams*,
3 V. & B. 72. Coop. 59.

24. Extrinsic evidence is admissible to explain a will, only where an ambiguity is raised by extrinsic circumstances. *Doe*, d. *Oxenden* v. *Chichester*,
4 Dow, 93.

25. Where extrinsic evidence can be admitted, the will must not be construed by matter posterior to its execution. *Welby* v. *Welby*, 2 V. & B. 199.

26. The testator, after the making of his will, contracts for the purchase of a house, and afterwards, by codicil, gives to A., his executor, "the house which he had given a memorandum of agreement to purchase, and which was to be paid for out of timber which he had ordered to be cut down;" this amounts to a direction that the purchase-money for the house shall be so provided for; and evidence will be admitted to show what was the order given by the testator, with reference to cutting of timber. *Sandford* v. *Raikes*, 1 Mer. 646.

27. Parol evidence is admissible to fortify the presumption of a legacy being adeemed. *Monck* v. *Lord Monck*,
1 B. & B. 298.

28. The presumption of a legacy being adeemed, may be rebutted by parol evidence. *Ibid*, 1 B. & B. 303.

29. The court cannot inquire into the amount of the personal estate, or its sufficiency to satisfy the testator's debts, in order to assist in the construction of the will. *Stephenson* v. *Heathcote*,
1 Eden, 43.

30. In the event of the deficiency of a particular fund appropriated to the satisfaction of certain legacies, the court, on the question of the exemption of the general personal estate, cannot advert to the fact of a sale of part of the testator's property subsequent to the will, by which the particular fund became deficient. *Gittens* v. *Steel*, 1 Swan. 24.

31. Calculations of property are clearly evidence in a case where the testator has stated in his will, how he imagines his property will stand after the dispositions he has therein made. *Barksdale* v. *Gilliat*, 1 Swan. 565.

32. The state of the testator's property is inadmissible evidence in the construction of a will of personal estate. *Kellett* v. *Kellett*, 1 B. & B. 542.

33. It is competent to the court to go out of the will, to ascertain the state of the testator's family, and his knowledge of it with respect to the disposition made. *Crone* v. *O'Dell*,
1 B. & B. 481.

34. In construing a will, the state of the testator's family at the time of making his will, may be considered. *O'Dell* v. *Crone*, 3 Dow, 68.

(c) *Agreements.*

1. Parol evidence is admissible to ex-

plain the terms of an ambiguous written agreement, though not to extend it. *Stokes* v. *Moore*, 1 Cox, 219.

2. Parol evidence cannot be admitted for the purpose of varying the agreement, although it may for the purpose of raising an equity founded on the agreement, by proof of collateral circumstances, or to prove the waver of a written agreement. *Davis* v. *Symonds*, 1 Cox, 402.

3. Parol evidence was rejected, where offered in aid of a specific performance of the sale of an estate by auction, to explain, by declarations of the auctioneer, an ambiguity on the face of the particular of sale, by a general clause for a separate valuation of the timber, and also special provisions as to the timber upon certain lots; the agreement signed on the back of the particular of sale binding the purchaser, the defendant, "to a strict fulfilment of this article, and to abide by the conditions and declarations made at the sale." *Higginson* v. *Clowes*, 15 Ves. 516.

4. There is a distinction as to admitting parol evidence where it is to enforce, and where to resist the specific performance of an agreement. *Ibid.*

5. The articles of an agreement which are signed, may refer to papers, as particulars of sale, so as to engraft them into the agreement, but parol evidence cannot be admitted to explain them. *Ibid.*

6. If a sale by auction be followed by a written agreement, parol evidence cannot be admitted, either to explain or to add to it. *Ibid*, 15 Ves. 520.

7. Parol evidence, though not admissible to enforce a specific performance of a contract for land, or to vary, add to, or explain a written contract, yet is admissible for the purpose of resisting a specific performance upon mistake or surprise, as well as fraud. *Clowes* v. *Higginson*, 1 V. & B. 524.

8. An omission in an agreement, by mistake, stands on the same ground as an omission by fraud; and parol evidence (as that of the attorney who drew the agreement) may be admitted to prove such omission. *Ramsbottom* v. *Gosden*, 1 V. & B. 168.

9. Parol evidence of declarations by the auctioneer at the sale, warranting the quantity of land, will be received in opposition to a specific performance, on the ground of fraud, but not to enforce a specific performance. *Winch* v. *Winchester*, 1 V. & B. 375.

10. The general rule that parol evidence is inadmissible to contradict a written agreement, admits of exceptions: as where the specific performance of an agreement is sought, the defendant may rebut the equity, and show by parol evidence, that the agreement was obtained by fraud, or that there was a mistake in it. So on a bill for specific performance of an agreement by several persons, to enter into several bonds for £1,500, parol evidence was admitted, to shew that the agreement was to give a joint bond for £1,500, and not separate bonds to that amount. *Lord Gordon* v. *Marquis of Hertford*, 2 Mad. 106.

11. Parol evidence admissible on the part of a defendant resisting a specific performance of an agreement to prove fraud, mistake, or omission, in the articles, and also to show the situation of the parties as connected with it. *Flood* v. *Finlay*, 2 B. & B. 15.

V. Parol.

(a) *To raise or support an Equity.*

1. Where land is paid for with the money of one man, parol evidence will not be admitted to show that the purchase was made on behalf of another. *Bartlett* v. *Pickersgill*, 1 Eden, 515. 1 Cox, 15.

2. In a suit by the heir at law against the personal representatives of an intestate, the parol declarations of the intestate in his lifetime are not admissible evidence to prove an agreement by him to purchase an estate. *Perchard* v. *Benyon*, 1 Cox, 214.

3. Parol evidence may be given to rebut an equity, though not to raise one. *White* v. *Williams*, Coop. 59. 3 V. & B. 72.

4. Parol evidence may be received to prove an agreement, when possession has been delivered under it; and when money has been expended in permanent improvements. *Toole* v. *Medlicott*, 1 B. & B. 401.

5. The delivery of possession, and the expenditure of money in improvements, imply the existence of an agreement; and parol evidence may be admitted to prove the terms of it. *Ibid*, 1 B. & B. 404.

6. Parol evidence may be given of the terms of a contract for sale, when

the possession taken is only referrible to it; such being part performance. *Savage* v. *Carroll*, 1 B. & B. 282.

VI. Secondary.

1. The production of a paper, importing to be an attested copy, though insufficient in itself, yet may with other evidence have considerable weight. *Ward* v. *Garnons*, 17 Ves. 140.

2. Copies of the books of the Bank of England are evidence: but upon a question, whether the signature to a transfer is the genuine hand-writing, the book itself must be produced. *Auriol* v. *Smith*, 18 Ves. 198.

3. The answer to a bill by a rector for an account of tithes, set up a simoniacal contract, and was supported by evidence of the contents of a letter, alleged to have been written by the witness (who was one of the patrons of the living) to the plaintiff, previously to his admission, and which contained the terms of the simoniacal agreement; and the letter which contained the plaintiff's acceptance of the agreement, having been returned to the plaintiff, was destroyed by him: held, that the evidence as to the contents of the letter was admissible in equity, since the depositions were sufficient notice to the plaintiff to produce the letter itself. *Wood* v. *Strickland*, 2 Mer. 461.

4. But such evidence would not be received at law without notice, it not being known at law, till the time of the trial, what evidence will be offered on either side, otherwise the best evidence might not be produced. But even at law, notice is not necessary, where, from the nature of the proceeding, the party must know, that the contents of a written instrument, in his possession, will come into question, as in trover for a deed, or an indictment for stealing a bill of exchange. *Ibid.*

5. It seems that a recital in a settlement after marriage, is not evidence against creditors of articles before marriage. *Battersbee* v. *Farrington*, 1 Wil. 88. 1 Swan. 106.

6. Copy of the parish register may be *prima facie* evidence. *Auriol* v. *Smith*, 18 Ves. 204.

7. Copies of the register of a dissenting-chapel not to be pleaded as evidence. *Newnham* v. *Raithby*, 1 Phil. 315.

8. The attested copy of an answer is not admissible in evidence before the grand jury. *Stratford* v. *Greene*, 1 B. & B. 296.

9. A recital in a deed executed in 1739, that, by a separate deed in 1703, A. declared he was seised of the freehold of lands in trust for B., to whom he had, on the same day, granted a lease of the same lands for one thousand years, is not evidence of the contents of the deed, declaring the trust; neither is the receipt of a master, acknowledging such deed to have been lodged with him, evidence of its contents, though it may be of its existence. *Kelly* v. *Power*, 2 B. & B. 236.

10. A copy of lost terrier not admissible in evidence. *Leathes* v. *Newitt*, 4 Price, 355.

VII. Presumptive.

1. The existence and execution of a settlement, by indentures of lease and release, was presumed from circumstances, which were chiefly—the existence of the drafts, the statement in an abstract of the title, and the existence of the lease for a year of other estates appearing to have been included in the same plan of settlement. *Ward* v. *Garnons*, 17 Ves. 134.

2. Where length of possession is a ground for presuming a release, it must be adverse possession. *Fenwick* v. *Reed*, 1 Mer. 114.

3. Bequest of stock, to be laid out in rebuilding almshouses. The fact, that almshouses were in mortmain before the 9 Geo. 2, c. 36, presumed, from an old inscription, and an extract from a local history. *Shaw* v. *Pickthall*, 1 Dan. 92.

4. A room, part of a mansion-house in the parish, fitted up as a chapel, in which marriages and baptisms have been solemnized, sufficient to establish the fact of the rectory being ecclesiastical, although there be no burying ground attached, and other incidents thereto be wanting. *Boulton* v. *Richards*, 6 Price, 483.

VIII. Admissions.

1. A bill by assignor and assignee of a debt, for the recovery of it, stating the assignment; and the defendant, in his answer, admits the title of the assignor, but not that of the assignee. Held, that as he

assignment is a fact, wholly immaterial to the defendants, and not in issue in the cause, it is not the subject of proof; but the assignor joining in the suit is an admission of the fact, upon which the court is bound to act. *Ryan* v. *Anderson*, 3 Mad. 174.

2. Where the bill stated a defendant to be out of the jurisdiction, which was admitted by the other defendants, some of whom were infants, the court thought, that proof of the fact was nevertheless necessary. *Wilkinson* v. *Beal*, 4 Mad. 408.

3. A defendant, by her answer, having claimed a gift from her husband, as an absolute *donatio inter vivos* to her separate use, whether evidence can be received to establish it as a *donatio mortis causa*—*Quære*. *Walter* v. *Hodge*, 2 Swan. 92.

IX. Proof of Execution of Deeds.

1. If the witness to a deed is dead, it is sufficient to prove his hand-writing; but if he is alive, he must not only prove his own hand-writing, but also the hand-writing of the person who executed the deed.

Hill v. *Unett*, }
Loxley v. *Hill*, } 3 Mad. 370.

X. Proof of Execution of Wills.

1. In proving the execution of a will, devising real estate, actual signature by the testator, in the presence of the three subscribing witnesses is not required, if he declares it to be his will before those who did not see him sign; and separate attestations are sufficient. *Westbeech* v. *Kennedy*, 1 V. & B. 362.

2. Examination of all the witnesses to a devise, not a technical rule: the decision binding the heir's right to ejectments, which he may repeat until so vexatious as to call for injunction. *Bootle* v. *Blundell*, 19 Ves. 502.

3. General rule in proving a will against the heir, that all the witnesses must be examined; that general rule, admitting necessary exceptions, as death, or absence out of the kingdom, and perhaps not applying where the will is not wholly, but only partially in question. *Ibid*, 19 Ves. 505.

4. Subsequent papers, though evidence of competence of a testator, regarded with considerable jealousy, as he is not permitted to prove his own sanity. Inference, that if not then conscious of his competence at the previous time, he would have re-executed the will. *Ibid*, 506.

5. Proof against the denial, by all the witnesses to a will, of their attestation. *Ibid*, 507.

6. Implication that witnesses to a will saw the testator execute, if so situated that they might have seen him: not where they were in an adjoining room and could not. *Morrison* v. *Arnold*, 19 Ves. 671.

*7. In wills of real estate the three witnesses must sign in the presence of the testator, and it is usually stated in the will that they did so sign. But although that circumstance should not be recorded, the will is effectual, if it be proved, that they actually did so sign. In a court of law, a will, thirty years old, if the possession has gone under it, and sometimes without the possession, but always with the possession, if the signing is sufficiently recorded, proves itself—*Sed quære*: whether, if the signing is not sufficiently recorded, a will of that age proves itself; if not, then possession under the will, and claiming and dealing with the estates as if they had passed under the will, would be cogent evidence to prove the duly signing. *Lord Rancliffe* v. *Parkyns*, 6 Dow, 202.

XI. Proof of Pedigree.

1. Declarations of relations are evidence of pedigree, but inconclusive without shewing on what occasion they were made, or what led to them, &c.; but whether a physician, or servant who attended the family, can be admitted as one of the family—*Quære*. *Walker* v. *Wingfield*, 18 Ves. 443.

2. The pedigree of a person in the hand-writing of a deceased relation, who had an interest in it as drawn out, will be rejected as evidence of such pedigree. *Edwards* v. *Harvey*, Coop. 39.

XII. Weight and Sufficiency of Evidence.

1. A single witness, not corroborated, is not sufficient to prevail against positive denial by the answer. *Cooke* v. *Clayworth*, 18 Ves. 12.

2. Unless confined by circumstances. *Savage* v. *Brocksopp*, *Brocksopp* v. *Lucas*, 18 Ves. 335.

3. If there be but one witness, and his evidence is contradicted in positive terms by the answer of the defendant, and there are no circumstances giving superior weight to the testimony of the witness, no decree can be made on such evidence. *Harrison* v. *Gardner*, 2 Mad. 217.

4. The forgery of a register, though it considerably affect, will not destroy the effect of other evidence. *Lloyd* v. *Passingham*, 16 Ves. 59. Coop. 155.

5. Evidence of conversation, overheard by a witness placing himself behind wainscot, &c., must be received with great caution. *Savage* v. *Brocksopp*, *Brocksopp* v. *Lucas*, 18 Ves. 335.

6. In a question of a right of way, evidence of an interruption acquiesced in, is of infinitely more weight than evidence of usage. *Legge* v. *Croker*, 1 B. & B. 514.

7. The evidence of a witness impeaching the instrument he has attested, like that of a witness to a will denying the sanity of the devisor, is admissible; but is to be received with the most anxious jealousy. *Howard* v. *Braithwaite*, 1 V. & B. 202.

8. Parol evidence of one witness, unsupported by other circumstances, is not sufficient to found a decree. *Dawson* v. *Massey*, 1 B. & B. 234.

EXECUTOR AND ADMINISTRATOR.

I. JURISDICTION.

1. A court of equity has jurisdiction for an account of personal estate and a receiver, pending a litigation for probate, though an administration *pendente lite* might be obtained in the Ecclesiastical Court. *Atkinson* v. *Henshaw*, 2 V. & B. 85.

2. A court of equity has jurisdiction pending a disputed administration in the Ecclesiastical Court to protect the property by a receiver; and such jurisdiction is not ousted by the power of the Ecclesiastical Court to appoint an administrator *pendente lite*. *Ball* v. *Oliver*, 2 V. & B. 96.

II. RENOUNCING OR OBTAINING PROBATE.

1. The renunciation of one executor in the lifetime of another, is a mere nullity, as it is not binding on him, unless made after he has become the survivor. *Arnold* v. *Blencowe*, 1 Cox, 426.

2. Executor of a first will cannot call upon the executor of a later will to prove it, till he has established his own interest. *Waller & Smith* v. *Hesrltine*, v. *Burgh*, 1 Phil. 172.

3. An executor, for whom an appearance had been given, but without authority, he being in the East-Indies, was dismissed. And a party having admitted an interest in a party applying for pro-

bate, was held not to be at liberty to retract it. *Panchard* v. *Weger*, 1 Phil. 212.

III. Obtaining Administration.

1. In the case of an annuity bequeathed to "the preacher of Kingland Chapel," a decree issued to shew cause why administration, limited to the interest of the deceased in such annuity, should not be granted to the officiating minister. The prerogative court, on motion, permitted administration to go to the Syndic of the governors of St. Bartholomew's Hospital, who were the patron of the chapel. *Maidman* v. *All persons in general*, 1 Phil. 51.

2. Primogeniture gives no right to an administration. *Earl of Warwick* v. *Greville*, 1 Phil. 123.

3. Where two parties appear before administration has been granted, both are to propound their interests, and to proceed *pari passu*; but where one party is in possession of an administration, he is not bound to propound his interest till the party calling in question the grant has first propounded and established his own.
Dabbs v. *Chisman*, } 1 Phil. 155.
Jennens v. *Beachamp*, }
Hibben v. *Calemberg*, 1 Phil. 166.

4. An intestate left a wife and son; the latter having possessed himself of the effects of the intestate, was, after the death of the widow, cited to take out letters of administration by a party without any apparent interest; the son appeared to the citation, but not returning the requisition, was excommunicated. This sentence reversed upon appeal. *Ackerley* v. *Oldham*, 1 Phil. 248.

5. Where the deceased left surviving his wife, two sons, and a daughter; and his wife, who was appointed executrix, could not obtain probate on account of mental imbecility; and the sons were nominated by the will trustees for the daughter, the court granted administration to the sons, rejecting the claim of the daughter to be joined with them. *Dampier* v. *Colson*, 2 Phil. 54.

6. It is not the practice to force joint administration upon unwilling parties. *Bell* v. *Timiswood*, 2 Phil. 22. *Dampier* v. *Colson*, 2 Phil. 55.

7. And where the court had to decide upon equal claims of two parties to administration, it refused administration to the one who had been bankrupt. *Bell* v. *Timiswood*, 2 Phil. 22.

8. It is not the practice of the court to grant administration from the residuary legatees to a nominee, where the parties disagree. *Dampier* v. *Colson*, 2 Phil. 55.

9. Where the woman, at the time of marriage, was seventy years of age, and possessed of money, and had been accounted and treated even after marriage as childish; and six months after the marriage, under a writ *de lunatico inquirendo*, a verdict found that she had been incapable from two years antecedent, the court refused administration to the alleged husband, on the ground of the invalidity of the marriage. *Browning* v. *Reane*, 2 Phil. 69.

10. *Cœteris paribus*, a man accustomed to business, is to be preferred as administrator. *Williams* v. *Wilkins*, 2 Phil. 100.

11. Where there are several next of kin in equal degrees, and there is no material objection or reason of preference, the Ecclesiastical Court grants administration to that person to whom the majority of interests are desirous of entrusting the estate. *Budd* v. *Silver*, 2 Phil. 115.

IV. Power and Duties of.

1. As to marshalling the assets of the vendee of an estate, by throwing the lien for the purchase-money upon the estate—*Quære*. *Mackreth* v. *Symmons*, 15 Ves. 329.

2. A real estate charged with payment of debts, in aid of the personal estate, shall be applied before the widow's paraphernalia. *Boyntun* v. *Boyntun*, 1 Cox, 106.

3. Leases for lives are distributable as personal estate, where there is no special occupant, or where the executor is the special occupant. *Milner* v. *Lord Harewood*, 18 Ves. 273.

4. The general rule for the conversion of personal property bequeathed for life, with remainders over into the three per cent. stock, held not to apply to property of a testator who died in India, under his will made there, invested by his executor in the company's securities there; but on the arrival of the parties in this country, it will be decreed to be remitted to England, and invested accordingly. *Holland* v. *Hughes*, 16 Ves. 111. 3 Mer. 685.

5. Executors cannot lend money on

personal security, though there are words in the will which may imply a discretion so to do. *Wilkes* v. *Steward*, Coop. 6.

6. Where the vendor of an estate would absorb the whole of the personal assets in payment of the purchase money, a rateable contribution will be decreed, as between the devisee of the estate, and the legatees and annuitants under the purchaser's will. *Headly* v. *Redhead*, Coop. 50.

See also *Cave* v. *Cave*, 2 Eden, 139.

7. Where there is a sufficiency of assets for payment of debts, executors may pay simple contract debts not bearing interest before specialty debts bearing interest, if not objected to by the specialty creditors; and the legatees are not at liberty to complain of the order of payment. *Turner* v. *Turner*, 1 J. & W. 39.

8. Where the agent of an executor paid interest on a legacy for seventeen years, without deducting the property tax, he could not afterwards deduct, out of future interest due, the amount of the property tax, in respect of such precedent payments. *Currie* v. *Goold*, 2 Mad. 163.

9. Executors have only power to sell real estate, where expressly given, or necessarily to be implied from the produce being to pass through their hands in the execution of their office. *Bentham* v. *Wiltshire*, 4 Mad. 44.

10. Where a testator devises to persons, whom he also appoints his executors, upon trust, to sell, for such purposes as he shall afterwards appoint, and then directs his debts to be paid by his executors; such direction authorizes a sale for the payment of debts. *Barker* v. *the Duke of Devonshire*, 3 Mer. 310.

11. The consent of one executor will bind the others in as well as out of court. *Holkirk* v. *Holkirk*, 4 Mad. 50.

12. An administrator *pendente lite* in the Spiritual Court concerning a will, has the power to bring actions for recovering debts. *Ball* v. *Oliver*, 2 V & B. 97.

13. An administrator *pendente lite* is appointed to collect the debts and property. *Gallivand* v. *Evans*, 1 B. & B. 192.

14. To enable such administrator to lodge money in court, he must file a bill. *Ibid.*

15. Whether he would be justified in so doing—*Quære.* *Ibid.*

16. In a case of competition between creditors, held on appeal, that an inquiry was properly ordered as to the consideration of two annuities alleged to have been voluntary, or *pro turpi causa*; as, when the objection was made, the assets could not be distributed without such inquiry, there not being sufficient to satisfy all claims. *Hunt* v. *Mansell*, 1 Dow, 211, 222.

17. A creditor having administration may oppose the probate of a will, without costs; so also an executor having probate may oppose a later will.
Dabbs v. *Chisman*,
Jennens v. *Beauchamp*, } 1 Phil. 160.

18. A creditor in possession of a grant of administration, is entitled to contest suit against a person asserting himself to be next of kin. *Elme* v. *Da Costa*. 1 Phil. 173.

V. Rights and Interests.

(a) *To retain his Debt.*

1. Under a covenant to a retiring partner, as soon as conveniently could be, to pay the debts, and indemnify him against them, broken by the death of the covenantor leaving debts undischarged; debts paid by the other are debts by specialty, against which the administrator cannot retain his own simple contract debt, as he may a debt in equal degree. *Musson* v. *May*, 3 V. & B. 194.

2. Executor has a right to retain his own debt. *Georges* v. *Georges*, 18 Ves. 296.

3. Executor paying to creditors more than the value of his testator's personal assets, acquires an absolute right to them by operation of law. *Chalmer* v. *Bradley*, 1 J. & W. 64.

(b) *Residue.*

1. It is sufficient to exclude the executors, as such, taking beneficially, that the testator professes to dispose of the whole of his property, although by the construction of his will he has not in fact done so. *Oldham* v. *Carleton*, 2 Cox, 399.

2. Testator gave "all his estate and effects to A. and B., their heirs, executors, &c. upon trust, in the first place, to pay, and charged and chargeable with all his debts, funeral expenses, and legacies, after given." A. and B. being afterwards appointed executors, are entitled to the residue of the personal estate undisposed of, (including a legacy of £1200 to a charity,

void by the statute 9 Geo. II. c. 36,) for their own benefit, against the claim of the next of kin. *Dawson* v. *Clark*,
15 Ves. 409. 18 Ves. 247.

3. Where the intention is to bequeath the residue from the executors, they cannot take, though the bequest fails. *Ibid.*
15 Ves. 414.

4. Executors take the residue, as residuary legatee would take it. *Ibid*,
15 Ves. 417.

5. Where the evidence admitted to prove the executor's claim to the residue, raises no direct intention in the executor's favor, but mere inference from equivocal declarations, with an intention to make an express residuary disposition, the executor will be a trustee of the residue for the next of kin. *Langham* v. *Sanford*,
17 Ves. 435. 2 Mer. 6.
19 Ves. 641.

6. A legacy to an executor of furniture, "plate only excepted,' and a bequest of a contract for a leasehold house, afford no inference that he should not take the residue beneficially. *Ibid*, 17 Ves. 635.

7. There is a difference between a legacy to persons by name, and to them as executors; in the latter case, they take it in that character, and not beneficially. *Currie* v. *Pye*, 17 Ves. 466.

8. Executor takes all not meant to be disposed of, not all that is not actually disposed of; so he would not take in the case of lapse, or being appointed executor in trust, and no object expressed. *Dawson* v. *Clarke*, 18 Ves. 254.

9. Personal property bequeathed upon trust, which does not exhaust the whole, executor not entitled to the surplus. *Ibid*,
18 Ves. 255.

10. In the ordinary case of lapse, the executors will not take, though the subject is not given to any one else. *Ibid.*

11. Executor with a legacy, or executors having equal legacies, will be considered trustees for the next of kin of the residue undisposed of, as, having part given them, they cannot be intended to take the whole. *King* v. *Dennison*,
1 V. & B. 277.

12. Executors having equal legacies for their care and trouble, will be trustees of the residue for the next of kin. *Gibbs* v. *Rumsey*, 2 V. & B. 294.

13. A blank space between the last line of a will and the testator's signature, raises no presumption of an intention to dispose of the residue against the legal right of the executor. *White* v. *Williams*,
3 V. & B. 72. Coop. 58.

14. Where the fund claimed as residue had not been reduced into possession, it was held to survive to the surviving executor. *Ibid.*

15. Legacy to an executor, who is also a trustee, excludes him from the beneficial interest in the residue, unless expressly given. *Bull* v. *Kingston*, 1 Mer. 314.

16. Where a testator gives a legacy to A. by one paper, and appoints him his executor by another paper, whether the violent presumption to exclude him from the surplus arises—*Quære.* But where the appointment follows the gift of the legacy, though at any interval in the same instrument, the rule of presumption does apply, because the whole instrument must be construed to have effect at once from the moment of signature. *Langham* v. *Sanford*, 2 Mer. 21.

17. When a testator, in the appointment of his executors, uses words indicative of an intention to impose a burthen, and not to confer a benefit; or where, after the appointment of executors, he expresses an intention to dispose of the whole of his property, the executors will be intended to take the office only, and not any beneficial interest. *Giraud* v. *Hanbury*, 3 Mer. 150.

18. A direction in a will "to keep accounts," held to afford a presumption that the executor was not meant to take the residue beneficially. *Gladding* v. *Yapp*, 5 Mad. 56.

19. Testator seised of real, and possessed of personal property, bequeaths various legacies, "to be raised and levied from my properties, by my executors;" and after bequeathing his interest in certain lands, to his heir at law, adds, "the remainder of my properties I bequeath to my executors, to make good the above sums, &c.; and I also ordain, &c., and devise the said (naming the executors) executors, to this my last will, &c.; also my residuary legatees, share and share alike." Held, that the executors, as to the surplus of the real estate, were trustees for the heir at law, but with great doubt as to the intention. *Kellet* v. *Kellet*, 3 Dow, 248, 254.

VI. Liabilities of.

(a) *For each other's Acts.*

1. Where testator directed that his

executors should not be liable for each other's acts, and one of the executors in good credit at the time, having called in a mortgage, and received the money, sends round the assignment to his co-executors, who execute it, and sign a receipt; held, that as no part of the mortgage money had come to the hands of the executors, they should not be answerable for it. *Westley* v. *Clarke*, 1 Eden, 357.

2. An executor, who has not proved, by assisting a co-executor who had proved, in writing letters to collect debts, or by writing directly to a debtor of the testator, and requiring payment, will not be considered as acting so as to be chargeable, except for his own acts, personally. *Orr* v. *Newton*, 2 Cox, 274.

3. Executors and trustees are chargeable for negligence, by joining in a power to a co-executor, for the sale of stock, upon his representation, that it was required for debts; but they are not liable so far as they can prove the money to have been applied to that purpose; and although the co-executor possessed other funds, but not through them, and which he wasted. *Lord Shipbrooke* v. *Lord Hinchinbrooke*, 16 Ves. 477.

4. The Lord Chancellor doubted the wisdom of those cases, which break down the old distinction between executors and trustees joining in an act, by which one obtains and misapplies the fund; the executors being all liable and trustees not; as the former need not, and the latter must join. *Ibid*, 16 Ves. 479.

5. One of two executors and trustees, not having otherwise acted in the execution of the will, joined with his co-executor and trustee, in the sale of stock, under a false representation, that the sale was necessary for the payment of debts, but such co-executor applied the greater part of the produce to his own private purposes, and became bankrupt. The executor joining in the sale is chargeable for the amount, except so far as any part was applied to the trust purposes, together with interest at four per cent., notwithstanding the parties beneficially interested consented to, and approved of the sale, under a similar misrepresentation. *Underwood* v. *Stevens*, 1 Mer. 712.

(b) *For Assets misapplied.*

For *Administration of Assets*, see Div IV. *ante.*

1. Executors must always be answerable for an infant's money, and where he lends the trust money on private securities, all the benefit made thereby will accrue to the estate, and the executor must answer all the deficiency; and the particular circumstances of good conduct in the executor, cannot prevail against the general rule. *Adye* v. *Feuilleteau*, 1 Cox, 24.

2. Upon a deposit by executors, of the testator's property, with their own, for their own debt, the latter property is to be first applied in payment. *M'Leod* v. *Drummond*, 17 Ves. 158.

3. If an executor or administrator refer, generally, all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission. *Robson* v. ——— 2 Rose, 50.

4. Where executors had been guilty of negligence, in allowing tenants to be in arrears, without taking legal steps to recover the rents; and had also kept large balances in their hands for years, which ought, according to the directions in the will, to have been invested in government stock, and no evidence was offered in exculpation, or to account for such balances remaining in their hands, the executors were charged with such arrears of rent, and interest upon the balances at 4 per cent. *Tebbs* v. *Carpenter*, 1 Mad. 290.

5. It does not follow, because an executor is directed to pay interest, that therefore he is to pay costs; but he must pay the costs of suit so far as his misconduct makes the suit necessary. So where the executor had been guilty of negligence, and in consequence was charged with arrears of rent unreceived, and interest upon the balance in his hand, he was also charged with costs of suit, so far as it related to such arrears and balance. *Ibid.*

6. Where the executor was directed by the will to sell two houses, and invest the produce, after payment of debts, in real or government securities; and instead of which the executor places it in his banker's hands, not appropriating it to the account of the legatees, but mixing it with his own money, he must bear the loss occasioned by the failure of the bankers, and with interest, and in this case was not allowed his costs. *Fletcher* v. *Walker*, 3 Mad. 73.

7. An executrix, who was entitled to annuity under the will, being considerably indebted to the estate, the court ordered, that the annuity should, as it became due, be applied in payment of such debt; and that her solicitor had a lien for his taxed costs, upon the annuity, after payment of what was due by her to the estate. *Skinner* v. *Sweet*, 3 Mad. 244.

8. But the arrears of the annuity were ordered to be paid the executrix, although no report of debts had been made, she having sworn, in her answer, there was no deficiency of assets, and undertaking to refund if necessary. S. C. Coop. 54.

(c) *Payment of into Court.*

1. Where the executor, in his answer, admits a sum of money to be in his hands, an action at law pending against him is no reason for his resisting a motion to pay the money into court, though he will have liberty to apply in case the plaintiff at law should recover; and where such plaintiff did recover, the court ordered the amount to be paid out to the plaintiff in the action, and not to the executor. *Yare* v. *Harrison*, 2 Cox. 377.

2. Where the testator had been dead three years, and the executor admitted a balance due from him to the testator, he was ordered to pay it into court, notwithstanding there were debts outstanding to which he was liable to the extent of the assets. *Mortlock* v. *Leathes*, 2 Mer. 491.

3. Executors took the personal estate of the testator under the will upon trust, to lay it out on good and sufficient security, for an infant, to be paid on his coming of age; after a decree on behalf of the infant to account, and after notice by the next friend, the executors, without application to the court, lent a part of such personal estate upon mortgage: they were, on motion, ordered to pay the same into court; but that part of the motion which asked, that the executors might be ordered to replace the amount by so much stock as the same would have been purchased at the time of investment, was refused. *Widdowson* v. *Duck*, 2 Mer. 494.

4. An executor will not be allowed to retain any part of the residue of the testator's property, to protect himself against a future contingent demand, in respect of covenants entered into by the testator for payment of rent and repairs of an estate held by him under lease from a corporation, where there is no existing breach of covenant, nor arrears of rent, in respect of which he is liable: but the court will not order the funds to be made over to the residuary legatee, without his giving a sufficient indemnity to the executor, the terms of which, in this case, were to be settled by the Master. *Simmons* v. *Bolland*, 3 Mer. 547.

5. An executor having paid legacies, stands in a situation, in which, at least for the security of the fund, it is not competent to him to allege that debts are unpaid. *Freeman* v. *Fairlie*, 3 Mer. 38.

6. Admission by an executor in his answer, "that the whole amount of the property is near £40,000, and that the whole vested in the public securities in India, either in his name, or in the name of the house in which he is a partner, but subject to his disposal, unless some part is in the hands of the "said house at interest, which he believes may be the case," is not a sufficient admission of money in his hands to order the payment into court of any part of it. *Ibid*, 3 Mer. 39.

7. An executor dealing with money in his hands, is bound to ear-mark it; but, if he cannot answer as to the state of it, the court has no power to act as upon an admission. *Ibid*, 3 Mer. 40.

8. Where an executor admits having possessed the testator's property, he cannot protect himself from the payment of the amount into court, by alleging an improper application of it, as having lent it on a promissory note; but where neither insolvency, nor other danger as to the money was suggested, time was allowed him. *Vigrass* v. *Binfield*, 3 Mad. 62.

9. Executor not called on to lodge money, except upon affidavit of his insolvency, or an admission by him of a balance in his hands after payment of debts. *Rutherford* v. *Dawson*, 2 B. & B. 17.

(c) *For Interest or Profit made.*

1. If an executor appears to have made 5 per cent. of the assets in his hands, or by the non-application of assets does damage to the estate, to the amount of 5 per cent., in either case he shall be charged with interest at that rate; so if he permits debts, carrying interest at 5

per cent. to run on, when he had in his hands a fund to pay them, he shall *ea ratione* pay interest at that rate; but where the executor retains the assets in his hands generally, he shall answer interest at 4 per cent. *Hall* v. *Hallett*, 1 Cox, 134.

2. An executor shall not be permitted, either immediately or by means of trustees, to be the purchaser from himself of any part of the assets; but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased. *Ibid.*

3. Where a testator directed his executors to lay out the residue of his estate "in the purchase of lands, or upon heritable or personal securities, at such rate of interest as they should judge reasonable;" and the executors lent the fund to one of themselves, on bond, at 4 per cent., when 5 per cent might have been made by mortgage or government securities: the discretion given by the will to the executors, might have been soundly exercised by their lending the money to any other person upon such terms as they thought reasonable; but a trustee contracting with himself, cannot spare himself; and he must therefore pay interest at 5 per cent., for the money in his hands, and although the testator had been in the habit, in his lifetime, of lending money to this executor at 4 per cent. *Forbes* v. *Ross*, 2 Cox, 113.

4. A testator in India, bequeaths sicca rupees, and the residue of his estate, to his wife for life, with remainder to his children, and appoints his wife and one of plaintiffs, executrix and executor; she invests the money on Indian security, producing a larger rate of interest, and afterwards comes to England with her only child, the infant plaintiff. The widow is not compellable to refund the excess of interest received by her, beyond what the legacy would have produced if invested in the English funds; but the infant plaintiff being in this country, has a right to have the property remitted to England, and laid out in 3 per cent. annuities. *Holland* v. *Hughes*, 16 Ves. 111. 3 Mer. 685.

5. An executor purchasing assets belonging to the estate of his testator, with the knowlege and full approbation of the parties then interested, will not, after a length of time, be answerable for the profit he has made; but otherwise, where the transaction was concealed, and disguised in a manner which imported a fraudulent intention. *Whatton* v *Toone*, 5 Mad. 54.

6. Executors charged with interest on the balances, though not prayed for by the bill. *Turner* v. *Turner*, 1 J. & W. 39.

7. Executor directed to lay out the testator's personalty in the funds, unnecessarily selling out stock, keeping large balances in his hands, and resisting payment of debts, by a false pretence of outstanding demands, was charged with 5 per cent. interest and costs; but the court refused to make rests in the account. *Crackelt* v. *Bethune*, 1 J. & W. 586.

8. Administration taken out in 1771; distribution to a certain extent made, but a large sum retained by the administrator on unfounded pretences, and the suit for account being much protracted by him: Held by the House of Lords, that notwithstanding the lapse of twenty years, before effectual suit for account commenced, the administrator ought to be charged with the full legal interest on the sum remaining undistributed and during the whole period of retention; and that the account should be taken with annual rests, and that interest should be charged on the annual balances; and that the administrator should pay to the plaintiff his costs of suit, incurred subsequent to the original decree. *Stackpoole* v. *Stackpoole*, 4 Dow, 209.

9. An administrator *pendente lite* is not liable to interest on a balance in his hands during the pendency of the suit in the ecclesiastical court. *Gallivan* v. *Evans*, 1 B. & B. 191.

10. To charge him with interest, he should be called on to lodge the balance in court. *Ibid*, 192.

11. Interest upon balances in the hands of executors cannot be charged, unless the purposes for which the money is retained appear to be answered. *Dawson* v. *Massey*, 1 B. & B. 231.

VII. Rights and Liabilities of Persons dealing with.

1. Executor advances sums of money to his daughters *pendente lite*, to two of them on their marriage, to the others as a voluntary gift, and afterwards dies insolvent, having received assets: on a bill by the legatees, the voluntary gifts were considered fraudulent; but those daugh-

ters being also legatees, they were permitted to retain in part of their legacies, subject to abatement. *Partridge* v. *Gopp*, 1 Eden, 163.

2. A purchaser of leasehold premises from an executor, need not, in general, see to the application of the purchase money; nor need the assignment contain any recital of the purpose for which the premises are sold; but if, on the face of the assignment, it appears to have been made in satisfaction of the private debt of the executor, the sale is fraudulent as against those interested in the premises under the will. But length of time will bar the claim to relief. *Bonney* v. *Ridgard*, 1 Cox, 145.

3. Security by executor upon the assets for his own debt and future advances, cannot be held, where the person dealing with the executor knows the property to belong to the testator; as where the circumstances proved the act not to be consistent with the duty of executor, but that it was for his own private advantage. *M'Leod* v. *Drummond*, 17 Ves. 168.

4. But there is great difference between a case where the money is advanced at the time the security is taken, and where the security is taken in discharge of an antecedent debt. *Ibid*, 17 Ves. 170.

5. The effects of the testator cannot be taken in execution for the debt of the executor. *Ibid*, 17 Ves. 168. S. V. *Ray* v. *Ray*, Coop. 264.

6. Pledge of the property of the testator by an executor cannot be held even against a pecuniary or residuary legatee, and though for money advanced at the time, if under circumstances showing knowledge of an intended application not conformable to, or connected with the character of executor. *M'Leod* v. *Drummond*, 17 Ves. 170.

7. Assignment of a chose in action, part of the assets, and judgment confessed, to a creditor by one of several executors, not available against the dissent of the others, on behalf of the general creditors; though perhaps the court would not interpose against the particular creditor, if the property had actually passed, or to deprive him of any legal advantage. *Lepard* v. *Vernon*, 2 V. & B. 51.

8. Every person who acquires personal assets by a breach of trust, or devastavit in the executor, is responsible to those who are entitled under the will, if he is a party to a breach of trust. *Keane* v. *Robarts*, 4 Mad. 357.

9. If a party, dealing with an executor for the personal assets, pays his money to the executor, so that it may be applied to the purposes of the will, he is not responsible for the executor's misapplication of it; but if dealing with the executor, he does in truth pay his money for the private purposes of the executor, he is equally a party to the breach of trust, whether he applies the money to the private debt, or the private trade of the executor. *Ibid*, 359.

10. Bankers, the agents of executors, and authorised by them to receive certain assets, remitting the amount to the executors in the course of their duty as agents, and afterwards applying the assets, when received, in payment of the amount of such remittances, are not responsible in respect of a misapplication by the executors, if they are not privy to any intention of such misapplication. *Keane* v. *Robarts*, 4 Mad. 332.

VIII. Suits by or against.

See also Div. IV. *ante*
Tit. Injunction, *post.*

1. The bill stated that plaintiff was legatee under a will of which the defendant was executor; that the usual decree for an account of the personal estate had been made, and the parties had been before the master, when the plaintiff was charged with several articles of the personal estate possessed by him; that the account between them was afterwards referred to an arbitrator, who found a small sum in favor of the plaintiffs, but never made an award; that after this the defendant, as executor, brought an action against the plaintiff for the effects of the testator, so in his possession; and the bill prayed an injunction, to restrain the defendant from proceeding at law, and that the value of the articles, posessed by the plaintiff, might be deducted out of the interest taken by him under the will. The court thought, upon this case, that the plaintiff was entitled to an injunction, till the master made his report: a demurrer, for want of equity, was therefore overruled. *Milner* v. *Goolden*, 1 Cox, 196.

2. Where a creditor of an intestate put in suit the bond entered into by his administratrix in the prerogative court, the court of Chancery granted an injunction,

on the terms of the administratrix giving judgment in the action, which was to stand as a security for the costs at law, and in equity, but not for the debt; and amending her bill by submitting to account. *Thomas* v. *Archbishop of Canterbury*, 1 Cox, 399.

3. Testator by his will gave his personal estate to his five infant children, by his first wife; and afterwards married a second wife, by whom he had one child, who died soon after its birth. On the death of the testator, the widow opposed the probate of the will, on the ground that it was revoked by the second marriage. A deed was then executed, by which the widow agreed, on certain considerations, to permit the will to be proved. The widow afterwards married, and on a suit by her and her second husband, to set aside the deed, as having been obtained by fraud, or surprise, and to have the assets administered, as in the case of an intestacy; the court directed the parties to proceed in the prerogative court, and reserved further directions. The prerogative court decided in favor of the will; the plaintiff appealed to the delegates, but afterwards agreed to abandon the appeal on payment of £200. Upon further directions the court directed the accounts of the personal estate, &c.; and notwithstanding the plaintiffs failed in setting aside the will, yet, as in any case, it was necessary that the accounts should be taken in this court, the plaintiffs had their costs out of the fund. *Thompson* v. *Sheppard*, 2 Cox, 161.

4. It is the settled rule of the court, not to permit a creditor to proceed at law, against an executor or administrator, after a decree to account, and for payment of all debts, as that gives every creditor who comes in a claim equal to that of a creditor by judgment at law, from the date of the decree; but the court does not take from a creditor the benefit of a judgment obtained prior to the decree; and where a creditor had commenced his action at law before the bill was filed, he was restrained from proceeding to trial, but was at liberty, upon his discontinuing the action, to prove the costs at law, as a debt under the decree. *Goate* v. *Fryer*, 2 Cox, 201.

5. A demurrer was allowed to a bill by the Bank of England, for an injunction to restrain an action by an executor claiming a transfer of stock, as considering the stock as specifically bequeathed, which was doubtful to trustees, in France, upon special trusts: if the executor cannot maintain the action at law, upon the nature of the bequest, or as having assented, an injunction is unnecessary; and if the executor can maintain the action upon his title to the stock, to be applied as the other property, then there is no equity. *Bank of England* v. *Lunn*, 15 Ves. 569.

6. Executor is not bound to plead the statute of limitations, but the objection may be taken after the decree against creditors coming in before the master.

Ex parte Dewdney, } 15 Ves. 498.
Ex parte Seaman. }

7. B., a purchaser, under a decree, of the first presentation to a living, of which A. is seised for life of the advowson, afterwards takes a conveyance from A. of the second presentation to the same living, and sells the first presentation to the present incumbent. To a bill by A., to set aside the transaction on the ground of fraud, praying a discovery, B. puts in an answer, and refuses a discovery, on the ground of subjecting him to forfeiture for simony. B. died, and the suit is revived against his executor, who is held entitled to the protection claimed by B. *Parkhurst* v. *Lowton*, 1 Mer. 391.

8. An executor will not be allowed to set up the title of the heir at law, as between himself and the personal representatives, where he has been receiving rents of houses, which he is unable to state, whether freehold or leasehold; and his being uncertain who are the persons entitled to such property, does not afford him any ground for declining to set forth, in answer to a bill by the personal representatives, what he has done with it. *Freeman* v. *Fairlie*, 3 Mer. 29.

9. A creditor proceeding at law against an executor, after notice of a decree against him to account, is so far in the nature of a contempt of court, that upon application for an injunction, the court will refuse him the costs of the further proceedings at law, and the costs of the application. *Curre* v. *Bowyer*, 3 Mad. 456.

10. An executor under a will, the validity of which was the subject of a suit in the ecclesiastical court, then remaining for judgment merely, brought actions against the plaintiff, who pleaded the general issue, in expectation the probate

would be recalled before trial; the bill alleging that the executor was insolvent, and was trying to get the estate into his possession. An injunction to stay trials was granted before answer, upon the plaintiff paying into court the money sought to be recovered by the actions. *Mansfield* v. *Shaw*, 3 Mad. 100.

11. There being two suits to take executor's accounts, the prosecution of the first suit was under the circumstances stayed, and the prosecution of the decree in the second suit was given to the plaintiff in the first suit. *Hawkes* v. *Barrett*, 5 Mad. 17.

12. Pledge by executors of bonds to the testator, upon advances from time time for several years. Decree at the Rolls dismissing a bill, not by creditors or legatees, but by co-executors, who had not previously acted, was affirmed by the Lord Chancellor on appeal. *M'Leod* v. *Drummond*, 17 Ves. 152.

13. After a distribution of assets, under a decree ascertaining rights of legatees, advertisements for all persons interested to prove their claims before the master, being previously published, a bill by a legatee, against the representatives of the executor, dismissed. *Farrell* v. *Smith*, 2 B. & B. 337.

14. A person in possession of an administration, and against whom suit is brought in the ecclesiastical court, is not bound to propound his interest, till the party calling in question the grant has first propounded and proved his.

Dabbs v. *Chisman*, } 1 Phil. 155.
Jennens v. *Beauchamp*, }

15. Where different claims were made to the property of an intestate, by suit in the ecclesiastical court, it was held, that the parties propounding their different interests, must proceed *pari passu*. *Waller* v. *Heseltine*, 1 Phil. 170.

IX. Accounts and Allowances.

1. Under a decree, in a suit by the residuary legatees for an account, and directing the application of the personal estate in payment of debts and funeral expenses, and the clear surplus to be paid over, making to the parties all just allowances, the master ought to allow payments in discharge of legacies. *Nightingale* v. *Lawson*, 1 Cox, 23.

2. There is a distinction between an executor and a receiver as to allowances for charges and trouble. *Potts* v. *Leighton*, 15 Ves. 276.

3. Under a settlement on marriage of a female ward of court, the husband, in consideration of receiving a certain part of her fortune, the value of which was taken by estimation, released all right and interest in the residue; he will not be permitted, on suggestion that the estimation was unfair, to attend at taking the account directed against the executors. *Pearce* v. *Crutchfield*, 16 Ves. 48.

4. Charges of a sale are to be taxed under the head of just allowances, and not of costs. *Crump* v. *Baker*, 18 Ves. 285.

5. A charge in an executor's answer by admission can only be discharged by showing the application immediate on the receipt of the money, as one transaction, and not by distinct independent items on the other side of the account. *Robinson* v. *Scotney*, 19 Ves. 582.

6. A surviving partner being executor, is not entitled, without express stipulation, to any allowance for carrying on the trade after the testator's death; but he will be allowed expenses actually incurred under the erroneous conception that he was the sole proprietor, by *bona fide* purchase from his co-executors; but which purchase was afterwards set aside as a breach of trust. *Burden* v. *Burden*, 1 V. & B. 170.

7. The court has a favorable leaning toward executors and trustees keeping regular accounts, and will do every thing to extricate them from difficulties which may arise in the accounts, or the management of the property, and will require no more than strict justice from them. But it is the bounden duty of an executor to keep clear and distinct accounts of the property; and if therefore he chooses to mix the accounts with those of his own trading concerns, he cannot thereby protect himself from producing the original books in which any part of those accounts may be inserted; and if his partners in trade have permitted him to mix the accounts with their general accounts, it seems they cannot afterwards object to a free inspection of the original books; and clearly so, in a case where the executor has admitted his having lent to the house part of the trust-property, and they have been dealing with it. *Freeman* v. *Fairlie*, 3 Mer. 43.

8. An executor in India coming to

England, and after twenty-one years being called upon to account, alleging that he has left his books, &c. behind him in India, was ordered to produce copies of all the entries in such books, &c. within six months, though impossible to be complied with, in order that the court may have an opportunity from time to time of seeing that he had used proper diligence. *Ibid.* 3 Mer. 24.

9. General rule as to the deposit of papers and writings is, that an executor must deposit them for the benefit of the parties interested, unless there are purposes which require that he should retain them. *Ibid,* 3 Mer. 30.

10. An executor in India having a legacy for his care and trouble, is not entitled to commission on receipts and payments, or either, as executor; and will not be allowed, in passing his accounts after a series of years, to renounce his legacy, and charge commission on such receipts and payments. *Ibid,* 3 Mer. 24.

11. Legacies to executors "for care and trouble in the execution of the will," are not to be paid to executors refusing to act; and payment of those legacies will not be allowed the acting executor in passing his accounts. *Ibid,* 3 Mer. 31.

12. An executor under the circumstances, was allowed the expenses of an accountant. *Henderson* v. *M'Iver,* 3 Mad. 275.

13. Executor and trustee cannot claim compensation for personal trouble and loss of time in the performance of trusts under a will; but if the nature of the trust be such that a trustee ought to have compensation, a special case must be made to the court before the trust is accepted. *Brocksopp* v. *Barnes,* 5 Mad. 90.

14. Executors are not on motion permitted to account before the master for property bequeathed by testator to minors; an account so taken is not binding on the minors, there being no suit depending in court to which they were parties. *In the matter of Burke,* 1 B. & B. 74.

15. There is no regular way of calling executors to account but by bill, they not being bound to account as guardians and receivers. *Ibid.* 1 B. & B. 75.

16. Plea by administrator *durante minoritate* to bill for account, of a suit by executor for the same purpose in the Ecclesiastical Court, and sentence, allowed as a stated account, with liberty to except as to subsequent receipts, and an issue directed as to the payment of a particular sum. *Penvill* v. *Luscombe,* 2 J. & W. 201.

17. Administrator held liable to pay a sum remaining undistributed, with the highest legal interest during the period of retention, and with annual rests, notwithstanding a delay of twenty years before effectual suit for account. *Stacpoole* v. *Stacpoole,* 4 Dow, 209.

18. Where equity has taken the management of assets from an executor, it will not permit him to be charged for what has been done pursuant to directions. *Farrell* v. *Smith,* 2 B. & B. 342.

19. An executor is bound to exhibit an inventory and account at the suit of a party interested in the property for which he is executor; and a probable or contingent interest is sufficient for that purpose. *Phillips* v. *Bignell,* 1 Phil. 239.

20. An equitable creditor has sufficient interest to call for such inventory and account. *Myddleton* v. *Rushout,* 1 Phil. 244.

21. The court exercises a discretion as to the sort of inventory it requires from an administrator. *Reeves* v. *Freeling,* 2 Phil. 56.

22. Objection to an inventory charging fraud by concealment and omission, overruled. *Butler* v. *Butler,* 2 Phil. 37.

23. A creditor is entitled to a statement of the effects which have come into the possession of the executor. *Barclay* v. *Marshall,* 2 Phil. 188.

FINE.

1. Possession and receipt of rent will amount to a disseisin, and give an estate upon which a fine will operate. *Coury* v. *Caulfield,* 2 B. & B. 272.

2. A fine levied by an elegit creditor, can avail nothing, possession not being adverse to the title of the debtor. Where a possession can be referred to a good

title, it cannot, in a court of equity, be treated as acquired by disseisin. *Ibid.*

3. A fine may, at law, be impeached for fraud; and in matters of fraud, equity has concurrent jurisdiction. *Ibid,* 2 B. & B. 272.

4. Where the possession of an estate can be referred to a good and valid title, equity will not refer it to a title obtained by fraud; therefore a fine by a person obtaining possession by fraud, and afterwards procuring assignments of elegits affecting the estate, cannot by non-claim operate as a bar, the possession of the conusor being referred to the elegit, and not to the title by fraud. *Ibid,* 2 B. & B. 255.

5. A fine levied upon a possession acquired by the fraud of a tenant, but acquiesced in by the landlord, with notice of the fraud, will operate as a bar. *Ibid,* 2 B. & B. 272.

FOREIGN LAW.

1. Where the object is to affect proceedings in England by a foreign law, such law must be proved as a fact. *Ex parte Cridland,* 3 V. & B. 99. 2 Rose, 166.

FORFEITURE.

I. What shall amount to.

1. A title of nobility, limited by patent in tail, is an estate tail, within the protection of the statute *de donis,* whether it be conferred from any place or not, and consequently not forfeited by an attainder of felony. *Earl Ferrers's Case,* 2 Eden, 373.

2. Clause of re-entry in a lease for three lives, in case lessee or his executors &c. should lease for more than seven years without licence; the third life being in possession as executor of the original lessee, and without notice of the proviso, leased for fourteen years; but this is no forfeiture, as he should have had notice of the condition to affect his interest by way of forfeiture for the breach of it; and as the lease could not extend beyond the life of the lessor, it could not pass an interest for fourteen years certain. *Northcote* v. *Duke,* 2 Eden, 319.

II. Equitable relief against.

1. A court of equity will, if it can, relieve against a forfeiture. *Blennerhassett* v. *Day,* 2 B. & B. 130.

2. In cases of contract, equity relieves against forfeitures introduced by the parties; but when they are created by statute, no relief can be given. *Nesbitt* v. *Tredennick* 1 B. & B. 47.

3. That relief will be given against a forfeiture when compensation can be made, is a principle applicable to cases of contract only; and not to the provisions of a statute or conditions in law. *Keating* v. *Sparrow,* 1 B. & B. 373.

4. Relief cannot be given against a forfeiture created by act of Parliament; but a court of equity will see that the proceedings working the forfeiture have been regular. *Blennerhassett* v. *Dey,* 2 B. & B. 128.

5. In cases of forfeiture, the court looks to the real transaction between the parties. *O'Brien* v. *Grierson,* 2 B. & B. 332.

III. Waver of.

1. After an eviction for non-payment of rent under the ejectment statutes, and after the expiration of the six months allowed the tenant to redeem; evidence of acts *in pais* is admissible, to show a waver of the forfeiture. *Malone* v. *Malone,* 1 B. & B. 32.

2. To permit a tenant to remain in

possession, and expend his money in building, with the knowledge of the landlord after an eviction for non-payment of rent, is a waver of the forfeiture, under the ejectment statutes. *Hume* v. *Kent*, 1 B. & B. 554.

3. Acceptance of rent, with notice of a forfeiture, is a waver thereof at law. *Ibid*, 561.

FRAUD.

I. What amounts to.

1. A record may be affected by fraud; a fine for instance; if the appearance of the woman before the judge was the effect of previous compulsion. *Hampson* v. *Hampson*, 3 V. & B. 42.

2. To prevent by promises a suit being instituted, until a claim is barred by the statute of limitations, is a fraud. *Barrington* v. *O'Brien*, 1 B. & B. 178.

II. Equitable Relief against.

1. In cases of fraud, courts of equity and courts of law have a concurrent jurisdiction; and therefore a demurrer for want of equity will not lie to a bill praying relief against a fraudulent policy of insurance. *Sowerby* v. *Warder*, 2 Cox, 268.

2. There are many instances of fraud that would affect instruments in equity, but of which the law could not take notice.

Butcher v. *Butcher*, } 1 V. & B. 98.
Gooday v. *Butcher*, }

3. The rule in equity, that interests obtained through the frauds of a third person cannot be maintained, is not to be extended to the case where a person innocently acquiring interests, afterwards sells them to innocent purchasers. *Lloyd* v. *Passingham*, Coop. 155.

4. An annuitant or legatee has a title to relief upon fraud in not performing a promise, relying on which the testator forbore to bequeath. *Chamberlain* v. *Agar*, 2 V. & B. 262.

5. It is not necessary to show even legal fraud on every occasion of seeking relief in equity, and a mere mistake will sometimes be sufficient. *Hitchcock* v. *Giddings*, 4 Price, 135. Dan. 1.

6. In giving relief against a fraudulent title, equity will reimburse the party in possession for permanent improvements. *Shine* v. *Gough*, 1 B. & B. 444.

7. A judgment at law may be impeached in equity on the ground of fraud, but not on the ground of irregularity. *Baker* v. *Morgan*, 2 Dow. 529, 530.

III. Effect of.

1. The clearest title cannot be used by persons cognizant of any fraud affecting it. *Gore* v. *Stackpoole*, 1 Dow, 30.

2. If a person be fraudulently prevented from doing any act, it will, in equity, be considered as if the act had been done. *Middleton* v. *Middleton*, 1 J. & W. 96.

FUNDS, PUBLIC.

I. Transfer of.

1. Petitions under the act 56 Geo. 3, c. 60, " to authorize the transferring of stock, &c. to the commissioners for the

reduction of the national debt," should be entitled, "In the matter of the act to authorize, &c."

Ex parte Gillett, } 3 Mad. 33.
——— . *Bacon*, }

2. On petition for transfer of stock standing in the name of the Accountant General, subject to the order of the court, under a power in an act of Parliament, the facts alleged being disproved, the petition is not dismissed; but an order made for the transfer to the persons appearing to be entitled. *Ex parte Williams*, 1 J. & W. 89.

3. Testator bequeathed £200 long annuities to B. for life, whom he appointed sole executor, and after his death to C. absolutely; C. sold his reversionary interest to B., and B. and C. joined in a power of attorney for the transfer of the stock to B., which the Bank refused to permit. The Bank has decreed to transfer the stocks, but without costs: for the devise of stock is in the nature of a Parliamentary appointment, and does not want the assent of the executor; and being so, the refusal of the Bank was right, and they ought not to be charged with more duty than the acts of Parliament impose upon them. *Pearson* v. *Bank of England*, 2 Cox, 175.

II. Liabilities of.

1. Stocks or annuities cannot be attached, sequestered, or taken in execution, and are not in any way liable to payment of debts during the life of the proprietor, except under a commission of bankrupt. *Bank of England* v. *Lunn*, 15 Ves. 577.

2. Property in the funds being a chose in action, cannot be attached. *M'Carthy* v. *Goold*, 1 B & B. 390.

3. Dividends of Bank stock being choses in action, cannot be sequestered. *Ibid*, 1 B. & B. 387.

III. Rise or Fall of.

1. No attention is paid by the court to the rise or fall of the stocks, the party must take it as it happens to be at the time of appropriation, which in this case was at the time of the Master's report.

Ex parte Dubost, } 18 Ves. 140.
——— *Pye*, }

2. If stock is purchased with trust-money, and funds, in whatever name the stock stands, the advantage belongs to the trust-fund. *Phayre* v. *Parec*, 3 Dow, 128.

GIFT.

1. An intestate died possessed of considerable personal property, and entitled, after the death of his wife, to the principal of certain Bank stock standing in the name of a trustee; his brother, by letter, expressed his intention of relinquishing his share of the intestate's estate to the widow, executed to the trustee (transferring to the widow,) a release of the Bank stock, and directed the preparation of a release of the general personal estate, the execution of which was prevented by his death; but to the moment of his death expressed his wish to execute it. The release of the stock is effectual in favor of the intestate's widow; but the intention to relinquish the share of the general personal estate not being perfected, amounts not to a gift; and she, as administratrix, must account to the representatives of the brother, but without interest. *Hooper* v. *Goodwin*, 1 Wil. 212. 1 Swan, 486.

2. A letter to executors, expressing legatee's consent that a sum of £500 was proper to be given to the daughter of the deceased husband: held, not to amount to a gift of so much in the executors' hands, the intention to give not being perfected, or carried into execution. *Cotteen* v. *Missing*, 1 Mad. 176.

3. A deed of gift, found cancelled among the papers of the grantor after his death, was decreed, in the absence of evidence of its having been satisfied, to be enforced against his representatives, upon the presumption that it was cancelled improperly. *Sluysken* v. *Hunter*, 1 Mer. 40.

GRAFT.

1. A mortgagee of a leasehold interest evicted for non-payment of rent, took a new lease after the expiration of the six and nine months allowed for redemption under the Irish stat. 8 Geo. 1, but, in pursuance of a contract entered into in the interval between the six and nine months, provided the parties interested did not redeem. This is not a graft upon the former lease, nor a trust for the original lessee, the mortgagee not being in possession, nor procuring the lease by fraud. *Nesbitt* v. *Tredennick*, 1 B. & B. 29.

2. A renewal obtained by a party having a rent-charge on a leasehold interest evicted for non-payment of rent, a trust for the original lessee, and a graft on the former lease. *Fitzgerald* v. *Rainsford*, 1 B. & B. 37.

3. The principles on which courts of equity act in considering renewed interests obtained by mortgagees, trustees, &c. grafts, are: that the advantage was procured by being in possession; or, when out of it, by a contrivance to oust the lessee of the benefit of the renewal. *Nesbitt* v. *Tredennick*, 1 B. & B. 46.

4. A lease obtained by a person interfering with assets, and compelling a surrender by executors of a leasehold interest bequeathed to minors, a graft on the former lease so surrendered. *Mulvany* v. *Dillon*, 1 B & B. 409.

5. Where a leasehold interest is in settlement, the tenant for life cannot, by surrender or otherwise get rid of the limitations of the settlement; for any new demise will, in equity, be considered as a graft on the old lease; and although it may be the best thing he could possibly do, yet he is not at liberty to surrender, or to deal for himself to the exclusion of those in remainder. *Eyre* v. *Dolphin*, 2 B. & B. 298.

GUARDIAN.

I. APPOINTMENT OF.

1. In the case of a natural child, the court will appoint the persons named in the father's will, to be guardians, without a reference to the Master. *Peckham* v. *Peckham*, 2 Cox, 46.

2. An order may be obtained upon petition, without any suit instituted for the appointment of a person to act as guardian, (the father being living,) and for a reference as to maintenance, but not for receiver. *Ex parte Mountford*, 15 Ves. 445.
Corbet v. *Tottenham*, 1 B. & B. 60.

3. Order on petition appointing a guardian without a reference, only where the property is exceedingly small, refused when it amounted to £1500. *Ex parte Wheeler*, 16 Ves. 266.

4. Persons nominated by a testator to be guardians of his natural children, consenting to undertake the guardianship, were appointed without a reference. *Chatteris* v. *Young*, 1 J. & W. 106.

5. Guardian not to be appointed without a reference, when the infant's property amounts to a £150 per annum. *Ex parte Janion*, 1 J. & W. 395.

6. Guardian appointed of an infant to put in his answer; and his presence in court dispensed with, on an affidavit of his inability to attend from illness. *Hill* v. *Smith*, 1 Mad. 290.

7. Guardian for a defendant to put in his examination, will be appointed on motion. *Attorney General* v. *Waddington*, 1 Mad. 321.

8. A mother having children by a second marriage, is not thereby rendered incompetent to be guardian of her children by the first marriage. *Corbet* v. *Tottenham*, 1 B. & B. 61.

9. A person is not incapacitated to act as guardian by being a dissenter. *Ibid*, 1 B. & B. 61.

10. An infant of the age of seventeen

appoints a guardian for himself by deed: this does not preclude an application to the court to appoint a guardian. *Curtis* v. *Rippon*, 4 Mad. 462.

II. Acts of, where valid.

1. A guardian cannot take from his ward any thing for his own benefit, except his demand, pending his guardianship; nor at its close: nor until the relation and influence have ceased. *Wood* v. *Downes*, 18 Ves. 127.
Montesquieu v. *Sandys*, 18 Ves. 313.

2. An act of the guardian, though without authority, if beneficial to the infant, will be protected. *Milner* v. *Lord Harewood*, 18 Ves. 273.

III. Accounts and Allowances.

1. If a guardian expends more in the maintenance of an infant than the sum settled by the court, unless under special circumstances, the court will not make any reference as to such extra expenditure. *Rainsford* v. *Freeman*, 1 Cox, 417.

2. Guardians are obliged to account, on application by petition or motion, being bound by recognizance to account regularly, or when called on, being considered as officers of the court. *In the matter of Burke*, 1 B. & B. 74.

3. A guardian will be charged with interest on balances of his ward's property kept in his banker's hands. *Dawson* v. *Massey*, 1 B. & B. 219.

4. If the guardian of an infant does not do his duty, or if any other sufficient ground be made out, the court will allow him to be removed; but so long as he continues he is considered responsible. *Russell* v. *Sharpe*, 1 J. & W. 4[illegible].

HABEAS CORPUS.

1. The Court of Chancery being always open, the Lord Chancellor can issue the common law writ of *Habeas Corpus* in the vacation time. *Crowley's Case*, 1 Buck, 264. 2 Swan, 1.

2. The writ of *habeas corpus* is a high prerogative writ, by which the king has a right to inquire the causes for which any of his subjects are deprived of their liberty, a liberty most especially guarded by the common law. *Ibid*, 2 Swan, 48.

3. The Court of Chancery can enforce obedience to a writ of *habeas corpus* by process of contempt. *Ibid*, 2 Swan, 73.

4. No inference from a statute designed in favor of the liberty of the subject to the prejudice of that liberty. The statute 31 Car. 2, is, in all its enactments, to be construed with reference to application for a writ under it. *Ibid*, 68.

5. The statute 31 Car. 2, c. 2, s. 3. extends to persons committed during term. *Ibid*, 69.

HEIR.

I. Rights of.

1. A. being seised in fee *ex parte paterna*, conveys, by indenture and fine, to trustees, in trust for herself, her heirs, and assigns, to the intent that she should appoint, &c. and for no other use, intent, or purpose whatsoever. A. makes no appointment, and dies without heirs *ex parte paterna:* Held, first, that the maternal heir was not entitled; and, secondly, by the Lord Keeper and the Master of the Rolls, that there being a terre-tenant, the crown, claiming by escheat, had not a title by subpœna, to compel a conveyance from the trustee, the trusts being absolutely determined, no opinion being given upon the right of the trustees: but by Lord Mansfield, C. J. thirdly, that

from the analogy between trusts and legal estates, the crown, claiming by escheat, was entitled to a decree; but that, if the conveyance had barred the crown of its right, as between the maternal heir and the trustee, the former was entitled. *Burgess* v. *Wheate*, 1 Eden, 179.

2. Though the lord is sometimes called *quasi hæres*, it is always to his prejudice, and never to his benefit. *Ibid*, 1 Eden, 208.

3. So far from the lord taking any benefit as heir or assignee, he is distinguished from both, and excluded from the privilege which the heir had by common law, and the assignee by statute. *Ibid.*

4. If an adult heir at law refuse an issue on the hearing of the cause the court will establish the will against him. *Jackson* v. *Barry*, 2 Cox, 225.

5. In a case of lessee for years, with an option at certain periods to purchase, the lessee making the option will be considered owner *ab initio*, for the benefit of the heir, and the purchase-money to be paid by the executor. *Daniels* v. *Davison*, 16 Ves. 253.

6. Bill by heir at law against legatees, charging a secret trust for charities, dismissed with costs, there being no evidence of a trust, and the heir refusing an issue. *Paine* v. *Hall*, 18 Ves. 475.

7. An heir at law is not to be disinherited in equity but by express words or necessary implication. *Kellett* v. *Kellett*, 1 B. & B. 541. 3 Dow, 254.

8. A legacy to an heir at law is not sufficient to defeat his claim to the undisposed real estate. *Kellett* v. *Kellett*, 1 B. & B. 543.

9. When a contract for the purchase of an estate is not complete in the lifetime of the ancestor, the terms of it not being ascertained, the heir is not entitled to have the personal estate applied in payment of the purchase-money. *Savage* v. *Carroll*, 1 B. & B. 265.

10. When the terms of such contract are not sufficiently made out in proof, a reference or issue will not be granted to ascertain them. *Ibid.*

11. To entitle an heir to an application of the personal estate in completing a contract for a purchase of lands by his ancestor, it must be such as he could have been compelled to execute. *Ibid*, 281.

12. A devisee takes only by force of the intent of the testator appearing from the will. *Secus*, as to an heir at law, who takes, not by force of the intent, but by the rule of law. *Tregonwell* v. *Sydenham*, 3 Dow, 194.

13. A remainder to a testator's right heirs is to be considered as evidence of his intention not to exclude his heir at law. *Tregonwell* v. *Sydenham*, 3 Dow, 208.

14. Where descendible property is not given to some devisee, it necessarily goes to the heir at law. The heir at law takes wherever he is not disinherited; and therefore takes whatever interest in land is not effectually disposed of; as *pro tanto* he is not disinherited. *Ibid*, 210.

15. The grounds of decision in those charity cases, where the heir at law did not take, though the devises were void, were, that the heir was completely disinherited, or his claim barred by express words, or necessary implication. *Ibid*, 213.

16. Heritable bonds, and with English securities, given on a loan of money to a domiciled Englishman, held, that a will disposing of the money due on the securities passed the interest of the heir at law. *Duchess of Buccleugh* v. *Hoare*, 4 Mad. 467.

II. Whether the Heir takes by Descent or Purchase.

1. The husband having, by articles, covenanted to settle lands, of £100 per annum on his wife for life, devises certain premises of the annual value of £50, and directs his executors to purchase land of sufficient value to make up the annual value of such estate £100; and then devises all his real estates, not therein before devised to his eldest son, his heirs, and assigns: but in case such son should die without issue before twenty-one, then over, the son takes as devisee, and not by descent, and therefore the simple contract creditors, but not the legatees, are entitled to resort to the real estate for so much as should be exhausted in making up the estate devised to the wife. *Scott* v. *Scott*, 1 Eden, 458.

2. The rule that a man cannot make his right heir a purchaser, is confined to the estate of which he is seized: and in the case of a devise, even if the testator is seized, the rule is not conclusive, but the devise must be construed according to

the intention to be collected from the will. *Robinson* v. *Knight*, 2 Eden, 159.

3. When the devised estates are not of the same nature as the estate which would have descended, the heir, being also the devisee, will take by purchase, and not by descent.

Scott v. *Scott*, 1 Eden, 461, 462. (*n*)
Swaine v. *Burton*, 15 Ves. 371.

4. The words "heir," or "heir male," in the singular number, are words of limitation, and not of purchase, unless words of limitation are superadded, or the context shows that the testator did not mean to use the words in their technical sense; as the word "issue;" an express estate for life to the ancestor; a clause that the estate should be without impeachment of waste; a limitation to trustees to preserve contingent remainders; or a direction so to frame the limitation that the first taker should not have the power of barring the entail. *Blackburn* v. *Stables*, 2 V. & B. 371.

5. A devise in fee to the heir is inoperative. *Welby* v. *Welby*, 2 V. & B. 190.

III. Where aided or relieved in Equity.

1. A gift obtained from an heir at law, who was in great poverty, and ignorant of his rights, by one who undertook to support him in obtaining possession of his estate, was set aside, as having been obtained by misrepresentation, imposition, and by taking undue advantage of the necessities of the heir. *Strachan* v, *Brander*, 1 Eden, 303.

2. A Court of Equity will not grant the heir at law an issue to try the validity of a will, where he has asquiesced in the probate, and in a bill to perpetuate the testimony of the witnesses, and suffered the executors and devisees to pay away large sums of money under the will. *Pike* v. *Hoare*, 2 Eden, 182.

3. Demurrer to bill by heir at law, for a discovery, seeking also relief, allowed; the relief sought being, first, that an issue might be directed to try the question in a different county, on an allegation of undue influence, an heir at law not being entitled to any issue except by consent, and a bill in equity not lying to change the *venue*. Secondly, for the production of title-deeds, without its being shown how they could be of service in assisting him to recover at law. Thirdly, to restrain the devisees from setting up outstanding terms, without directly averring there were any outstanding terms, so as to be capable of being met by a negative plea. Fourthly, for an injunction to stay waste and destruction, and for a receiver, there being no instance of the court so interfering, as between heir at law and devisee, where their adverse rights are in litigation; and on the ground of negligence and delay; the bill having been filed more than two years after the death of the presumed testator, and no action yet brought, although the commission of the alleged acts of waste and destruction stated to have been immediately after his death. Fifthly, that the plaintiff may be let into possession of copyholds, unsurrendered to the use of the will; that being mere legal relief, although he might have been entitled to the discovery whether there were any copyholds unsurrendered. The bill also going on to pray, in the character of one of the next of kin, for an injunction from interfering with the personal estate. and a receiver; the injunction asked for an indefinite period, and no allegations of a suit depending in the Ecclesiastical Court. *Jones* v. *Jones*, 3 Mer. 161.

4. An heir at law out of possession is entitled to a discovery of deeds necessary to support his legal title, or to have terms removed when they are an impediment to his recovering possession at law; but he cannot pray immediate relief by the delivery of the possession of the estate and of the title deeds; the jurisdiction of the court in respect of causing title deeds to be delivered up, being confined to the possession of the estate. *Crow* v. *Tyrrell*, 3 Mad. 179.

5. A court of equity will not entertain a bill by an heir at law, for setting aside and declaring void an impeached will, alleged to have been procured to be made under circumstances of fraud charged, unless some obvious impediment, which the court can see and reach, to proceeding at law by ejectment, be shewn by the bill, to obstruct the plaintiff in that his regular course, and although the bill charge generally, that the defendants have possessed themselves of all the papers and muniments of the deceased, and threaten to set up outstanding terms. *Jones* v. *Jones*, 3 Price, 663.

6. Heir at law, defendant, contesting the will and failing, but establishing a

claim as creditor against the testator's estate, charged with the payment of his debts, is entitled to his costs. *Burne* v. *Breen*, 1 B. & B. 308.

7. Equity constantly gives relief to heirs at law against frauds committed upon their ancestors. *Falkner* v. *O'Brien*, 2 B. & B. 221.

8. A bill, by the heir at law, against a purchase from the executor to have the lease for years declared attendant on the inheritance, dismissed, the evidence of the trust being insufficient. *Kelly* v. *Power*, 2 B. & B. 236.

IV. Expectant or Reversioner.

(*a*) *Sales by, when relieved against.*

1. The protection of a court of equity to an expectant heir, dealing for his expectancy approaches almost to an incapacity in them to contract. Relief may be obtained against a very advantageous purchase from such a person, though without fraud, such cases being subject to a severe scrutiny; though mere inadequacy, unless so gross as to be evidence of fraud, is, between persons standing on precisely equal footing, of no account. The relief is on payment of principal and interest, and, where there is no fraud, costs, the purchaser being considered as a mortgagee; but in this case the purchaser's bill to establish the purchase was dismissed with costs, except the costs of depositions used by the other party. *Peacock* v. *Evans*, 16 Ves. 512.

2. The sale of a reversionary interest in the Court of Chancery, is considered as the case of an expectant heir, and forms an exception to the general rule, that for mere inadequacy of value a contract is not to be set aside during the continuance of the same situation of the vendor; his acquiescence has no effect, and the value is to be estimated as at the time of the transaction, not according to the event. Interest at 5 per cent. will be directed upon the money advanced, but no compound interest. *Gowland* v. *De Faria*, 17 Ves. 20.

3. Where a person has dealt with an heir apparent for his expectancy, it does not rest on the heir to show that the bargain was unreasonable and improvident; but on the person so dealing, to show that it was reasonable. *Davis* v. *The Duke of Marlborough*, 2 Swan. 139. *Bernal* v. *Marquis Donegal*, 3 Dow, 151.

4. In the protection afforded by courts of equity to expectant heirs, age is not material. *Davis* v. *The Duke of Marlborough*, 2 Swan. 143.

5. Relief against an oppressive deed, though obtained from an heir apparent, is given only on payment of the consideration, with interest. *Ibid*, 2 Swan. 166.

6. Both at law and in equity, where a man has a power of disposition over his property, whether he sells to relieve his necessities, or to provide for his family, he cannot avoid his contract upon the mere inadequacy of price. The court will, however, relieve expectant heirs and reversioners from disadvantageous bargains, they being so much exposed to imposition, and so much in the power of those dealing with them, as to make it a rule of policy to throw upon the purchasers the onus of proving a fair consideration; but this rule does not extend to sales of reversions by auction, there being, in such case, no room for fraud or imposition on the part of the purchaser; and the vendor not being in his power, a bill, therefore, to set aside a sale of a reversionary interest by auction, was dismissed with costs. *Shelly* v. *Nash*, 3 Mad. 232.

7. The consideration of certain post-obit bonds not allowed to be impeached by an expectant heir, who had deliberately, on various occasions, acknowledged the fairness of the transaction, &c. *Bernal* v. *Marquis Donegal*, 3 Dow, 133.

8. A reversionary grant from a person in the situation of an expectant heir, made thirty-four years, and confirmed by a subsequent deed, was set aside, being obtained by fraud and imposition; the party confirming, being ignorant of his rights, and the length of time satisfactorily accounted for. *Roche* v. *O'Brien*, 1 B. & B. 330.

9. A. an expectant heir, being indebted to B., his friend and father-in-law, and B. being indebted to C., A. gives C. post-obit bonds in discharge of his debt to B., and C. gives B. credit in account, for half the amount of the bonds, after the death of A's father; when the bonds had become payable, A. and B., by deeds de-

liberately executed, acknowledge the fairness of the transaction, A. then files a bill against C. and B., to have the bonds set aside, on the ground of imposition and the want of consideration, and afterwards dismisses his bill as against B., and examines him as a witness; so that no relief could be had by either party in the cause against B. Held, by the Lords reversing a decree of the Irish Chancery, that, under these circumstances of acknowledgment, dismissal, and examination of B. as a witness, A. had debarred himself from impeaching the consideration of the bonds; but that from the confidential situation in which B. stood with respect to A., and the knowledge which C. had of all their transactions, the bonds ought not to be available as post-obit bonds, but only for the sums actually allowed by C. as the consideration for them, with interest, from the dates of the bonds. *Bernal* v. *Marquis Donegal*, 3 Dow, 133.

10. The principle of protecting expectant heirs in their dealings, does not extend to the avoiding their engagements deliberately entered into, so as not to oblige them to refund what was actually advanced to them. *Ibid*, 3 Dow, 156.

HEIR-LOOMS.

1. A court of equity has jurisdiction for the specific delivery of chattels personal, especially in the nature of heir-looms. *Earl of Macclesfield* v. *Davis*, 3 V. & B. 16.

2. Inspection ordered, on motion, of articles, claimed by the plaintiffs as heir-looms, in a chest at the banker's of the defendant, who by answer insisted on a lien. *Ibid.*

3. Where the testator directed that all his family pictures in his mansion-houses should be heir-looms, and be held with his mansion-houses, by the person in possession thereof, under his will; and having given the use of his prints to G. for life, and after his decease to F., bequeathed to trustees, all household goods, furniture, glasses, and linen, &c. in his mansion-house, except the family pictures and prints not framed, to sell such parts as should be in his house, except his family pictures, as they should think proper; the other part which might be thought worth keeping, to be removed to his house at R.; and to dispose of, or to retain such of his effects at R. as they should think proper; and after his debts should be reduced to £35,000, then, as to his family pictures, and such of his effects at R. as should remain unsold, in trust for R. L. if living, for his own proper use and benefit; but if he should die without leaving issue male living, in trust for I. L., or such person as should become entitled to the possession of his estate at R., for the same right and interest as before declared with regard to R. L. The family pictures are heir-looms, but R. L. being alive when the debts are reduced to £35,000, becomes absolutely entitled to the remaining personalty. *Savile* v. *The Earl of Scarborough*, 1 Swan. 537. 1 Wil. 239.

4. Devise of all testator's real estate to his brother T. G. for life, with remainder to the first and other sons of his said brother in tail male; and in default of issue to his other brother R. G. for life, with remainder to his first and other sons in tail male: and testator directed that certain chattels should go as heir-looms, "as far as by law they can, to the heir male of his family, successively, as his real estate is thereby settled." Held, that T. G. took a life interest only in the chattels, and dying without issue, that they went over with the estates to R. G. *Gower* v. *Grosvenor*, 5 Mad. 337.

IMPLICATION.

1. Necessary implication means not natural necessity, but so strong a probability of intention, that an intention to the contrary cannot be supposed. *Wilkinson* v. *Adam*, 1 V. & B. 466.

INCLOSURE ACT.

1. Commissioners under an inclosure act are liable to suits at law, and in equity, for acts not according to their authority. Therefore, where a bill charged, not collusion expressly, but that the commissioners were proceeding to divide unjustly, and not according to their authority, upon the information of a tenant of the plaintiff's manor, who was also the owner of the adjoining one, and the boundaries and documents being intermixed, a demurrer by the commissioners was overruled. *Spect* v. *Crawter*, 17 Ves. 216.

2. Where an act of inclosure authorises a sale of the allotments before the award of the commissioners, the award is rather evidence of, than constituting a title. *Kingsley* v. *Young*, 18 Ves. 208.

3. An inclosure act empowered commissioners to sell, by private contract, any part of the commonable lands, fronting or adjoining the houses or gardens of the *purchasers*; and also empowered the commissioners to sell by auction such parts, at the greatest distance from the houses of the respective proprietors, as the commissioners should think fit for defraying the expenses of the act; and the surplus of the produce of such sales was directed to be divided among the proprietors. On a bill by one proprietor on behalf of himself and the others, the commissioners were restrained by injunction from proceeding in an agreement made by them, for the sale of a pond by private contract, to a person who was not the owner of any property, adjoining or fronting the pond, it appearing that the pond was of much public utility, and was agreed to be sold at an under value. *Hawes* v. *James*, 1 Wil. 2.

INFANT.

See Guardian, *ante*; Ward of Court, *post*.

I. Jurisdiction.

1. When a suit is instituted for the administration of an infant's estate, the court has jurisdiction over the infant; and, on the petition of the guardians, may order him to be delivered to them. *Wright* v. *Naylor*, 5 Mad. 77.

II. Acts of, where binding.

1. An infant may, by contract previously to her marriage, bar herself of a distributive share of her husband's personal estate in the event of his dying intestate. *Drury* v. *Drury*, 2 Eden, 39. *Earl Buckinghamshire* v. *Drury*, 2 Eden, 60. S. C. 3 Bro. P. C. 492. *Opinions & Judgments of C. J. Wilmot*, 177.

2. Female infant not bound by agreement in marriage to settle her freehold estate. *Milner* v. *Lord Harewood*, 18 Ves. 259.

3. Covenant on marriage by female infant, tenant in *quasi* tail, not binding upon the remainder-man, she dying under age. *Lecky* v. *Knox*, 1 B. & B. 210.

4. Where the husband gave his bond for the amount of two promissory notes

given by his wife before her marriage, and thereupon the creditor delivered up the notes, and afterwards, to a suit upon the bond, the husband pleaded his infancy at the time of the execution; upon a bill by the creditor, the court would not decree payment of the money; but on the principle that an infant shall not take advantage of his own fraud, the court would put the parties in the same situation as they were in at the time the bond was given; therefore it was ordered that the bills should be delivered up, and that the defendant should not plead the statute of limitations to any action the plaintiff should bring on the notes, or any other plea which the defendant could not have pleaded at the time the bond was given. *Clarke* v. *Cobley*, 2 Cox, 173.

5. Though a conveyance by infant trustee, not being within the stat. 7 Anne, c. 19, is voidable; yet if he would be bound to convey when adult, he would in equity be restrained from setting it aside. —— v. *Handcock*, 17 Ves. 384.

6. Where an infant, nearly of age, by a concealment of his infancy obtains from his trustees a transfer of property, to which when of age he would be entitled, he is guilty of a fraud, which precludes him or his assigns, who stand precisely in his situation, from calling for a repayment, and more especially if when adult he receives the remainder of the fund, and thereby confirms his former act. *Cory* v. *Gertcken*, 2 Mad. 40.

III. Where or not bound by Statute.

1. The statute of 27 H. 8, which introduced jointures, extends to infants; and therefore a jointure made before marriage on an infant cannot be waved by her after marriage. *Drury* v. *Drury*, 2 Eden, 39.
Earl Buckinghamshire v. *Drury*, 2 Eden, 60.

2. Where the words of a law in their ordinary signification are sufficient to include infants, the virtual exception must be drawn from the intention of the legislature, manifested by other parts of the law from the general purpose and design of the law, and the subject matter of it. Thus the statutes of limitations and of fines would have bound infants, &c. without an express exception. *Beckford* v. *Wade*, 17 Ves. 92.

3. Where a landlord or lessor in 1781 by an ejectment for non-payment of rent entered upon the possession of a widow tenant for life, remainder to four children, infants, and the children, long after they came of age, and after the lessor had been twenty-five years in undisputed possession, filed their bill in 1806 for relief: held, by the Lords reversing a decree of the Irish Court of Exchequer, that there was no ground whatever for interference in equity, the rights of infants in remainder not being saved by the Irish statute, (11 Anne, c. 2, s. 8;) and any irregularity in the proceedings in the ejectment being only matter for consideration at law. *Baker* v. *Morgans*, 2 Dow, 526.

4. Rights in remainder of infants not saved under the statutes of ejectment for non-payment of rent in Ireland; such a saving would be inconsistent with the rights of landlords, who on entry for non-payment of rent are re-instated as if no lease had ever been granted. *Ibid*, 2 Dow, 532.

IV. Trustee under Stat. 7 Anne.

1. An infant directed to convey charity estates to new trustees, under the statute of 7 Anne, he having no duty to perform; but where the infant has any duty to perform, as trustee, beyond the mere conveyance, the case is not within the statute. *Attorney General* v. *Pomfret*, 2 Cox, 221.

2. But an infant mortgagee is within the statute, notwithstanding he may be beneficially interested in the mortgage money. *Ex parte Bellamy*, 2 Cox, 422.

3. An infant trustee is within the statute 7 Anne c. 19, notwithstanding he takes an interest as co-executor, and co-residuary legatee, and entitled to the mortgage money, the receipt and discharge of the other executor leaving the infant a mere trustee. —— v. *Handcocke*, 17 Ves. 383.

4. Infant trustee, within the statute 7 Anne c. 19, must be a dry trustee, having no interest in the subject. *Ibid*, 17 Ves. 384.

5. The presumption is against intending an infant to be a trustee. *King* v. *Dennison*, 1 V. & B. 278.

6. Mortgagee is within the statute 7 Anne, c. 19, as to infants, though entitled as co-executor and residuary legatee to the mortgage money, the discharge

of the other executor leaving a naked trust. *Ex parte Tutin*, 3 V. & B. 151.

7. The infant heir of an assignee, under a commission of bankruptcy, is a trustee within the statute of Anne. *Ex parte Beddam*, 1 Rose, 310.
——— *Kirk*, Buck 478.

8. The infant heir of a messenger, to whom in bankruptcy a provisional assignment had been made, and who died before the choice of assignees, held to be a trustee, within the statute of Anne. *Ex parte Carter*, 5 Mad. 81.

9. Where an order had been made, under the statute, for an infant trustee to convey, and he refused to comply with the order, the court held, that an attachment was not the proper course against such infant, he not being a party to the cause, but ordered him to convey within a week, and if he did not obey the order, that the party must move to stand committed, unless cause. *In re Beech*, 4 Mad. 128.

10. Tenant in tail, with remainders over, by bargain and sale conveyed to B., for the purpose of making him tenant to the *præcipe* in a recovery. By a mistake, the recovery was suffered before the bargain and sale was executed. The tenant in tail died: held, that the infant heir of B. was not a trustee under the statute of 7 Anne, c. 19. *Ex parte Boehm*, 5 Mad. 124.

11. Premises were, by deed dated the 3d January, 1765, conveyed in trust for W. C. for life, remainder over in fee, subject to an annuity or rent-charge of £400 to E. C. for life, if she should survive W. C., and subject to a term of ninety-nine years, granted to trustees in trust for securing the rent-charge, with a proviso, making void the term, on payment of the annuity; and subject also to a proviso, that if W. C. should survive E. C., and marry again, he might appoint an annuity of £100 out of the premises to the use of the person he should marry: E C. died, as did W. C., without executing the power. Held on petition, under 7 Anne, c. 19, that the legal estate descended on the infant heir of the surviving trustee, who, as a trustee within the act, was directed to convey. *Ex parte Ward*, 5 Mad. 291.

12. The court refused to direct an infant, customary heir, to surrender copyhold premises to a purchaser, which had been sold, and conveyed to him by the deceased ancestor of the infant, for valuable consideration; and for which the ancestor had received the purchase money in his lifetime, on a motion made to confirm a report, which found that the infant was a trustee, within the 7th of Anne, on the ground that it was an *ex parte* proceeding, and *non constat* the ancestor was competent to sell, and therefore the court could not say that the infant ought to be declared a trustee within the statute of Anne. *In the matter of Janaway*, 7 Price, 679.

V. Maintenance.

1. The court will allow maintenance for an infant legatee. where the father is not in circumstances to be able to give the infant an education suitable to the fortune he expects; and it is not necessary that the father should be absolutely insolvent. *Buckworth* v. *Buckworth*, 1 Cox, 80.

2. But the court will not allow maintenance to a great grand-child legatee out of a fund not vested. *Ibid.*

3. The testator authorized his executors, at any time before T. L. should attain the age of 26 years, to raise, by sale of a sufficient part of certain Bank annuities, any sum of money not exceeding £600; and pay and apply the same towards the preferment or advancement in life, or other the occasion of T. L., as the said executors should think proper; and at the age of 26 he gave the said £600 to T. L. absolutely. The executors declining to act, the court will not give this £600 to T. L. before 26, without referring it to the Master, to inquire whether T. L.'s situation requires the £600, or any part thereof to be advanced. *Lewis* v. *Lewis*, 1 Cox, 162.

4. In the allowance of maintenance for an infant, the circumstances and situation of his mother, who was the testamentary guardian, were taken into consideration, and as on account of the insolvency of the mother, another person had been appointed guardian. part of the allowance to the infant was paid to the guardian, for his maintenance, and the residue to the mother. *Heysham* v. *Heysham*, 1 Cox, 179.

5. Liberal allowance of maintenance made for an infant in regard to an illegitimate brother unprovided for. *Bradshaw* v. *Bradshaw*, 1 J. & W. 647.

6. The court will not make an allowance to a father for the maintenance of a child for the time past, although it should appear, he had not been of ability to maintain the infant; and although the will had expressly given the produce to the trustees to be applied for his maintenance. *Andrews* v. *Partington*, 2 Cox, 223.

But see *Host* v. *Pratt*, 3 Ves. 733.

7. Maintenance allowed for the time past, the father being liable to debts, he was obliged to contract in supporting the minors; and no fund being in court to reimburse him till the time of the application. *Ex parte Darlington*, 1 B. & B. 240.

8. An order for reference as to maintenance of an infant, may be obtained on petition, without suit, where the property is small. *Ex parte Mountford*, 15 Ves. 445.

Corbet v. *Tottenham*, 1 B. & B. 63.

9. But when the property is considerable, or it be necessary to take accounts in the Master's office, or when the trustees are called upon by the guardian to allow maintenance, a bill must be filed. *Corbet* v. *Tottenham*, 1 B. & B. 60.

10. Reference to approve of a guardian, and for maintenance of an infant, ordered, on petition, without suit, where the amount of the property was about £200 per annum. *Ex parte Myerscough*, 1 J. & W. 151.

11. An infant's property being very small, maintenance was ordered out of the principal, without a reference. *Ex parte Green*, 1 J. & W. 253.

12. The interest of small legacies paid to the mother of infants, for their maintenance in the lifetime of the father, he being abroad, and in embarrassed circumstances. *Walker* v. *Shore*, 15 Ves. 122.

13. A general direction for maintenance, comprehending all children, is not restrained by the bequest of the capital, in terms limited to those living at the date of the will. *Freemantle* v. *Taylor*, 15 Ves. 363.

14. Maintenance for children under the circumstances given to a father, who had £6000 a year of his own, and although no report of debts had been made. *Jervoise* v. *Silk*, Coop. 52.

15. Where the testator had given an annuity to his daughter, for the maintenance of herself, and the education and maintenance of her children, and after her death, a legacy to the children, "when" and "as" they attain 21, with survivorship in case of any dying under that age, and if all die, the legacy to cease; maintenance was ordered upon the fair inference of intention. *Lambert* v. *Parker*, Coop. 143.

16. Wherever children born, and to be born, have a common interest in a fund, the fund, if necessary, may be applied for the maintenance of the children. If the father is not of ability, the court will allow maintenance for the children, although the mother has a competent separate estate. *Haley* v. *Bannister*, 4 Mad. 275

17. Maintenance will be allowed where principal and interest of a legacy to a child are vested, although the interest is directed to accumulate until legatee attains the age of twenty-one. *Stretch* v. *Watkins*, 1 Mad. 253.

17. It is a general rule, that the court never breaks into the principal of an infant's fortune for his maintenance; but where rent was paid, in order to save the estate from the costs of an ejectment, such payment was allowed out of the principal of the infant's fortune. *Ex parte M'Key*, 1 B. & B. 405.

18. Maintenance out of the principal of minor's fortune, composed chiefly of accumulated interest, refused. *Ibid.*

VI. Estate of, how protected in Equity.

1. Interest of an infant is not affected by the recital of a deed made during infancy. *Milner* v. *Lord Harewood*, 18 Ves. 274.

2. The court acts for an infant as a trustee, changing property for his benefit, but so as not to affect his power over it even during infancy, as in the case of his testamentary power over personal property. *Ex parte Phillips*, 19 Ves. 122.

3. Where the heir of a mortgagor is an infant, and the mortgagee consents to a sale, the court will not allow him to be foreclosed without an inquiry whether it would be for his benefit. *Mondey* v. *Mondey*. 1 V. & B. 223.

4. Costs of the unsuccessful defence of an infant charged, not upon the general fund, but upon his own share. *Earl of Orford* v. *Churchill*, 3 V. & B. 59.

5. The old rule in administering pro-

perty under a will, that all persons having any charge upon or interested in the estate, however numerous, must be made parties, has of late years been dispensed with for the purposes of convenience; yet it may often be provident to make a single annuitant a party for the purpose of taking the accounts so far as may be requisite; but it is not therefore necessary to burden an infant's estate by allowing the attendance of an annuitant at the passing of accounts, to which, in point of interest, he is a stranger. In this case, after a decree to take an account of the estate of an infant since become lunatic, an annuitant, claiming also as next of kin, was not allowed her costs of attending the passing the account of the general estate, where there was no direction for such purpose in the decree. *Tharp* v. *Tharp*, 3 Mer. 516.

6. Where infants are bound to elect to take under or against the will, the court will refer it to a master to ascertain which is most for their benefit. *Gretton* v. *Haward*, 1 Swan. 413. *Ebrington* v. *Ebrington*, 5 Mad. 117.

7. Where there is a devise of real estate to an infant, subject to the payment of debts, the court will not direct a sale on the hearing of the cause, though the insufficiency of the personal estate is admitted, until a report is made of such insufficiency. *Birch* v. *Glover*, 4 Mad. 376.

8. The estate of an infant cannot be purchased by a party acting as agent or executor. *Mulvany* v. *Dillon*, 1 B. & B. 418.

9. Decree for sale of estates to pay debts and incumbrances, on a bill to which an infant remainder man in tail was a party; the sale effected at an undervalue, to the prejudice of the infant, by fraud and collusion between tenant for life and purchaser: bill by the infant, when of age, to set aside the sale as fraudulent as against him, and adjudged in *dom. proc.* accordingly. *Colclough* v. *Bolger*, 4 Dow, 54, 64.

VII NEXT FRIEND OF.

1. No degree of mistake or misapprehension is sufficient to fix a *prochein amy* personally with costs; whoever stands forward in that character on the behalf of infants, is to be encouraged to every possible extent, while he can be supposed to intend the infant's benefit; but the same principle which guides the court in encouraging an honest *prochein amy*, will involve a dishonest one in the expenses of his own proceedings. *Whittaker* v. *Morlar*, 1 Cox, 285.

2. The next friend of an infant plaintiff cannot withdraw himself from that situation and substitute another, without a reference to the Master. *Melling* v. *Melling*, 4 Mad. 261.

3. The court will change the next friend of an infant, if he will not proceed with the cause. *Ward* v. *Ward*, 3 Mer. 706.

4. A solicitor is not to attach without orders from his client; but where the client is next friend of an infant, and moves to discharge the attachments on that ground, although otherwise regularly issued, it is a question whether it ought not to be referred to the Master to see whether it is for the interest of the infant that the next friend should be continued. *Ward* v. *Ward*, 3 Mer. 706.

5. The next friend of an infant cannot be appointed a receiver of the rents and profits of the estate, even by consent, as his duty is to watch the accounts and conduct of the receiver; the characters are therefore incompatible. *Stone* v. *Wishart*, 2 Mad. 64.

6. Where, after decree, the *prochein amy* of infant plaintiffs dies, the defendant may move, in prosecution of the suit, for a reference to the Master to appoint another *prochein amy*. *Bracey* v. *Sandiford*, 3 Mad. 468.

VIII. PRACTICE.

(*a*) *Instituting and conducting Suits for.*

1. Where two suits are instituted in the name of an infant by different persons as his next friends, it is a motion of course to refer it to the Master to see which of the two suits is most for the infant's benefit, upon the mere allegation of counsel, that both suits are for the same purpose; it being at the risk of the party moving, in case the allegation should prove untrue, to have the order for reference discharged with costs. It is competent for the Master, upon such a reference, to suggest any improvement in the frame of the suit, and to report any special circumstances that may appear to him to be for the infant's benefit. *Sullivan* v. *Sullivan*, 2 Mer. 40.

2. It is not competent for the next

friend of an infant to move for a reference to the Master, to inquire if the suit which he has instituted is for the infant's benefit. *Jones* v. *Powell*, 2 Mer. 141.

3. Where a Master reported that two suits were for the same matter, and that one of them was most for the benefit of infant parties to be prosecuted, the court would not stop the other suit unless on payment of costs, and by consent, there being no decree in either cause.
Mortimer v. *West*, } 1 Wil. 159.
Ford v. *West*, } 1 Swan. 358.

4. The court will not, upon petition of an infant party, direct an inquiry whether the cause has been properly conducted; but if the next friend or guardian does not do his duty, he will be removed. *Russell* v. *Sharpe*, 1 J. & W. 482.

5. Where a bill is filed in the name of an infant, he may abandon the suit when he comes of age; but he cannot compel the *prochein amy* to pay the costs, unless it be established that the bill was improperly filed. *Anon*, 4 Mad. 461.

6. In the case of an infant plaintiff, whether the cause can be heard on bill and answer—*Quære*. *Cowdell* v. *Tatlock*, 3 V. & B. 19.

7. Where an infant heir in a suit impeaching the will is entitled to an issue, but the counsel for the infant is clear, from the evidence, there is no ground to impeach the will, he is well justified in declining to ask for an issue. *Levy* v. *Levy*, 3 Mad. 245.

8. Generally speaking, infants are bound, as adults are, by the conduct of their solicitor in a cause. *Tillotson* v. *Hargrave*, 3 Mad. 494.

(b) *Answer.*

1. An infant defendant may, before he attains twenty-one, amend his answer, and go into a new defence. *Savage* v. *Carroll*, 1 B. & B. 548.

2. An infant's answer cannot be read against him, nor excepted to; and may be amended when he comes of age. *Ibid*, 1 B. & B. 553.

3. Defendant brought to the bar of the court for contempt in not putting in his answer; being an infant, the court, on suggestion of his infancy, will assign him a guardian, and discharge him. *Wilson* v. *Bon*, 1 Price, 62.

(c) *Evidence.*

1. The examination *de bene esse* granted to plaintiffs in a bill to perpetuate testimony, after subpœna served, but before appearance of infant defendants, in contempt by the messenger's return, that they had absconded and were not to be found, and upon affidavit of the materiality of the evidence, and danger of its loss, and undertaking to proceed with all due diligence to issue, and examination in chief to be proved before publication of the depositions *de bene esse*. *Frere* v. *Green*, 19 Ves. 319.

2. After witnesses were examined upon the original bill, an amended bill was filed against new parties, some of whom were infants; the court refused to order the evidence taken on the original bill to be read against such of the new defendants as were infants. *Quantock* v. *Bullen*, 5 Mad. 81.
See also *Wilkinson* v. *Beal*, 4 Mad. 408.

3. Infants, defendants, will not be concluded, as to the question of bankruptcy, by the production of the commission, &c. under the stat. 49 Geo. III. c 121, although no notice has been given on their behalf of an intention to dispute the commission. *Bell* v. *Tinney*, 4 Mad. 372.

4. When tenant in tail is party to a suit, and depositions are taken, publication passed, and the cause set down for a hearing; and then a new tenant in tail comes *in esse*, who takes before the one already a party, the depositions taken in the cause may be read against such new tenant in tail; for since, if he had come *in esse* after a decree made on the depositions, such decree would be binding upon him, coming *in esse* before the decree, he must be bound by the proceedings so far as they are completed. *Lord Westmeath* v. *Lady Westmeath*, 3 Mad. 436.

(d) *Decree.*

1. A decree omitting to give an infant six months to shew cause against it, erroneous. *Savage* v. *Carroll*, 1 B. & B. 551.

2. Where there is a decree against an infant, it is the practice in England, to give the infant an opportunity of showing cause, when he comes of age, against the

decree. But that practice seems to have been little attended to in Ireland, till the Irish practice in that respect was reformed by Lord Redesdale. *Colclough* v. *Bolger*, 4 Dow, 62.

3. A minor is bound by a decree. *Lightburne* v. *Swift*, 2 B. & B. 213.

4. In the case of foreclosure against an infant, the decree absolute repeats the clause *nisi* as in the original decree, giving six months after age to show cause, which can only be error in the decree. *Williamson* v. *Gordon*, 19 Ves. 114.

5. Decree of foreclosure against an infant, with a day to show cause. *Goodier* v. *Ashton*, 18 Ves. 83. But see *Mondey* v. *Mondey*, 1 V. & B. 223.

(*e*) *Demur of Parol.*

1. Testator devised an estate to his heir at law, charged with two legacies, and afterwards dies indebted on specialty, his heir being an infant; in this case the parol shall not demur. *Mould* v. *Williamson*, 2 Cox, 386.

2. Under a decree for partition between infant *cestuis que* trust defendants, the conveyance was respited until they attained their age of twenty-one. *Attorney General* v. *Hamilton*, 1 Mad. 214.

INJUNCTION.

Page

I. To stay Judicial Proceedings.

(a) At Law.

1. After a decree in equity for a specific performance the plaintiff brings an action at law to recover damages for the delay in the performance of the agreement; although the defendant would have been clearly entitled to an injunction in a new suit, yet, if the decree has been wholly executed, the court cannot make such an order in the original cause. *Ford* v. *Compton*, 1 Cox, 296.

2. If a party fail in proving a material fact at law, and afterwards obtains a discovery of such fact from the adverse party in equity, it is a ground for granting an injunction, though the court at law would not grant a new trial, to enable the party to prove the fact by fresh witnesses. *Hankey* v. *Vernon*, 2 Cox, 12.

3. An injunction to stay trial is never granted until after the common injunction has been obtained; and therefore, where the time for the defendant's appearance, is the day for which notice of trial was given, the trial cannot be stayed. *Wright* v. *Brains*, 2 Cox, 232.

4. An injunction against proceeding at law will not be granted until after appearance, or default of appearance, or answer. *James* v. *Downs*, 18 Ves. 522. *White* v. *Klevers*, 18 Ves. 471.

5. Injunction may be obtained upon a bill of inter-pleader against bankrupts and their assignees, by a debtor to the estate, sued by the bankrupt with the view of indirectly contesting the commission. *Lowndes* v. *Comford*, 18 Ves. 299. 1 Rose, 180.

6. A court of equity has jurisdiction by injunction upon the ground of vexation by repeated actions at law. *Waters* v. *Taylor*, 2 V. & B. 302.

7. An injunction was refused against a verdict in ejectment upon a breach of covenant by lessee for years, as to the mode of cultivation; though equity could relieve against such breach, the plaintiff at law having been prevented from proving other breaches, against which the court could not relieve, as by assigning without licence. *Lovat* v. *Lord Ranelagh*, 3 V. & B. 24.

8. There is a distinction as to an injunction to restrain an ejectment against a tenant under an actual lease, and one under a mere covenant for a lease: in the latter case, if the lease would contain a covenant which would have been broken, and against which breach equity would not relieve, an injunction would not be granted. In the former case, to support an injunction, there must be some right arising, either from the conduct of the lessor, or under the statute 4 Geo. 2, c. 28. *Ibid*, 3 V. & B. 29.

9. Injunction will be granted to restrain the defendant from suing for a rent charge, granted to qualify him to sit in parliament, the purpose never having been answered. *Platamone* v. *Staple*, Coop. 250.

10. An injunction will be granted in the court of Chancery, though the court of law in which the action has been brought, has refused to stay proceedings upon an application for that purpose, made upon a release of one of the plaintiffs, and affidavits of the circumstances of the case. *Whitfield* v. *Ralfe*, Coop. 89.

11. The court will not grant an injunction to stay proceedings at law by which a purchaser seeks to recover the amount of his deposit, where the description in the printed particulars of sale was calculated grossly to deceive as to the real nature and value of the estate. *Stewart* v. *Allison*, 1 Mer. 26.

12. But the court granted an injunction where the terms and validity of the contracts were questions of evidence, and could only be decided at the hearing of the cause. *Levy* v. *Lindo*, 3 Mer. 81.

13. A surety may obtain an injunction against the principal's proceeding at law, where such principal has available securities placed in his hands for the same debt. *Dixon* v. *Ewart*, 3 Mer. 322.

14. After decree to account, injunction granted on the motion of defendant to restrain the plaintiff from proceeding at law in an action commenced pending the suit in equity. *Wilson* v. *Wetherherd*, 2 Mer. 406.

15. In case of charity, the court is not bound by the strict rules of practice, as with respect to granting an injunction, whether common or special, to stay proceedings at law, but will act according to what the justice of the case seems to require, so as to save the parties. *Attorney General* v. *Pearson*, 3 Mer. 396.

16. Injunction to stay execution granted before appearance against defendants to a bill of revivor, executors of the original defendant, on the merits disclosed

by the answer, and on affidavit of personal service of the notice of motion. *Turner* v. *Wright*, 1 J. & W. 290.

17. The common injunction to stay proceedings at law does not extend to distress for rent. *Hughes* v. *King*, 1 J. & W. 392.

18. A party bringing an action at law for damages, in consequence of having been arrested on an attachment, which on his application has been set aside for irregularity, will be restrained from proceeding in it, but without prejudice to any application such party may be advised to make to the court for compensation. *Frowd* v. *Lawrence*, 1 J. & W. 655.

19 Equity will not restrain by injunction farther proceedings at law upon a verdict, obtained through the defendant's neglect to produce his certificate of bankruptcy in evidence. *Lingard* v. *Hibbertson*, 1 Rose, 459.

20. Injunction granted on the merits to restrain proceedings on post-obit bonds, under the circumstances of the case, until the hearing of the cause. *Darley* v. *Singleton*, Wigh. 25.

21. An injunction to restrain a sheriff from executing a *fieri facias* against the furniture and effects of the defendant at law, which, with a house and land, had been let by him to the plaintiff, who was in possession, was refused; the right to take in execution being a question of law, the court had no jurisdiction. *Garstin* v. *Asplin*, 1 Mad. 150.

22. An injunction to stay proceedings at law in an interpleading suit, stands upon the same principle as a similar injunction in any other suit; and therefore an *ex parte* injunction upon the filing a bill of interpleader was refused. *Croggon* v. *Symons*, 3 Mad. 130.

23. A special injunction to restrain a defendant from distraining will be granted before answer, if the defendant be in contempt for not having answered. *Heming* v. *Emuss*, 1 Price, 386.

24. An injunction will not be granted to restrain a defendant from taking out execution on a judgment suffered by default, on a case made by bill and answer, that the bill of exchange, on which the action had been brought, was given in consideration of defendant's delivering up a former bill, which had been endorsed in consideration of a gaming debt. *Graves* v. *Houlditch*, 2 Price, 147.

25. It is sufficient for the purpose of obtaining an injunction to restrain a plaintiff at law from proceeding in the action, that the defendant at law state in his bill and affidavit, that an unsettled account subsists between the parties, and that the plaintiff would be found indebted to him on such account in a greater sum than he is proceeding for; nor is such a bill demurrable on the ground that the plaintiff in equity, stating a balance to have been acknowledged to be in his favor, might have pleaded it at law on notice of set-off. *Wattleworth* v. *Pitcher*, 2 Price, 46.

26. Where an action at law has been brought on a bail-bond given to the sheriff, on an attachment from the equity side of the court of Exchequer, for not answering according to the condition, and a verdict has been recovered; if the defendant, instead of pleading the answer put in, pleads *non est factum*, and refuses to settle with the plaintiff, by paying the costs pending the action, when he had an opportunity, before the judge on a summons, the court will not restrain the plaintiff from taking out execution, (although the defendant has answered since the action brought), but on the terms of all the costs at law being paid; notwithstanding the plaintiff has not (as he ought to have done) refused to accept the answer when it came in, till the contempt were cleared, but has actually waved them, by excepting to the answer, and amending his bill. *Hurd* v. *Partington*, 3 Price, 222.

27. But the court will not order the defendant at law to pay the costs in equity also, because they are waved by the plaintiff accepting the answer. *Ibid.*

28. Where four of many actions against the various underwriters on several policies (individually) had been tried, and verdicts passed for the plaintiffs at law, the court granted an injunction to restrain further proceedings on the money being paid into court, there being strong suspicion of fraud in the assured, and the answer of one of them, a defendant, not having come in. *Kensington* v. *White*, 3 Price, 164.

But see *Whitemore* v. *Thornton*, 3 Price, 241.

29. The court will not grant an injunction to a lessee to restrain a party proceeding against him in ejectment, or to restrain his landlord from distraining for rent which he has received notice from the plaintiff in ejectment not to pay to the landlord, because it is either way a pro-

ceeding which would have the effect of bringing his landlord's title into dispute, which he is not to be permitted to be the means of doing. *Homan* v. *Moore*, 4 Price, 5.

30. A plaintiff applying for an injunction to restrain a defendant from proceeding at law to recover the amount of a promissory note, on the ground that there are accounts subsisting between them, held to be precluded, by having settled and signed an account, leaving a balance in favor of the defendant. *Hirst* v. *Peirse*, 4 Price, 339.

31. On an application for an injunction to restrain a defendant from proceeding at law to recover the amount of a promissory note, on the ground that there are accounts subsisting between them, leaving a balance in favor of the plaintiff, and that there have been other subsequent accounts between them, and charges said to be due to the plaintiff, for business done as attorney or agent; to all which matters the defendant is interrogated by the plaintiff's bill: if there be exceptions taken to the sufficiency of the answer, the court will not order a further answer, or grant an injunction on the ground of insufficiency, because the interrogatories and the charge relate to what is rather matter of set off and defence at law, than of account, raising an equity on which the court can interfere; for demands of such sort do not raise an account, so as to give such attorney or agent an equity against the holder of his promissory note, as in the case of money mutually due on both sides. *Hirst* v. *Peirse*, 4 Price, 339.

32. Where a purchaser has been long (four years) in treaty under contract for the purchase of an estate, and has paid part of the purchase-money; but in so short a time as a fortnight after the last act of negotiation, suddenly terminates the treaty, and commences an action to recover back the money paid on account: an injunction will be granted to restrain the action, on motion, almost as of course; and *semble*, even on a hearing under such circumstances. *Warde* v. *Jeffery*, 4 Price, 294.

33. The court will grant an injunction to restrain a judgment creditor from taking out execution on his judgment against lands, which had been the property of his debtor, but were sold by him to a purchaser before the creditor obtained his judgment; but which, from the invalidity of the conveyance, had since descended to the vendor's heir at law. *Prior* v. *Penpraze*, 4 Price, 99.

34. The court will enjoin a plaintiff proceeding in an action at law, on a lost bill of exchange, on the equity of the defendant's right to have a sufficient indemnity. *Davies* v. *Dodd*, 4 Price, 176.

35. Where a country solicitor became bankrupt, and the client after the bankruptcy paid the town agent the amount of his bill in the cause, and obtained possession of the paper, the court, on the ground of the agent's lien, granted an injunction against an action, previously commenced by the assignees against such town agent for recovery of the papers. *Bray* v. *Hine*, 6 Price, 203.

36. The court will grant an injunction to stay trial of an ejectment at the next assizes, on a motion made on the 27th of February, of which notice had been given to the defendant's clerk in court, only on the 26th, if moved on merits confessed in an answer put in only on that day, because there is only one day of sitting in the Hilary vacation, which ought not to prejudice suitors, and it can be no surprise on a defendant under such circumstances. *Hayward* v. *Greenwood*, 7 Price, 537, Dan. 209.

37. Injunction against an action commenced by the plaintiff, while proceeding under a decree, to account for the same matter, it being a contempt to proceed at law after the subject of the suit had been attached in court. *Mocher* v. *Reed*, 1 B. & B. 318.

38. After the dismissal of a bill for the specific execution of an agreement, the plaintiff being unable to make a good title, an injunction to restrain him from proceeding on the agreement at law, granted on motion, the defendant undertaking forthwith to file a bill. *M'Namara* v. *Arthur*, 2 B. & B. 349.

(*b*) *In Equity.*

1. Where there are different suits for the same purpose, in the same court of equity, one may be restrained from proceeding; but whether, if the suits are instituted in different courts of equity—*Quære.* *Jackson* v. *Leaf*, 1 J. & W. 229.

(*c*) *In the Spiritual Court.*

1. An administratrix having an equitable demand against the personal estate of her intestate, the court will enjoin the next of kin from proceeding in the spiritual court to compel a distribution; but they may proceed to compel the administratrix to exhibit an inventory. *Blackhouse* v. *Hunter*, 1 Cox, 342.

(*d*) *Court of Session in Scotland.*

1. Where parties, defendants to a suit, are resident in this country, the court of Chancery has authority to act upon them personally, with respect to the subject of the suit, as the ends of justice may require; and, with that view, may order them to take, or omit to take, any step or proceeding in a court of justice in a foreign country. So where the assignee of a bond, originally given for money won at play, sought by proceedings in the court of Session in Scotland to recover the amount out of an estate of the obligor in that country, the court of Chancery granted an injunction; the question upon the bond being one of the law of this country, and the power of the court of Session being insufficient, either to compel discovery, or, if the case should require it, to order the bond to be delivered up to be cancelled. *Bushby* v. *Munday*, 5 Mad. 297.

II. To stay Waste.

1. The court will not interfere by way of injunction, to stay waste, where the defendant is a stranger in estate, and may be turned out of possession immediately. *Mortimer* v. *Cottrel*, 2 Cox, 205.

2. An injunction against waste will not be prevented by appearance the day before the motion. *Allen* v. *Jones*, 15 Ves. 605.

3. Injunction granted in cases of equitable waste. *Twort* v. *Twort*, 16 Ves. 132.

4. An injunction against waste will be granted against one tenant in common, who holds the premises as occupying tenant to the other: otherwise not, except as to destruction. *Ibid*, 16 Ves. 128.

5. An injunction may be obtained to restrain a tenant from year to year, under notice to quit, as well as in the case of a lessee for a longer term, from doing damage, and from removing the crops, manure, &c. except according to the custom of the country. *Onslow* v. ——, 16 Ves. 173.

6. Injunction to restrain waste was granted where the defendant, insisting on his own title, admitted possession received from plaintiff's tenant without his knowledge; the court, in such case, holding the defendant's title to be no better than the tenant's, from whose breach of duty possession was obtained. Cited *Norway* v. *Rowe*, 19 Ves. 154.

7. Injunction may be obtained against a tenant for waste, by the destruction of a dovecote, but not by removing presses &c. not fixed to the freehold. *Kimpton* v. *Eve*, 2 V. & B. 349.

8. Devise to A., and her heirs for ever, in the fullest confidence "That after her decease, she will devise the property to my family" being restrained to an estate for life, by decree at the Rolls, the devisee was restrained by injunction from cutting timber pending an appeal. *Wright* v. *Atkyns*, 1 V. & B. 313.

9. Injunction may be obtained against permissive waste. *Coldwall* v. *Baylis*, 2 Mer. 408.

10. Lease from dean and chapter, with covenant on the part of the lessors not to make sale of, or take any timber-trees growing, or to grow on a certain part of the premises, save for the necessary building, or repairing, &c. of their cathedral church, or of the church buildings thereto belonging. This covenant does not extend to deprive the dean and chapter of the right to cut the whole of the timber, if wanted, for the purpose of repairs, which is a right they might have exercised independently of the covenant, and therefore the lessee cannot maintain an injunction against them; more especially as deans and chapters, like other ecclesiastical persons, are not liable to be restrained in cases of waste, either by prohibition or injunction, except in the Ecclesiastical Court, or at the suit of the Crown. *Wither* v. *Dean and Chapter of Winchester*, 3 Mer. 421.

See also *Herring* v. *The Dean and Chapter of St. Pauls.* 2 Wil. 1.

11. There is no instance of the court interfering by injunction against waste, &c. as between heir at law and devisee, where their adverse rights are in litigation; and in a case where also the party

applying had delayed more than two years from the death of the testator, the injunction was refused. *Jones* v *Jones*, 3 Mer. 173.

12. In injunctions against waste, there is a distinction where the tenant hath only *impunitatem*, and where he hath *jus in arboribus*. If he hath only a bare indemnity, or exemption from an action, if he committed waste, it is fit he should be restrained by injunction from committing it; but if he hath a right in the thing itself when wasted and cut down, it is not reasonable that he should be restrained.
Skelton v. *Skelton*, 2 Swan. 170, (*n*).
Abrahall v. *Bubb*, *Ibid*, 172, (*n*).

13. So no restraint can be put upon a jointress in tail who hath the inheritance. *Skelton* v. *Skelton*, *Ibid*, 170, (*n*).

14. A lawful power and liberty to commit waste may be restrained by injunction, when the waste about to be committed is signally *contra bonum publicum*. *Ibid.*

15. Injunction to stay waste refused, the acts of waste committed being trivial, and the plaintiff's proceeding having been dilatory. *Barry* v. *Barry*, 1 J. & W. 651.

16. A small degree of waste, manifesting an intent to do more, is sufficient for the court to act upon. *Ibid*, 1 J. & W. 653.

17. In cases of waste, it is the business of the reversioner to apply to the court promptly. *Ibid.*

18. A mortgagee is entitled to an injunction to restrain a mortgagor in possession from cutting down timber, if the land without it is a scanty security. It may be extended to cutting down underwood contrary to the usual course of husbandry; but not to underwood generally, although the mortgagor is insolvent. *Humphreys* v. *Harrison*, 1 J. & W. 581.

19. Injunction may be obtained to restrain waste, and sowing land with mustard-seed, or any other pernicious crop. *Pratt* v. *Brett*, 2 Mad. 62.

20. The plaintiff and defendant (partners,) agreeing to dissolve their partnership, and that defendant, on payment of half the value of the effects, shall take the whole: the defendant takes possession of the plaintiff's premises, and pulls down part of the buildings. Held, that it is not waste; and an injunction to restrain him from so doing refused. *Cofton* v. *Horner*, 5 Price, 537.

III. In Cases of Trespass.

1. The court has occasionally granted injunctions in cases of trespass, as well as waste, and where a party obtained possession of an estate under a contract to purchase, and began to cut timber, he was restrained by injunction. *Crockford* v. *Alexander*, 15 Ves. 138.

2. There is no difference between destruction and trespass where there is no privity of estate; and at law a writ of estrepement may be had to prevent repetition of waste. *Ibid.*

3. An injunction may be obtained in case of trespass, upon the ground of irremediable mischief in nature of waste, as by the lord of a manor and his lessees against taking stones, having a peculiar value, and found at the bottom of the sea, but within the manor. *Earl Cowper* v. *Baker*, 17 Ves. 128.

4. Or by a copyhold tenant against the lord of a manor digging for coal on such copyholder's premises. *Grey* v. *Earl of Northumberland*, 17 Ves. 281.

5. But from the nature of the case, and the consequences of such an injunction, it will not be continued without securing the means of a speedy trial. *Ibid.*

6. The jurisdiction against waste by injunction and account, applied to trespass, by exceeding a limited right to enter, and take stone from a quarry, this being a destruction of the inheritance, as in the case of timber, coal, &c.; and the distinction between waste and trespass is therefore disregarded. *Thomas* v. *Oakley*, 18 Ves. 184.

7. Injunction granted in cases of trespass as well as waste.
Field v. *Beaumont*, 1 Swan. 208.
Norway v. *Rowe*, 19 Ves. 144.

8. The court will not by injunction restrain the working of mines permitted during eight years, without directing an action. *Field* v. *Beaumont*, 1 Swan. 208.

9. Whether, after a verdict at law in an action of trespass, the court will grant an injunction against future trespasses, in favor of parties who refused at the trial to produce documents necessary to a fair decision—*Quære*. *Ibid*, 1 Swan. 210.

IV. Purprestures, and Nuisance.

1. The Court of Chancery has jurisdiction by injunction, on information by the Attorney General or the relation of individuals, against a nuisance by an offensive and unwholesome process in trade; but it is not exercised without a trial at law, regulating according to justice the time of trial of an indictment depending, and removed by *certiorari* into the King's Bench, from the assizes, as against the relators, but whether as against the defendants—*Quære.* *Attorney General* v. *Cleaver.* 18 Ves. 211.

2. Jurisdiction upon public nuisance in a highway or a harbour; if upon the kings's soil, the crown may abate, if not, the fact must be tried by a jury. *Ibid*, 218.

3. Injunctions in cases of nuisance are granted with great caution, and not *ex parte*, where they would suspend or destroy concerns established with great expense. *Ibid*, 217.

4. On the filing of an information by the Attorney General, at the relation of an individual, and a bill by the relator, the Lord Chancellor granted an injunction, *ex parte*, on affidavits, to restrain a purpresture in the river Thames; and it appearing that there had been no previous writ of *ad quod damnum*, and that an indictment in the King's Bench was depending against the defendants for the same act, the Lord Chancellor refused to dissolve the injunction before the trial of the indictment, notwithstanding there were some affidavits on the part of the defendants stating, that the act complained of was beneficial to the navigation. And it was held to be immaterial to whom the soil belonged, it not being competent either to the crown or to a subject to use it for any purpose amounting to a nuisance. *Attorney General* v. *Johnson*, 2 Wil. 87.

V. To restrain Infringement of Patent Rights.

1. Upon a bill brought by the king's printer to restrain the defendant from the publication of certain acts of parliament, &c., to which the patentees for printing law books were also defendants, the court refused to interfere between the contending patents; and therefore, only restrained the defendant from printing at any other than a patent press. *Baskett* v. *Cunningham*, 2 Eden, 137.

2. A party applying for an injunction against the violation of a patent, must, at the *time of applying*, swear as to his belief that he is the original inventor. *Hill* v. *Thompson*, 3 Mer. 622.

3. Where there has been exclusive possession of some duration under a patent, the court will grant an injunction without previously putting the party to establish his right at law; but otherwise where the patent is recent. *Ibid.*

4. The court of Chancery is bound to protect secrets in medicines in cases of patents, because the patentee is a purchaser from the public, and bound to communicate his secret to the public, at the expiration of the grant. *Williams* v. *Williams*, 3 Mer. 157.

VI. In Cases of Copyright.

(*a*) *Published Works.*

1. The court refused to maintain an injunction, obtained by the assignee of an author, after the expiration of the two terms of years allowed by the statute 8 Anne, the common law right of the author being so extremely doubtful. *Osborne* v. *Donaldson*, 2 Eden, 327.

2. An injunction to restrain the printing a court calendar. *Longman* v. *Winchester*, 16 Ves. 269.

3. Whether copying a map, as an illustration, in a fair history of all the maps of a county would be restrained by injunction, as an invasion of copyright—*Quære* *Wilkins* v. *Aikin*, 17 Ves. 425.

4. If the proprietor of a work gives permission to several to publish it, and then others copy it, he must bring his action before he can have an injunction to protect his copyright. *Platt* v. *Button*, 19 Ves. 447, Coop. 303.

5. An injunction was granted, until answer or further order, to restrain the publication of a work as the plaintiff's, upon affidavit by his agents (he himself being abroad) of circumstances, making it highly probable that it was not the plaintiff's work, and the defendant refusing to swear as to his belief that it was. *Lord Byron* v. *Johnston.* 2 Mer. 29.

6. But such an injunction will not be granted upon motion without notice. *Ibid.*

(*b*) *Unpublished Manuscripts or Letters.*

1. The court restrained by injunction the printing of an unpublished MS. a copy of which had been given by the representative of the author, to a person under whom defendants claimed, but not with the intention that he should publish it. *Duke of Queensbury* v. *Shebbeare*, 2 Eden, 329.

2. There may be a copyright in private letters, which remains in the writer after transmission, and will be protected by injunction. But where such letters were alleged to have been obtained from an agent, to whom they were sent in confidence, and the answer denied confidence, and avowed the defendant's object in publishing them in a newspaper, of which he was proprietor, to be, not profit, but the vindication of his character from the imputation of giving false intelligence, which was publicly cast upon him by the plaintiff, the court dissolved the injunction. *Lord and Lady Percival* v. *Phipps*, 2 V. & B. 19.

3. How far the publication of private letters by executors, assignees of bankrupts, &c. can be restrained by a court of equity, independently of contract and property—*Quære. Ibid*, 2 V. & B. 28.

4. An injunction was refused to restrain the publication of a work which had been left for twenty-three years by the author in the hands of a bookseller, to whom it was originally sent, with an intention of its being published; but which intention was afterwards relinquished; and the work having passed into the hands of the defendants, who published it without the consent or privity of the author. *Southey* v. *Sherwood*, 2 Mer. 435.

5. The court will not interfere, by injunction, upon the author's application, to restrain the publication of a work, which is of such a nature, that an action could not be maintained for damages. *Ibid.*

6. Injunction granted to restrain the performance of a comedy, the copyright of which had been sold by the author, and had been afterwards assigned by writing to the plaintiffs, although it did not appear whether the original assignment was in writing. *Morris* v. *Kelly*, 1 J. & W. 481.

7. Injunction granted on the application of the executor to restrain the defendant from publishing letters, the property of the testator. *Earl of Granard* v. *Dunkin*, 1 B. & B. 207.

(*c*) *Music.*

1. The court will, by injunction, protect copyright in music; but where such copyright had not been asserted against violation by several persons during fifteen years, an injunction was refused till after a trial at law. *Platt* v. *Button*, 19 Ves. 447. Coop. 303.

VII. Darkening antient Lights.

1. Injunction against darkening antient windows will not be granted in every case, where, affecting the value of premises, an action would lie. The effect must be that material injury to the comfort or existence of others, which should not only be redressed by damages, but, upon equitable principles, prevented. *Attorney General* v. *Nichol*, 16 Ves. 338.

2. But an injunction till answer, or further order, against obstructing antient lights, was granted before appearance, and without notice. In this case the plaintiff had also commenced an action at law, but which, *semble*, makes no difference. *Ibid*, 3 Mer. 687.

VIII. Breach of Covenant.

1. The court refused an injunction to restrain a breach of covenant, by selling or disposing of water from a well to the injury of certain water-works, from inability to enforce it. *Collins* v. *Plumb*, 16 Ves. 454.

2. Covenant to repair, and, at the end of the term, surrender buildings in good condition, does not preclude an injunction against pulling them down, and carrying away the materials just before the end of the term. *The Mayor of London* v. *Hedger*, 18 Ves. 355.

3. There is a distinction between express covenant and implied agreement, so as to entitle a party to an injunction in the former instance, but not in the latter, against tenant removing articles contrary to the custom of the country. *Kimpton* v. *Eve*, 2 V. & B. 349

4. Injunction to restrain husband from preventing his wife's solicitor and friends from having access to her, she being confined by dangerous illness in his house, to enable her to execute a deed of appointment under a power in her marriage settlement, refused, it not being proved that

she had given instructions for such a deed. *Middleton* v. *Middleton*, 1 J. & W. 94.

5. Whether, under any circumstances, such an injunction would be granted—*Quære*. *Ibid.*

IX. Breach of Contract.

1. The lessee of a house agreed to repair the premises, with the exception of damage by fire; the premises being burnt down, there is no equity in favor of the lessee for an injunction against an action under the contract for payment of rent. *Holtzapffel* v. *Baker*, 18 Ves. 115.

2. In a case where a party was under a contract with the proprietors of a theatre not to write dramatic pieces for any other theatre, the court, by injunction, restrained him from writing for any other theatre. *Morris* v. *Coleman*, 18 Ves. 437.

3. But where a party agreed to compose and write reports of cases determined in a court of justice, to be printed and published by a particular individual, for a stipulated remuneration, the court refused to interfere by injunction to restrain him from permitting reports written by him to be published by another person. *Clarke* v. *Price*, 2 Wil. 157.

4. Vendor and vendee proceeded in treaty beyond the time for completing the contract; the vendor, having brought an action for breach of contract, and withdrawn his record, he not having got in a judgment against the estate amounting to half the purchase money, was refused an injunction to restrain the vendee from proceeding at law to recover the deposit money. *Wood* v. *Bernal*, 19 Ves. 220.

5. If there is a claim to take reasonable tolls at a fair or market, and a person is refused at such fair or market the accommodation to which he is entitled, *semble*, that a court of equity cannot interfere by injunction. *Weale* v. *The West Middlesex Water Company*, 1 J. & W. 373.

6. Injunction to restrain a water company, established under an act of parliament, from severing the plaintiff's pipes from the main pipe, or from interrupting the supply of water, was refused, for want of jurisdiction, the act of parliament not operating as a contract between the parties. *Ibid*, 1 J. & W. 358.

7. There are many cases of contract, the breach of which will entitle the party to an action of damages, but will not entitle him to relief in a court of equity; but there are exceptions in the cases of specific performance, or irreparable damage. *Ibid*, 1 J. & W. 370.

8. An injunction, though not to be continued with a view to a specific performance of an agreement to grant a lease, which if granted, would under a clause for re-entry be at an end by the tenant's acts, will be maintained, upon an undertaking to give possession when required, by the court, and paying the rent due by waver of the forfeiture if incurred; viz. distraining for rent due subsequently to the forfeiture. *Gourlay* v. *Duke of Somerset*, 1 V. & B. 68.

9. Injunction restraining the sale of an estate until answer to a bill for the specific performance of a parol agreement to exchange, and which was partly performed by the plaintiff having purchased the estate to be given in exchange. *Curtis* v. *Marquis of Buckingham*, 3 V. & B. 168.

10. The court of Chancery will not interfere by injunction to prevent the violation of an agreement, of which, from the nature of the subject, there could not be a decree for a specific performance, as to restrain the defendant from imparting the secret of an invention, which had been the subject of a patent long since expired. *Newbery* v. *James*, 2 Mer. 446.

11. Whether in the exercise of its jurisdiction to decreethe specific performance of an agreement, the court can interfere by injunction to restrain a party from divulging a secretin medicine — *Quære*. *Williams* v. *Williams*, 3 Mer. 157.

12. The owner of a ship at sea, having executed a valid mortgage of a ship at sea, the court granted an injunction to prevent an improper endorsement on the certificate of the ship's registry. *Thompson* v. *Smith*, 1 Mad. 395.

X. Breach of Trust.

1. Injunction to restrain a defendant from communicating certain recipes for veterinary medicines, and vending them, was granted, on the ground that he had obtained a knowledge of the mode of preparing them by a breach of trust; but the injunction was confined, so as not to prevent the defendant administering them to animals then under a course, it appearing that a sudden discontinuance would be prejudicial. *Yovatt* v. *Winyard*, 1 J. & W. 394.

XI. Negotiating Bills of Exchange.

1. The court will grant an injunction to restrain the negotiation of bills of exchange void in their creation, as their negotiation would induce a necessity of making other persons parties to the suit. *Lloyd* v. *Gurdon*, 2 Swan. 180.
See also upon the same principle, *Roberts* v. *Roberts*, 2 Cox, 422.
Echliff v. *Baldwin*, 16 Ves. 267.

2. The solicitor to a commission of bankruptcy restrained by injunction from negotiating a promissory note, received by him of the bankrupt for costs of his certificate, the solicitor being indebted to the estate in such sum, as that the share to which the bankrupt was entitled by having purchased debts, exceeded the amount of the note. *Ex parte Harding*, Buck, 24, 37.

XII. Sailing of Vessels.

1. The court of Admiralty is open all the year round to applications by part-owners, to restrain the sailing of ships without their consent, until security given to the amount of their respective shares. But where the shares are unascertained, that court has no jurisdiction; and in such case the court of Chancery will exercise a concurrent jurisdiction by injunction to restrain the sailing of a ship, until the share of the party complaining shall be ascertained, and security given to the amount of it. In this case it was referred to the Master to make the inquiry, and settle the security, with liberty for the defendants to propose themselves as such security. *Haly* v. *Goodson*, 2 Mer. 77.

2. But the court refused an injunction to prevent the sailing of a ship, upon the application of a part-owner, where it was intended to sail the next day, and it did not appear by the affidavit in support of the motion that there were any circumstances to account for the delay in making the application. *Christie* v. *Craig*, 2 Mer. 137.

XIII. In Cases of Arbitration.

1. Injunction will be granted under some circumstances, upon bill verified by affidavit, to restrain proceedings in an arbitration. *Mylne* v. *Dickinson*, Coop. 195.

2. The court refused to grant an injunction to restrain the exercise of a power of sale given to secure a balance to be ascertained by an arbitrator, although the award was made after the plaintiff had executed a deed for the purpose of revoking his authority. *Harcourt* v. *Ramsbottom*, 1 J. & W. 505.

XIV. Irreparable Mischief.

1. Injunction against draining coal mines which would be prejudicial to the Birmingham Canal, refused, before the Canal Company established their right at law upon their laches for 2 years, permitting expenditure. *Birmingham Canal Company* v. *Lloyd*, 18 Ves. 515.

2. The Court refused to entertain jurisdiction against commissioners of sewers, to restrain by injunction their removing a float or tumbling buoy upon a river, although such removal was stated to be irreparable mischief; there being a much shorter remedy by *certiorari* in the court of King's Bench, which, however, interferes with great caution. Whether there may be cases in which a court of equity would interfere—*Quære*. *Kerrison* v. *Sparrow*, 19 Ves. 449. Coop. 305.

3. Jurisdiction by injunction on danger of irreparable injury to property, though, as a public nuisance, an object of prosecution by the Attorney-General; the subject a corning house to powder mills, from site, construction, &c. imminently dangerous to the neighbourhood and public. Indictment directed, with an arrangement for a speedy trial, and preventing imminent danger in the interval. *Crowder* v. *Tinkler*, 19 Ves. 617.

4. Injunction on injurious use of a body of water, against using it otherwise than as used before. *Ibid*, 19 Ves. 620.

5. An injunction to restrain defendant from digging earth, &c. near or immediately under a bank, which protected the plaintiff's lands from inundation of the sea, was granted before answer, in consideration of irreparable injury the plaintiff might sustain, and he having established his right at law, without which it would not have been granted. *Chalk* v. *Wyatt*, 3 Mer. 688.

6 Where the defendant had erected flood-gates and other works, which obstructed an ancient mill, bill by a lessee of the mill praying that defendant might be decreed to pull down the works, and be re-

strained by injunction from erecting new works; held that such bill will not lie until after the right be established at law, if the works have been erected a long time, as for three years; such laches precluding the party from equitable relief in the first instance. *Waller* v. *Smeaton*, 1 Cox, 102.
See *Robinson* v. *Byron*, 2 Cox, 4.

XV. Fraud.

1. Goodwill of the waggon trade from Bristol and Bath to London, was purchased under a commission of bankruptcy by the plaintiff; and another waggon concern, from Bristol and Bath to Warminster and Salisbury, was purchased in trust for the bankrupt, who having obtained his certificate commenced trade again to London by that road, soliciting customers by advertisement and cards, stating generally, that being reinstated by his friends in the carrying business, his waggons set out at the usual hours, &c. This is not such a case of fraud as to induce a court of equity to grant an injunction. *Cruttwell* v. *Lye*, 1 Rose, 123. 17 Ves. 335.

2. There is no exclusive right in a subject not protected by patent, which will prevent the sale by another person under the same title, but not assuming the name and character of the plaintiff. *Canham* v. *Jones*, 2 V. & B. 218.

XVI. To deliver Possession of Estate.

1. An injunction may be obtained on motion of course to deliver possession of an estate according to the decree, as a ground for a writ of assistance, and being the only mode of obtaining immediate possession, a court of equity properly acting only *in personam*. *Huguenin* v. *Basely*, 15 Ves. 180.

XVII. Executors, by or against.

1. The usual decree against administrator will entitle him to an injunction against the suit of a creditor, but he will be required to give an account of the assets, either by the answer or affidavit. *Gilpin* v. *Lady Southampton*, 18 Ves. 469.

2. After a lapse of six or seven years, equity will not, by injunction, restrain a creditor of an executor from taking in execution the goods of the testator for the executor's own debt. *Ray* v. *Ray*, Coop. 264.

3. After a decree against executors to account, the court will not by injunction restrain a creditor from proceeding at law, upon a verdict which would entitle him to a judgment *de bonis propriis* against the executor. *Terrewest* v. *Featherby*, 2 Mer. 480.

4. In cases where the injunction is granted, it may be obtained on the application of the plaintiff in equity as well as of the executor. *Ibid*, 483 (*n*).

5. But the court will grant an injunction if the judgment obtained is *de bonis testatoris*. *Brook* v. *Skinner*, 2 Mer. 481 (*n*).

6. It makes no difference that the executor suffers judgment to go by default. *Dyer* v. *Kearsley*, 2 Mer. 482 (*n*).

7. Whether, after a decree for administration of assets, a legatee will be restrained on motion from suing for his legacy—*Quære*. *Jackson* v. *Leaf*, 1 J. & W. 229.

8. If a creditor files a bill, and afterwards another files a bill, and the executor answers the second, and a decree is obtained, it is competent for the executor himself to restrain the first from proceeding, but the practice is to pay the creditor the costs incurred prior to his having notice of the decree. *Ibid*, 1 J. & W. 231.

9. In the case of an executor, after a decree to account, creditors are restrained by injunction, without bill, from proceeding at law. *Mocher* v. *Reed*, 1 B. & B. 320.

10. Where an executor claimed under the will, and also by a gift from the testatrix in her lifetime, the court, upon affidavit of undue influence over the testatrix, enjoined the executor from selling, &c. since, as the defendant claimed by a gift *inter vivos*, an administration *pendente lite* would not secure the property. *Edmunds* v. *Bird*. 1 V. & B. 542.

11. An injunction to restrain an executrix, the testator's wife, from recovering the testator's property, on the ground, that not having property of her own, that of the testator would be endangered by her receiving it, refused, the poverty of the executrix being a fact known to the testator. *Howard* v. *Papera*, 1 Mad. 142.

12. Where the executor had become bankrupt, an injunction was granted; though whether the court would interfere if the testator had known his executor to

be a bankrupt, and then appointed him,—*Quære.* *Gladdon* v. *Stoneman*,
1 Mad. 143 (*n*).

13. Injunction to restrain defendant from receiving a testator's effects, and to stay trial of actions, was, under the circumstances, granted before answer, but upon the terms of paying into court the money sought to be recovered in the actions. *Mansfield* v. *Shaw*,
3 Mad. 100.

XVIII. Extending or continuing to stay Trial.

1. A common injunction may be extended to stay trial, upon an affidavit that the plaintiff "had been advised by his counsel, and verily believes, that he cannot safely proceed at law without a discovery from the defendant of the several matters contained in the bill;" and without stating in such affidavit the points of the discovery wanted. *Hartley* v. *Hobson*, 2 Cox, 117.
Partington v. *Hobson*, 16 Ves. 220.

2. But the affidavit must state also, that the plaintiff believes the answer will furnish discovery material to his defence in the action.
Appleyard v. *Seton*, 16 Ves. 223.
Earnshaw v. *Thornhill*, 18 Ves. 488.
Bishton v. *Birch*, 2 V. & B. 41.

3. Injunction in Chancery to stay proceedings at law, obtained before action commenced, prevents the commencement; but obtained after action commenced, it stays execution only, and will not stay trial but upon a distinct application to the court for that purpose; the practice in Chancery differing in this respect from that of the Exchequer. *Earnshaw* v. *Thornhill*, 18 Ves. 488.
Bishton v. *Birch*, 2 V. & B. 41.

4. An answer filed is a sufficient objection to extending an injunction to stay trial, though filed after notice of motion; but the defendant having submitted to exceptions to the answer, the order was made; an insufficient answer being considered as no answer. *Bishton* v. *Birch*, 1 V. & B. 366.

5. The defendants, upon a trial at law, had refused to produce deeds, rent-rolls, &c. pursuant to notice, and the plaintiff not being provided with parol evidence of their contents, nor having given any *subpœna duces tecum*, such defendants obtained a verdict. In January, the Court of King's Bench granted a new trial, upon some other ground, which was to take place at the ensuing assizes, March 7; but the plaintiff delayed filing a bill for the production of such documents until 9th February; and having obtained a common injunction, a motion on the 28th February, that the injunction might be extended to stay trial, was refused with costs. *Field* v. *Beaumont*, 3 Mad. 102.
1 Swan. 204.

6. An injunction will not be continued to restrain an action by bankers, for the amount of cheques, where granted on the alleged equity of an understanding between the plaintiff and the defendants, as to certain terms on which such cheques were alleged to be given (the bill also praying a discovery), the defendants in equity denying any such understanding. *Askam* v. *Thompson*, 4 Price, 330.

7. The court will not continue an injunction, to restrain an action on a promissory note, granted *nisi* on merits charged in the bill, if the defendant deny the plaintiff's equity to the best of his knowledge, recollection, or belief; for they hold themselves bound by positive denial in an answer, although it be of recollection of circumstances which it appears improbable that, if true, a defendant should forget. *Hoyte* v. *Hawkins*, 4 Price, 327.

8. The court will continue an injunction granted to restrain a defendant from proceeding at law to enforce payment of a promissory note given to the defendant's testator, on the ground that that testator had agreed to accept an annuity in satisfaction of it, and had received a sum of money as part of that annuity on account, although nothing more conclusive had been done by the parties, and no bond or other security given to the grantee, and the whole remained executory. But they will impose on the party enjoining the action the terms of bringing the money into court. *Dally* v. *Catchlowe*,
4 Price, 147.

XIX. Breach of, and Commitment.

1. In a suit to restrain the defendant from proceeding at law in respect of an award, under which the plaintiff was to pay a sum of money to the defendant, a common injunction was obtained: but as the injunction was not obtained till after the defendant had commenced proceedings, by making the award a rule of court; held, that by analogy to the common case

of restraining an action, it would only restrain the execution of the attachment for non-performance of the award; and therefore the obtaining a rule to show cause why such attachment should not issue, or the making the rule absolute, was no breach of the injunction. *Franco* v. *Franco*, 2 Cox, 420.

2. An injunction in the court of Chancery before action commenced, stays all proceedings at law: after action commenced, permitting the defendant to call for a plea, and proceed to judgment, if in a condition to do so; or if not, to do only what is necessary to enable him to do so; it restrains execution: therefore, after bail excepted to, taking out a rule upon the sheriff to bring in the body, is a breach of the injunction. *Bullen* v. *Ovey*, 16 Ves. 141.

3. Proceeding against bail is a breach of injunction staying proceedings at law. *Leonard* v. *Atwell*, 17 Ves. 385.

4. A breach of injunction by defendant present in court during the motion, though retiring before the order pronounced, will be a contempt; but after a considerable lapse of time, and the order not drawn up, the court refused a motion to commit, with costs. *James* v. *Downes*, 18 Ves. 522.

5. An execution issued upon a joint judgment, with notice, to the sheriff, of the injunction, and express direction not to take the plaintiff in equity, is no breach of an injunction, restraining proceedings at law against such plaintiff. *Chaplin* v. *Cooper*, 1 V. & B. 16.

6. There may be a breach of injunction after notice of the order, though there has been no personal service of the injunction or order. *Kimpton* v. *Eve*, 2 V. & B. 349.

7. The exception to the rule, requiring personal service of an order of injunction, where the party was present when the order was made, was established by Lord Hardwick, and has since been farther extended to notice by information. *Ibid*, 2 V. & B. 350.

8. The delivery of a declaration is a breach of the common injunction to stay proceedings at law: but where the plaintiff had appeared to the declaration, pleaded, and entered into the usual rule to confess lease, entry, and ouster, he could not move to commit the defendant for such breach. *Mills* v. *Cobby*, 1 Mer. 3.

9. Where an injunction had been obtained to restrain plaintiff at law from taking possession under a verdict in an action of ejectment, the procuring an attachment for non-payment of the costs, is a clear breach of the injunction; but as the injunction ought not, under the circumstances of the case, to have extended so far, the Lord Chancellor would not make an order of commitment, but only to pay the costs occasioned by the breach of the injunction, and of the consequent application to the court. *Partington* v. *Booth*, 3 Mer. 148.

10. Where an injunction is obtained, even after execution executed, Lord Thurlow held it a breach of the injunction to call on the sheriff to pay over the money; but he thought it would not be a breach for the sheriff voluntarily to pay the money—*Sed Quære*. *Franklyn* v. *Thomas*, 3 Mer. 234.

11. When an injunction is obtained on bill filed after execution executed, the goods not yet being out of the hands of the sheriff, and the sheriff proceeds to sell without process, he will be ordered to pay the money into court. *Ibid.*

12. Special injunctions to restrain proceedings at law, are granted in those circumstances only where the party has not had any opportunity of obtaining the common injunction, as upon judgments entered up on warrants of attorney, &c. therefore where the defendant, on the day when the common injunction might otherwise have been obtained, puts in a demurrer, which is overruled, and a common injunction granted, as of course; but, in the mean time, the plaintiff is taken in execution: upon an application to discharge the plaintiff, the court held, that where the plaintiff is entitled to an answer, and the defendant files an untenable demurrer, it is the bounden duty of the court to protect such plaintiff; but that it was also the duty of the court to place the defendant where he would have been but for such untenable defence. The court therefore ordered the defendant to discharge the plaintiff out of custody, upon his delivering to the defendant a warrant of attorney to confess judgment for the same sum for which he was then in execution, with interest, &c. and upon his undertaking not to avail himself of his having been taken in execution as a discharge of the debt; to pay the money into court in case the common injunction should be dissolved; and in default of pay-

ment to surrender himself to the Warden of the Fleet, waving personal service, &c. *Franklyn* v. *Thomas*, 3 Mer. 225.

13 Plaintiff brings an action against the defendant upon a policy of assurance, and files a bill in the Court of Chancery for a discovery, and a commission to examine witnesses abroad; the defendant files a bill in the Exchequer against the plaintiff for a discovery, and obtains an injunction, for want of an answer, to stay proceedings at law: the plaintiff afterwards moves in Chancery for a commission abroad to examine witnesses. Held, that the application was restrained by the injunction in the Exchequer, it being in substance a proceeding at law. *Novaes* v. *Dorrien*, 4 Mad, 362.

14. A solicitor may proceed to tax his costs after verdict at law, notwithstanding an injunction to stay execution, with a view to commencing an action in his own name for the amount, after a final settlement between the parties by arbitration, without his concurrence. *Brooks* v. *Bourne*, 1 Price, 72.

15. Shewing cause against a rule *nisi* for a new trial, is not a breach of an injunction against proceeding at law. *Whitmore* v. *Thornton*, 3 Price, 241.

16. Where a receiver of rents and profits is enjoined from further receiving, &c. the court will extend the injunction to his agent, (an attorney in this case,) and commit him also for a breach of the order, although he living at a distance in the country have not been regularly served with the injunction, if sufficient circumstances can be shown to afford fair and satisfactory evidence that such agent knew of the order: as if his principal have published the opinion delivered by the dissentient judge only, and a statement of the judgment has appeared at the same time in the provincial papers. Wood, Baron, *dissentiente*, considering the notice insufficient in this case at least as to the agent. *Sir Watkin Lewes* v. *Morgan*, 5 Price, 518.

17. Application for committing such agent should be for a rule to show cause. *Ibid.*

18. Personal service of a notice of motion to commit for breach of an injunction is necessary, and cannot be dispensed with, though counsel undertake to appear for the party. *Ellerton* v. *Thirsk*, 1 J. & W. 376.

19. If the original writ is required, the motion cannot be made without producing it. *Ibid.*

20. A defendant being in court when the order for an injunction is made, is bound by it from that time, although it be not formally served till some time afterwards. *Semble*, that an injunction, restraining an administrator from transferring the intestate's stock into his own name, will, by equitable construction, operate to prevent his parting with any stock so transferred. *Scott* v. *Becher*, 4 Price, 346.

21. One of the barons of the court of Exchequer dissenting from an order for an injunction, and notice of an appeal from the decision having been given, is no excuse for disobeying the order. *Sir Watkin Lewes* v. *Morgan*, 5 Price, 518.

XX. Dissolving, or setting aside.

1. If an injunction bill is filed, after a verdict at law, and while the plaintiff at law is out of the kingdom, and a common injunction is obtained for want of an answer, the court will, on motion, direct the plaintiff in equity to pay into court the money recovered, and in default thereof, will dissolve the injunction. *Potts* v. *Butler*, 1 Cox, 330.

2. When an injunction has been obtained in a cause, which afterwards abates by the death of the defendant, the practice is to move, on the part of the defendant's representatives, that the plaintiff may revive within a reasonable time (a week generally), or the injunction may be dissolved. *Stuart* v. *Ancell*, 1 Cox, 411.

3. Where the defendant in equity dies without putting in his answer, pending an injunction against him to restrain proceedings in an ejectment, and obtained for want of an answer, the heir at law may, on motion, obtain an order that the plaintiff in equity may revive within a week, or the injunction be dissolved. *Hill* v. *Hoare*, 2 Cox, 50.

4. On an application to dissolve an injunction *nisi* on the coming in of the answer, the plaintiff shews exceptions for cause, with the usual undertaking, to procure the master's report in four days: and the master reported the answer sufficient. The injunction is dissolved not-

withstanding the plaintiff's exceptions to the master's report. *Botham* v. *Clark*, 2 Cox, 428.

5. When an answer has been reported impertinent, it is not necessary to have the impertinent matter actually expunged, to enable the defendant to move to dissolve an injunction upon coming in of his answer, though he cannot move it pending the reference. *Kenny* v. *Barnwell*, 2 Cox, 26.

6. And where upon putting in of his answer the defendant obtains an order *nisi* to dissolve the injunction, and the answer is referred for impertinence, the defendant cannot move to make the order to dissolve the injunction absolute till the reference is disposed of; but the plaintiff is bound to obtain the master's report in four days. *Jennings* v. *Walker*, 1 Cox, 178.

7. Motion on answer to dissolve injunction *nisi*. The plaintiff shewing exceptions for cause, must procure the report in four days, but the time is extended by courtesy. *Bishton* v. *Birch*, 2 V. & B. 42.

8. The service of subpœna to appear and answer is necessary in case of special injunction; but the practice having been unsettled, the defendant was put to dissolve upon the merits, as disclosed by affidavit. *Attorney General* v. *Nichol*, 16 Ves. 338.

9. A subsequent order, extending an injunction against proceeding at law to stay trial, cannot be discharged separately, but the injunction, as extended, must be dissolved generally upon the answer, by the usual order *nisi*, subject to shewing exceptions for cause, or the undertaking to shew cause on the merits. *Earnshaw* v. *Thornhill*, 18 Ves. 485.

10. Injunction to stay trial, obtained on affidavit, that plaintiff cannot safely defend the action without discovery, and that it will give a good and effectual defence, will not be discharged upon the answer of one defendant only. *White* v. *Steinwacks*, 19 Ves. 83.

11. The court refused to dissolve an injunction on one answer only coming in to an interpleading bill, but the plaintiff's delay to get in the other answers would be a special ground for application to dissolve, or to have the money out of court. *Hyde* v. *Warren*, 19 Ves. 322.

12. An injunction, after a verdict in a joint action, was dissolved, as against those defendants to whose answers no exceptions were taken, but not as against the rest pending exceptions to their answers. *Joseph* v. *Doubleday*, 1 V. & B. 497.

13. An injunction against proceeding at law is gone by the master's report, that the answer is sufficient, and is not restrained by exceptions. *Bishton* v. *Birch*, 2 V. & B. 40.

14. The order extending it to stay trial, which in the court of Chancery is a distinct order, falls also as a part of the original injunction, without a motion to dissolve. *Ibid.*

15. When an order *nisi* is obtained to dissolve an injunction on the coming in of the answer, and exceptions being shewn for cause, the master reports the answer sufficient; the injunction is thereupon dissolved, and no further motion is necessary. *Hutchinson* v. *Markham*, 2 Mad. 355.

16. After order to dissolve injunction *nisi*, on the answer, a reference of impertinence being obtained, the impertinence expunged, and afterwards exceptions disallowed, injunction dissolved on motion, in the first instance, without an order *nisi*. *Lacy* v. *Hornby*, 2 V. & B. 291.

17. The ground of a motion to dissolve an injunction *nisi* is, that the plaintiff may determine, whether to shew cause on the merits, or by exception; and if he takes exceptions which are overruled the injunction is gone, there being no cause shewn. *Lacy* v. *Hornby*, 2 V. & B. 292.

18. Order *nisi* to dissolve an injunction obtained on motion after the last seal in the vacation, the brief not having been delivered to counsel on the seal day, discharged with costs, for irregularity. *Sharp* v. *Ashton*, 2 V. & B. 413.

19. Exceptions to the master's report, as to impertinence, is not cause against dissolving an injunction. *Corson* v. *Stirling*, Coop. 93.

20. The defendant put in his answer to the amended bill, which answer was excepted to for insufficiency. A motion to dissolve the injunction absolutely in the first instance was refused, the court being unable to judge, except upon reference to the master, whether or not the answer was sufficient. *Vipan* v. *Mortlock*, 2 Mer. 477.

21. Although, in cases in the nature of waste, an injunction will sometimes be granted *ex parte*, even after appearance, yet, if in such a case an injunction has been obtained for default of appearance, and it turns out that an appearance had in fact been entered at the time when the injunction was moved for, the order will be discharged. *Harrison* v. *Cockerell*, 3 Mer. 1.

22. An injunction to restrain a party from divulging a secret in medicine, unprotected by patent and other purposes, was dissolved upon affidavit of the defendant, denying the facts in plaintiff's affidavit, and that there was any secret in the invention. *Williams* v. *Williams*, 3 Mer. 157.

23. On a motion to dissolve a special injunction staying the trial of an action till further order, the master having reported the answer imperti ent in a small part only, and the plaintiffs having excepted to the report, and insisting on their right, after the question of impertinence was decided, to except to the answer for insufficiency, the Lord Chancellor examined the bill and answer, and dissolved the injunction, so far as it extended to stay trial. *Raphael* v. *Birdwood*, 1 Swan. 228.

24. In injunction cases, the master's report on the question of impertinence must at least, without reference to the inquiry whether there is farther impertinence, have the same weight as his report on the question of insufficiency. *Raphael* v. *Birdwood*, 1 Swan. 232.

25. When the common injunction has been extended to stay trial, and then the answer is put in, the defendant must obtain an order *nisi*, but cannot move at once to dissolve the injunetion. *Naylor* v. *Middleton*, 2 Mad. 131.

26. A motion cannot be made on the last seal after Trinity term, to dissolve an injunction, and to have a day named in the vacation for making the order absolute, but the defendant is only entitled to the usual order *nisi*. *Rew* v. *Dixon*, 2 Mad. 258.

27. An injunction, when sealed at the next seal, operates from the order, and not from the sealing; so a motion to set aside a common injunction, where the answer had been put in between the order and the sealing, was refused with costs. *Rattray* v. *Bishop*, 3 Mad. 220.

28. A motion *nisi* being made at the last seal after Trinity term, to dissolve an injunction which had been obtained to restrain proceedings at law, a day was appointed during the petitions to shew cause. *Fielding* v. *Capes*, 4 Mad. 393.

29. An injunction to stay proceedings at law dissolved for irregularity: plaintiffs having obtained the injunction as of course, for want of the answer of two defendants who resided abroad, without notice to the other defendant, who was sole plaintiff at law, and had put in his answer in time. *Cooper* v. *Flindt*, Wigh. 409.

30. The court will not make absolute the common order *nisi*, to dissolve an injunction granted to restrain a purchaser from proceeding at law to recover part of the purchase money, paid by him in advance (the contract being impracticable on the ground of want of title and outstanding encumbrances), without the master's report as to the sufficiency of the title, although the objections are fully stated in the defendant's answer. *Church* v. *Legeyt*, 1 Price, 301.

31. A defendant may move to dissolve an injunction for insufficient service of the subpœna, although he has not appeared. *Menzies* v. *Rodrigues*, 1 Price, 92.

32. A variance between the affidavit in support of a motion for an injunction, and the bill, in the date of the bill of exchange, on which the defendant had commenced proceedings at law, is sufficient ground for dissolving an injunction obtained thereon, and the court will, on motion, dissolve it. *Wattlewoth* v. *Pitcher*, 2 Price, 189.

33. The court will dissolve the injunction obtained to restrain proceedings at law on policies of insurance, if the amount of the losses claimed be not paid into court; and they will not permit money so paid in to be taken out, on the ground of great lapse of time between the filing of the bill and the putting in the answer, unless it appear that the delay was gross and wilful on the part of the defendant, and that he was plainly not disposed to answer at all. *Kensington* v. *White*, 3 Price, 172.

34. A commission to examine witnesses abroad will be granted, under such circumstances, on the coming in of defendant's answer, although not prayed by the original bill, and the injunction will be in the mean time continued. In this case

the defendant had been very dilatory in putting in a sufficient answer. *Ibid*, 3 Price, 173, 174.

35. The court set aside an injunction (granted after trial and verdict obtained) where one of the defendants, plaintiff at law, in whom the interest was averred to be, was in contempt for not having answered, and his answer being most material to the defence at law, as it might shew that the property was not in truth in him; and that although the affidavit of merits on which the injunction was obtained, contained allegations of strong facts in support of the plaintiff's equity, and although the court of law had since, on the same facts having been brought before them, on motion for a new trial, granted a rule *nisi*, against which cause has not yet been shewn. *Whitmore* v. *Thornton*, 3 Price, 241.

36. Such an order can only be obtained before verdict, and if obtained after, will be discharged on motion. *Ibid.*

37. If a plaintiff in an injunction bill, filed to restrain the defendant from proceeding in an action at law, gives a *cognovit*, and undertakes in writing to dismiss his bill, and consent to the dissolution of the injunction, but afterwards refuses to do so, the court, upon a motion by the defendant, and notice to the plaintiff, will dissolve the injunction, but not dismiss the bill. *Norway* v. *Ede*, 6 Price, 156.

38. An injunction to restrain action of ejectment obtained on merits confessed in the answer, will not be dissolved before the hearing, but the application refused with costs. *Hayward* v. *Greenwood*, 7 Price, 537.

39. The court will not dissolve an injunction obtained to stay proceedings in ejectment, on motion, in favor of persons claiming under a child, otherwise provided for by his father's will, on whom the legal estate in customary-hold lands intended to be devised for life, or in tail to another child by the same will, subject to questions of law as to the operation of the devise, has descended for want of being surrendered to the use of the will, against parties claiming under the latter as remainder-men or purchasers, notwithstanding the devisee have covenanted with the heir that he shall stand seised to the use of himself and his heirs and assigns, in case of breach of covenants, which were afterwards broken. *Hodgson* v. *Merest*, 7 Price, 658.

39. The court will not change the possession by dissolving an injunction of an ejectment on motion before the hearing, even in a strong case. *Ibid*, 7 Price, 658.

40. A party attempting to get an injunction dissolved before the hearing, on an affidavit of special circumstances, must pay the costs of such an application if he fail. *Hayward* v. *Greenwood*, 7 Price, 537.

XXI. Revival of.

1. Where an injunction to stay waste has been obtained on bill filed and affidavit, the defendant may immediately on the coming in of his answer, move to dissolve the injunction without obtaining any order *nisi*; but then his answer can only be received as an affidavit, and it seems the plaintiff may read affidavits in contradiction to it: and if afterwards upon exceptions the answer appears insufficient, the injunction shall be revived. *Countess of Strathmore* v. *Bowes*, 1 Cox, 263.

2. When an injunction is dissolved on the answer, it cannot be revived of course, without special motion or amendments verified by affidavit. *James* v. *Downes*, 18 Ves. 522.

3. Injunction cannot be revived pending the rehearing of an order by which an exception to a report, that the answer was insufficient, was allowed. *Scott* v. *Mackintosh*, 1 V. & B. 503.

4. The plaintiff had obtained a common injunction upon an attachment, for want of an answer. This injunction being dissolved upon coming in of the answer, the plaintiff amended the bill, and upon special application, supported by affidavits of the material facts, stated by way of amendment, the injunction was revived; the defendant being in default for want of an answer, though not in contempt, no attachment having issued. *Vipan* v. *Mortlock*, 2 Mer. 476.

5. Where the answer displaces the plaintiff's equity, and entitles the defendant to dissolve; if the plaintiff by amendment makes a new title, he may revive the injunction. *Penfold* v. *Stoveld*, 3 Mad. 471.

6. A plaintiff cannot move to revive an injunction upon the report of impertinence; that can only be done on the report of the insufficiency of the answer. *Dansey* v. *Browne*, 4 Mad. 237.

XXII. Perpetual.

1. A right is not considered to be determined so as to be a ground for a perpetual injunction by any one trial at law, unless upon an issue sent out of this court for the purpose. *Robinson* v. *Lord Byron*, 2 Cox, 4.

XXIII. Practice.

(*a*) *Service of Subpœna.*

1. The service of subpœna is necessary in the case of a special injunction. *Attorney-General* v. *Nichol*, 16 Ves. 338.

2. Service upon the attorney, the defendant being abroad, is good service, only to compel appearance, and not for the purpose of a special injunction in the first instance. *Anderson* v. *Darcy*, 18 Ves. 447.

3. Subpœna served on Sunday is irregular; attachment and injunction therefore, granted on such service, set aside before appearance, but on entering appearance with the register. *Mackreth* v. *Nicholson*, 19 Ves. 367.

4. Service of subpœna issued on an injunction bill, though effected at eleven o'clock on the night of the return day, and at so great a distance from town as to render it impracticable for the defendant to appear in time to prevent an injunction for want of appearance, held to be sufficient service. *Nightingale* v. *Merryweather*, 1 Price, 287.

5. The court will order the solicitor of a plaintiff residing abroad, who has been employed to commence an action at law, to accept a subpœna on an injunction bill, supported by an affidavit of the facts, and of the subsistence of an account between the parties. *Wattleworth* v. *Pitcher*, 2 Price, 5.

(*b*) *Affidavits.*

1. Where injunction to stay waste is obtained on bill filed and affidavits, on motion to dissolve, the answer can be read only as an affidavit: and *semble*, affidavits may be read in contradiction to it. *Countess Strathmore* v. *Bowes*, 1 Cox, 263.

2. Affidavits may be admitted on motion after answer for an injunction and receiver, in the case of partnership, by analogy to the case of waste. *Peacock* v. *Peacock*, 16 Ves. 49.

3. The truth of affidavit in support of a motion to stay trial that the discovery will be material, is not questionable, nor the effect of the discovery considered, unless its immateriality appears clearly upon the face of the bill. *White* v. *Steinwacks*, 19 Ves. 84.

4. Affidavits are not admitted on motion against the answer, except in a case of waste; and in the case of partnership, those filed originally with the bill for an injunction are admitted, merely as to management and exclusion, and not in support of the title. *Norway* v. *Rowe*, 19 Ves. 144.

5. In an injunction cause, affidavits may be read on motion against the answer, though not on the title, but on questions of fact, as in the instance of waste, &c. and the original affidavit, where the defendant, having obtained time to file affidavits, instead of that puts in an answer. *Morphett* v. *Jones*, 19 Ves. 350.

6. In injunction cases no affidavit as to the title can be introduced after answer. *Platt* v. *Button*, 19 Ves. 447. Coop. 303.

7. Letters set out in the bill, but not admitted by the answer, may be verified by affidavit in support of an injunction. *Taggart* v. *Hewlett*, 1 Mer. 499.

8. Affidavits in support of injunction admitted, though filed after answer, where they went to prove an allegation in the bill as to acts of the parties, the truth of which was neither admitted nor denied by the answer; but such affidavit will not be allowed in contradiction to the answer. *Morgan* v. *Goode*, 3 Mer. 10.

9. Affidavits filed subsequently to the answer cannot be read in support of a motion for an injunction to stay waste. *Smythe* v. *Smythe*, 1 Swan. 252.

10. In moving for an injunction after answer, affidavits filed after the answer may be read in support of allegations in the bill, which are not noticed by the answer. *Jefferys* v. *Smith*, 1 J. & W. 298.

11. Upon an injunction bill to stay proceedings at law, where the plaintiff at law is abroad, the affidavit of merits, which is necessary, must be made on the motion, that service of the subpœna upon the attorney of the plaintiff at law, may be good service, and not upon the motion for the injunction: and unless the solicitor has personal knowledge of the merits of the cause, his affidavit will not be sufficient. *Kenworthy* v. *Accunor*, 3 Mad. 550.

12. The court will not permit a plaintiff, in aid of a motion for an injunction,

to restrain an acting partner from collecting or incurring debts, to use an affidavit made and filed after the coming in of defendant's answer; because they will not consider such a case as one in the nature of irreparable waste, in which case such an affidavit, made and filed before answer, might be used. *Lawson* v *Morgan*, 1 Price, 303.

12. Injunction granted on statement of belief of the facts constituting the plaintiff's equity, where they must necessarily lie in the knowledge of the defendant, if true, and are not denied by him in his answer. *Scott* v. *Becher*, 4 Price, 346.

13. The court will, on application by a defendant, order an affidavit, in support of a bill of injunction, to be filed, for the purpose of giving him an opportunity of answering its contents, although it is not otherwise the usual course of practice to file it. *Ibid.*

14. To obtain an injunction against a tenant to stay waste in cutting turf, the affidavit must state that the turf was cut for the purpose of sale; the tenant being entitled to fire-bote. *De Salis* v. *Crossan*, 1 B. & B. 188.

15. A bill being filed for obtaining an injunction to stay proceedings at law, the subpœna was served on the attorney of the plaintiff at law, who refused either to appear for the defendant, or give any information of him; but to enable the plaintiff to obtain an injunction, the affidavit of such service must state positively that neither the attorney, nor his client, knew where to find the defendant, nor where he might be served with the process. *Jardine* v. *Hayes*, 7 Price, 239.

(c) *Obtaining Order for.*

1. The referring a bill for impertinence, does not stay all proceedings; but if the bill is for an injunction, and is referred for impertinence before the time for answering is out, the plaintiff cannot, at the expiration of the time, move for an injunction, as of course, for want of an answer; but he is in the same situation as if the time for answering were not out, until the master has reported on the reference. *Neale* v. *Wadeson*, 1 Cox, 104.

2. The court will not make an order in the nature of an injunction against one defendant on the motion of another defendant, who has no interest in the suit, as a stake holder; but such defendant, as stake holder, is entitled to file a bill of interpleader, as he must apply in the shape of plaintiff; and for this purpose the Bank is to be considered as a private person. *Birch* v. *Corbin*, 1 Cox, 144.

3. After a decree pronounced, injunctions are frequently granted without a bill. *Mocher* v. *Reed*, 1 B. & B. 320.

And see also, Div. XVII. *ante.*

4. Jurisdiction by injunction, where the effect will be to stop a great trading concern, exercised with caution, not ex parte, but on notice, with the opportunity of opposing an affidavit. *Crowder* v. *Tinkler*, 19 Ves. 617.

5. Where an injunction is refused on merits in the answer, it cannot be obtained of course upon amended bill. *Bliss* v. *Boscawen*, 2 V. & B. 101.

6. A plaintiff is entitled to the common injunction immediately on an attachment being issued, and, therefore, a motion to discharge an order for an injunction, and an attachment, on which the injunction had issued, was refused, where the answer had been sworn the evening before, but not filed until after the injunction issued. *Bruce* v. *Webb*, 2 Mer. 474.

7. An injunction, except it be to stay waste, can, out of term, be moved for on a seal day only, and though motions be continued on the following day no injunction can then be moved, for which the party was not prepared to move on the seal day. *Rowe* v. *Jarrold*, 5 Mad. 45.

8. An application for an injunction, and the appointment of a receiver, should be made the subject of two successive motions. *Lawson* v. *Morgan*, 1 Price, 303.

9. Where exceptions have been filed *nunc pro tunc*, the court will not grant an injunction on opening a material exception, unless the plaintiff, on obtaining his order, give a four-day rule for arguing the exceptions. *Edwards* v. *Hogarth*, 1 Price, 147.

10. To constitute what is called a material exception to an answer, or one, on the opening of which an injunction will be granted, it is not only necessary that the charge in the bill is not fully answered, but the charge itself must be of such import, that the answer will be of use to the plaintiff in his defence at law; and if that is not manifest, the want of an answer will not entitle the plaintiff to an injunction. *Hirst* v. *Peirse*, 4 Price, 339.

11. A tender of further answer, pending exceptions to the original answer, is a submission to the exceptions, and the injunction may be moved for after such an offer, as of course. *Edwards* v. *Johnson*, 1 Price, 203.

12. The court will discharge an order for an injunction obtained on a motion of course, if it ought to be moved for on notice. *Reed* v. *Bowyer*, 1 Price, 101.

13. In what case the interrogating part of a bill for an injunction, held not to be sufficiently answered. Exception for insufficiency allowed, and held to be material, and injunction ordered thereupon. *Lipscombe* v. *Bateman*, 6 Price, 407.

(*d*) *Service of Order.*

1. A plaintiff having obtained an order for an injunction, ought not to serve it before it is formally passed and entered; and if the order so served be wrongly drawn up, to the prejudice of the defendant, the court will treat and punish it as a contempt, on application for that purpose; and all the costs incurred by such a proceeding, will be ordered to be paid by the plaintiff. *Scott* v. *Becher*. 4 Price, 346.

2. If a defendant has notice of an injunction, by information or by being present during the motion, he will be bound by it from that time, although there is no personal service of the injunction or order. *James* v. *Downes*, 18 Ves. 524.
Kimpton v. *Eve*, 2 V. & B. 349.
Scott v. *Becher*, 4 Price, 346.

(*e*) *Amendment of Pleadings.*

1. Injunction falls by amending the bill, unless expressly saved. *Bliss* v. *Boscawen*, . 2 V. & B. 102.

2. After answer put in, and not excepted to, the plaintiff is not entitled to amend the bill without prejudice to an injunction, staying proceedings at law, where it is the common injunction, not obtained upon the merits. *Turner* v. *Bazeley*, 2 V. & B. 330.

3. Generally, a plaintiff to a bill for an injunction must state at once the whole case within his knowledge: but the court, though jealous of amendment, without prejudice to the injunction, will permit even re-amendment, ascertaining precisely its nature, and by clear and positive affidavit, that the plaintiff had not a knowledge of the facts, enabling him to bring that case upon the record sooner. *Sharp* v. *Ashton*, 3 V. & B. 144.
Mair v. *Thelluson*, 3 V. & B. 145 (*n*).

4. Where a common injunction is obtained, and an answer afterwards put in, to which exceptions are taken, it is a motion of course, for leave to amend without prejudice to the injunction, and for defendant to answer amendments and exceptions together. *Dipper* v. *Durant*, 3 Mer. 465.

5. The words, "without prejudice to the injunction," are unnecessary, as the amendment will not affect the injunction. *Adney* v. *Flood*, 1 Mad. 449.

6. Where the defendant puts in an answer displacing the plaintiff's equity, and entitling him to dissolve the injunction, the plaintiff cannot amend without prejudice to the injunction. His title to the injunction is gone; but, if upon a new case, he can make a new title, he may revive the injunction. *Penfold* v. *Stoveld*, 3 Mad. 471.

7. After an injunction granted against one of two defendants, who afterwards put in their answers, leave was given, on an application for that purpose upon affidavit, to amend the bill, without prejudice to the injunction: the answer of the defendants, against whom the injunction was not granted, stating facts which were a surprise on the plaintiff, and rendered the amendments necessary; and the amendments not requiring any further answer from the defendant enjoined, not altering the case as against him. *Vesey* v. *Wilkes*, 3 Mad. 475.

8. A plaintiff cannot amend his bill to enjoin further proceedings at law after verdict, without first paying into court the sum recovered at law, although the original bill was filed before verdict obtained. *Harrison* v. *Delmont*, 1 Price, 118.

9. But he will be permitted to amend, by a stated time, on bringing the money into court. *Ibid.*

INQUISITION.

1. The court has authority to allow the traverse of an inquisition, though it may be doubtful whether a person claiming merely as a bare trustee ought to be allowed to traverse; and the court refused leave to traverse where no evidence was produced to invalidate the inquisition, except the oath of the applicant. *In re Sadler,* 1 Mad. 581.

2. The right of the subject to traverse extends to every inquisition by which property is found to be in the crown, and is not confined to cases where the crown claims property by reason of the incidents of tenure. But the court will not give permission to traverse an inquisition, unless the petitioner praying for such permission makes out a *prima facie* case against the crown. *Ex parte Gwydir,* 4 Mad. 281.

3. Where an inquiry by inquisition miscarries, and a *melius inquirendum* is necessary, the application to quash the inquisition must be on the part of the crown, and not of the subject. *Ibid,* 4 Mad. 313.

4. *Semble,* the statute 8 Henry 6, c. 10, applies to all rights by which lands are seised as lands of the crown, or as land or property which ought to belong to the crown. *Ibid,* 4 Mad. 315.

5. Whether the finding of the jury upon an inquisition be a good finding, is a question of law, and would be tried on the traverse. *Ibid,* 4 Mad. 318.

INSOLVENT DEBTORS' ACT.

1. The day limited in the insolvent debtor's act, 49 Geo. 3, c. 115, on which the debts must be due, to entitle the prisoner to his discharge, refers to the time when such debts are contracted, and not when they are ascertained: so where a devastavit by an executor was committed before, but not ascertained by report or decreed to be paid, till after the time fixed by the act, of which the executor had taken the benefit, and he was taken under an attachment for breach of a writ of execution of the decree, he was held entitled to his discharge. *Wheldale* v. *Wheldale,* 16 Ves. 376.

2. The general assignment under the Insolvent Debtor's Act does not pass a reversionary interest in the wife, she surviving her husband, any more than a general assignment in bankruptcy. *Hornsby* v. *Lee,* 2 Mad. 16.

3. The provisional assignee of an insolvent debtor, under the statute 54 Geo. 3, c. 102, s. 13, if made party to a suit, is entitled to his costs, although the insolvent himself would not be. *Mountford* v. *Scott,* 3 Mad. 34.

4. Infant tenant in tail taking the benefit of the Insolvent Act, 49 Geo. 3, c. 115, his estate tail does not pass to his assignees, because he could not be legally in custody for debt. *Burton* v. *Haworth,* 5 Mad. 50.

5. The wife's equity will be enforced against the husband's general assignee, under an Insolvent Debtor's Act. *Worrall* v. *Marlar,* 1 Cox, 153. *Elliott* v. *Cordele,* 5 Mad. 149.

6. A bill filed by a judgment creditor against his debtor, who had been discharged under the Insolvent Act, 53 Geo. 3, and the executrix of a will, under which he (the debtor) was entitled to a share of the residue of the testator's personal property, praying an injunction against the executrix to restrain her from paying it over to the legatee, and that the plaintiff might be paid his debt thereout. A general demurrer was allowed, on the ground that the plaintiff had a remedy at law under the Insolvent Act. *Otley* v. *Lines,* 7 Price, 274.

INTEREST.

I. WHERE AND AT WHAT RATE PAYABLE.

1. The court will not give interest upon a stale demand; where the parties entitled had lain by upwards of thirty years, interest was given from the filing the bill only. *Merry* v. *Ryves*, 1 Eden, 1.

2. It is the settled practice of the court not to allow a creditor coming in under a decree any thing which would be given to him at law, in the shape of damages; and therefore, though it is of course for a jury to give interest on a promissory note, under the name of damages, yet such interest is never allowed under a decree. *Rigby* v. *Macnamara*, 2 Cox, 420.

3. In the case of a written contract for a sum of money, payable on demand on a day certain, interest is in equity, as at law, payable from the time of demand made, or from the fixed period of payment. *Lowndes* v. *Collins*, 17 Ves. 27.

4. Interest at 5 per cent. under a contract to give promissory notes. *Ibid*, 17 Ves. 27.

5. Interest will be given beyond the penalty of a bond upon a mortgage for the same debt, though by a surety. *Clarke* v. *Lord Abingdon*, 17 Ves. 106.

6. Interest decreed to the full amount, produced by a fund wrongfully withheld from the party entitled; but where the demand was established as a debt against the funds of another party, the interest given was 4 per cent. *Earl Orford* v. *Churchill*, 3 V. & B. 59.

7. Interest will be given on a note of hand, from the time of its becoming payable. *Lithgow* v. *Lyon*, Coop. 29.

8. Interest is given upon bills of exchange at law, not strictly as interest but in the nature of damages, and for a breach of the contract not in pursuance of it. *Ex parte Williams*, 1 Rose, 399.

9. An implied contract to pay interest may be raised from the dealings between the parties, as where the debtor has been in the habit of paying interest upon such or similar securities. *Ibid.*

10. On refunding sums paid under an erroneous construction of a will, a legatee entitled to other funds in the hands of the court making interest, is to be charged with interest, but not where the legatee has no farther concern in the estate. *Gitten* v. *Steele*, 1 Swan. 199.

11. Interest not to be allowed upon the interest of a bond debt, computed in a report. *Turner* v. *Turner*, 1 J. & W. 39.

12. Interest will not be given on a portion beyond the filing of the bill, when the plaintiff, being under no disability, and where no compromise had taken place, had slept upon his rights, of which a defendant, not guilty of fraud, was ignorant. *Barrington* v. *O'Brien*, 1 B. & B. 180.

13. Interest will be allowed upon the arrears of a rent-charge, where the annuitant has been restrained from proceeding at law to recover them. *O'Donel* v. *Browne*, 1 B. & B. 262.

14. Persons bound by recognizance to account annually, and retaining money in their hands though no use be made of it, must pay interest for it. *Dawson* v. *Massey*, 1 B. & B. 230.

15. When interest has for a length of time been paid upon a consolidated sum of principal and interest, an agreement to that effect will be inferred, and a decree made accordingly. *M'Carthy* v. *Lord Llandaff*, 1 B. & B. 375.

16. Interest will be charged on gales of rent received by mortgagee in possession, after his debt has been paid off. *Lord Trimleston* v. *Hamill*, 1 B. & B. 377.

17. Interest will be decreed on money retained by a trustee in his hands for a length of time. *Ibid*, 1 B. & B. 385.

18. An agreement *a priori*, that interest should bear interest is void; but one at the end of the year that it should, is valid. *Lord Clancarty* v. *Latouche*, 1 B. & B. 430.

19. After an acquiescence in accounts annually furnished by bankers, an agreement that the balance of principal and interest shall bear interest will be presumed. *Ibid*, 1 B. & B. 429.

20. Interest beyond the penalty allowed to a judgment creditor, trustee in possession, under the will of his debtor, and as such applying the entire of the rents in discharge of other debts, and not retaining any part for his own. *Atkinson* v. *Atkinson*, 1 B. & B. 238.

21. Interest beyond the penalty is not in the master's office recoverable against the assets of a deceased debtor. *Ibid*, 1 B. & B. 239.

22. If the party is by injunction prevented from recovering his debt at law; or if an elegit creditor is called to an account in equity, interest may be recovered beyond the penalty. *Ibid*, 1 B. & B. 239.

23. *Semble*, a public servant to whom money is from time to time imprested, is not chargeable with interest on occasional balances in his hands, and certainly not where the amount is trifling, the occasions unavoidable, and the time of holding such balances short. *Attorney-General* v. *Lindegreen*, 6 Price, 287.

24. Where an officer of the customs received money as fees from the merchants, which had been paid to officers, called king's waiters, till the abolition of their offices by act of Parliament, and the money remained in his hands for some time unappropriated, he not knowing to whom he was accountable for it, or could safely pay it, till it was afterwards appropriated by act of Parliament; though he admitted in his answer to a crown information that he had mixed the money with his own and so made profit of it, it was held that he ought not to be charged with that profit, nor with interest, during the period the money remained unappropriated. *Mucklow* v. *Attorney-General*, 4 Dow, 12.

II. Where refunded.

1. An equity attaching to a bond, attaches also to interest paid on it; and where the court orders a bond to be cancelled, they will also order the interest paid on it to be refunded. *Hitchcock* v. *Giddings*, 4 Price, 135. Dan, 1.

INTERPLEADER.

I. Where it lies or does not lie.

1. A bill of interpleader lies against several persons, among whom an entire charge upon an estate has been split upon notice of their claims, though no suit is instituted, and where there is but one legal right of entry. The principle being not only that the payment cannot be safely made, but also that the party entitled to be discharged by a single payment should not be harassed by a number of suits. *Angell* v. *Hadden*, 15 Ves. 244.

2. Interpleading bill by a tenant to ascertain to which of two claimants he was to pay his rent, the one establishing his title by evidence, the other making default at the hearing. Payment decreed to the former; and a perpetual injunction against the other. *Hodges* v. *Smith*, 1 Cox, 357. 16 Ves. 204.

3. Interpleader will lie against a bankrupt and his assignees, at the suit of a debtor, sued by the bankrupt for the purpose of trying the validity of his commission. *Lowndes* v. *Cornford*, 18 Ves. 299. 1 Rose, 180.

4. Interpleader will also lie where the defendant gives a color of title to a stranger, by assigning his claim under a contract with plaintiff. *East India Company* v. *Edwards*, 18 Ves. 376.

5. A sheriff levying upon goods alleged to be in settlement, cannot maintain a bill of interpleader. *Slingsby* v. *Boulton*, 1 V. & B. 334.

6. A bill of interpleader may be filed on an attorney's claim of lien upon a sum awarded as damages, under a judgment obtained by the client against the plaintiff. ——— v. *Bolton*, 18 Ves. 292.

7. Interpleader allowed by a factor against defendants residing abroad, and one of whom did not appear. The subject, a policy of insurance on a cargo lost, for effecting which the plaintiffs claimed to be reimbursed their expenses. *Martinius* v. *Helmuth*, 2. V. & B. 412. Coop. 245.

8. A bill of interpleader will lie upon

opposite claims, though all the defendants but one reside out of the jurisdiction; and the plaintiff, after a reasonable time, having used all due diligence to bring them within the jurisdiction, will be decreed to give up the subject to the only defendant appearing, and will be protected by injunction against the others afterwards coming within the jurisdiction; and order that service on the attorney should be good service.
Stevenson v. *Anderson*, 2 V. & B. 407.
Martinius v. *Helmuth*, 2 V. & B. 412 (*n*).

9. An equitable claim against a legal right of action is a ground of interpleader. *Martinius* v. *Helmuth*, 2 V. & B. 412.

10. Bill of interpleader was in this case sustained upon bills of exchange, received by the plaintiff as agent to procure payment for his principal, in Scotland, to whom they were remitted against an order for goods, pursued in an action of trover by the party, who so remitted them; and by attachment in Scotland, by a creditor of that party. *Stevenson* v. *Anderson*, 2 V. & B. 407.

11. Interpleader may be in favor of an Insurance Company, against whom the landlord of premises burnt down had brought an action for the insurance money, and the tenant of the premises had filed a bill claiming, under an agreement for a lease, to have the money laid out in rebuilding the premises. *Paris* v. *Gilham*, Coop. 56.

12. Plaintiff, having parted with the property, cannot put the different claimants to an interpleader upon an undertaking to pay over the value of such property to the party entitled. *Burnett* v. *Anderson*, 1 Mer. 405.

13. It is sufficient to support a bill of interpleader, that each of the defendants has a claim to the matter in question, although one may be a legal and the other only an equitable claim, the principle being, to prevent the plaintiff from being doubly vexed; and it is not necessary that he should actually have been sued. *Morgan* v. *Marsack*, 2 Mer. 107.

14. And where one of the defendants had been restrained by injunction from proceeding at law against the other defendant, and the injunction had been dissolved on the merits: this is no objection to a bill of interpleader against them both. *Ibid*, 2 Mer. 107.

15. Although a captain may file a bill of interpleader, where parties claim adversely at law or in equity under the bill of lading, *sed quære*, where such adverse claims are paramount to the bill of lading. Delivery according to the bill of lading will fully justify the captain; and those who allege an equity paramount to the bill of lading and against the consignor, should assert it by a suit of their own. *Lowe* v. *Richardson*, 3 Mad. 277.

16. In a subsequent case, the court thought a captain could sustain such bill, though the adverse claims were paramount to the bill of lading, as the right of possession in chatels may be in one person, and the right of property in another. *Morley* v. *Thompson*, 3 Mad. 564 (*n*).

17. An agent to receive particular monies is bound to pay the same over to his principal, notwithstanding the claims of third persons, and therefore a bill of interpleader by such agent will not lie. *Nickolson* v. *Knowles*, 5 Mad. 47.

II. Practice.

1. In a suit of interpleader, a commission issued on the part of one defendant for the examination of witness abroad, of which notice was given to the plaintiff, but not to the other defendant. This practice, though inconvenient, is not irregular. *Brymer* v. *Buchanan*, 1 Cox, 425.

2. Interpleading bill is considered as putting the defendants to contest their respective claims, as a bill by an executor or trustee, to obtain the direction of the court upon the adverse claims of the defendants. Therefore, at the hearing, if the question between the defendants is ripe for decision, the court decides it; and if not ripe for decision, directs an action, or an issue, or a reference to the master, as is best suited to the nature of the case. *Angell* v. *Hadden*, 16 Ves. 202.

3 In a bill of interpleader the plaintiff always admits a title against himself in all the defendants; and cannot say that as to some he is a wrongdoer. *Slingsby* v. *Boulton*, 1 V. & B. 335.

4. The court thought the affidavit in support of a bill of interpleader goes too far, if it states the bill is filed without the knowledge of either of the defendants. *Stevenson* v. *Anderson*, 2 V. & B. 410.

5. The court is concluded by the plaintiff's affidavit of no collusion, and will

not admit an affidavit to the contrary. *Ibid.*

6. A plaintiff in an interpleading bill, having done all in his power to bring the parties before the court, may obtain a decree, although one of the defendants had appeared, but not answered, and is not present at the hearing, if such defendant has been duly brought into contempt for want of an answer. *Farebrother* v. *Prattent*, 5 Price, 303.

III. Costs.

1. After the right is decided between the parties in interpleader, the costs must be paid by the defendant, who is found in the wrong, to the plaintiff and the other defendants. *Dowson* v. *Hardcastle*, 2 Cox, 278.

Edensor v. *Roberts*, 2 Cox, 280.

2. Costs to defendant, a mere trustee by consignment of goods, as to plaintiff in bill of interpleader, given, not as between attorney and client, but as between party and party. *Dunlopp* v. *Hubbard*, 19 Ves. 205.

3. Principle in cases of interpleader is, that the defendant, who improperly raises the double claim, should pay the costs; but the plaintiff, who is considered as undertaking to bring the defendants before the court, must use reasonable diligence to get in the answer of one out of the jurisdiction: if he will not come in, the other who appears must have the stake, and the plaintiff will be protected: but whether he must not pay costs—*Quære. Martinius* v. *Helmuth*, 2 V. & B. 412.

4. The plaintiff in a bill of interpleader is not entitled, after replying to the answers, to move for his costs, but must set down the cause for hearing. *Jones* v. *Gilham*, Coop. 49.

ISSUE.

I. Where directed.

1. Courts of equity have a jurisdiction to try questions of fact without the aid of a jury; but it is to be exercised by a sound discretion. *Hampson* v. *Hampson*, 3 V. & B. 42.

2. It is not the principle of a court of equity, merely because there is a question of fact which may be tried by a jury, to send it to be so tried. *Bullen* v. *Michel*, 4 Dow, 329.

3. The course upon a bill to establish a devise, is an issue for the satisfaction of the court. *Bootle* v. *Blundell*, 19 Ves. 501.

4. Testator bequeathed £5000 to each of his children who should survive him. The vessel in which he and one son were, on their voyage from India was lost, and all on board perished; the fact, whether the son survived the father, must be tried by an issue. *Mason* v. *Mason*, 1 Mer. 308.

5. Where devisees claimed a conveyance of an estate upon the ground of an alleged equitable title in the testator, under an agreement, and such agreement was denied by the answer, but supported by evidence of ownership, such as the receipt of rents and profits, and redemption of the land-tax; an issue was directed to try whether the testator was, at his death, beneficially entitled. *Burkett* v. *Randall*, 3 Mer. 466.

6. A court of equity may decide conclusively in the first instance on all causes brought to a hearing, without directing an issue to be tried, except in the cases of an heir at law disputing the validity of a will, or a rector suing for tithes. The direction of an issue by the court of equity is in its discretion; and its object being to institute further inquiry, merely for the better information of the court itself, the order for the trial of an issue is *ex mero motu*. *Bullen* v. *Michel*, 2 Price, 399.

7. A court of equity may itself decide on facts without directing an issue; though, in the exercise of its judicial discretion it does often call for the assistance of a jury, but it is not bound to do so; and this is the case in tithe causes, as well as in others; for the design of an issue out of a court of equity is to inform the conscience of the court; and if the conscience of the court is sufficiently informed, no issue need be directed; nor,

if an issue has been directed, need any new trial be granted. *Ibid.*
4 Dow, 318, 329, 332.

8. A defendant not entitled to an issue or inquiry to establish a case, relied on by his answer, but omitted in proof. *Savage* v. *Carroll*, 1 B. & B. 548.

9. When there is contradictory evidence, raising a doubt in the mind of the court, a reference or an issue will be granted: *aliter*, when no evidence whatsoever is given. *Savage* v. *Carroll*,
1 B. & B. 283, 550.

II. Evidence upon.

See also *Tit.* Witness (*post.*)

1. Where an issue is directed, liberty for each party to examine the other will not be given without consent. *Howard* v. *Braithwaite*, 1 V. & B. 374.

2. On the trial of an issue *devisavit vel non* directed by the Court of Chancery, all the witnesses to the will should be examined. *Bootle* v. *Blundell*,
Coop. 136.
19 Ves. 494, 509.

3. On a motion for a receiver, an issue was directed, and the court ordered that the plaintiff and a defendant should be examined upon the trial of the issue, (without consent); the defendants afterwards refused to proceed on the issue, and the court held that it had not power to compel them. *Gardiner* v. *Rowe*, 4 Mad. 236.

4. In directing an issue, the court will not order the examination of persons at the trial, who, by the rules of the court of law could not be examined without such order, except sometimes in cases where the facts in dispute rest only in the knowledge of the plaintiff or defendant. *Ex parte Dister*, Buck, 234.

III. Practice.

1. An issue, whether an instrument was obtained by fraud, &c. will not be directed on motion after answer, as in a case where the decree depends upon a simple fact, as legitimacy, or competence, according to the present practice, to refer a title on motion. *Fullagar* v. *Clark*,
18 Ves. 481.

2. If an issue be directed, but is not tried, nor any notice of trial given, it will be directed to be tried at the next assizes, or taken *pro confesso*. *Anon*,
4 Mad. 255.

3. An issue will not be directed to be tried in the Court of Exchequer, unless for some special reason, and on a motion made for that purpose. *Antrobus* v. *The East India Company*, 5 Mad. 3.

4. Summary of the usual proceedings on the direction of issues out of the Court of Exchequer, to be tried at law, and on the return of the *postea*. *Askew* v. *Greenhow*, 2 Price, 314.

5. The practice in the Exchequer, permitting the plaintiff in an issue to make default once at the trial, does not prevail in Chancery. *Bearblock* v. *Tyler*,
1 J. & W. 226.

6 The probable absence of counsel is a sufficient ground for obtaining leave to postpone the trial of an issue. *Bearblock* v. *Tyler*, 1 J. & W. 225.

7. An issue directed to ascertain whether a modus was payable in respect of a certain part of a farm, was held to be irregular, it being double in its nature, applying first to the farm, which the modus was intended to cover, next to the payment contended for as a modus. *White* v. *Lisle*, 4 Mad. 214.

8. The Court of Exchequer will not make an order that a plaintiff in an issue, directed by a decree to be tried at a previous assize, shall name an attorney in the office of Pleas to appear and accept the issue. The course is to move that the issue be taken *pro confesso* against the plaintiff, if he do not go to trial. *Drake* v. *Smyth*, 6 Price, 100.

9. The party who has to sustain the affirmation is to be plaintiff in an issue, and as such has the choice of the court in which it is to be tried. *Ex parte Malkin*, 2 Rose, 27.

IV. Costs.

1. Where there are several issues directed to try the validity of moduses, some of which are found for the plaintiff and others for the defendant, the parties will each be allowed costs on the issues found for him, and must pay them to his opponent where the issues are found against him. *Prevost* v. *Bennett*,
2 Price, 272.

2. Where a finding at law is confirmed, those who dispute it must pay the costs; and costs of a motion dismissed are not costs in the cause. *White* v. *Lisle*, 4 Mad. 226.

3. A plaintiff withdrawing issues, liable to costs. *Brookland* v. *Golding*,
Wigh. 100.

JOINT TENANCY.

1. A joint contract to purchase by two persons to them and their heirs, with equal payments, is a joint tenancy, and therefore subject to survivorship. *Aveling* v. *Knipe*, 19 Ves. 441.

JOINTURE.

1. The statute of 27 H. 8, which introduced jointures, extends to infants; and, therefore, a jointure made before marriage on an infant, cannot be waved by her after marriage. *Drury* v. *Drury*, 2 Eden, 39.
Earl of Buckinghamshire v. *Drury*, 2 Eden, 60.

2. Where lands of a specified annual value are settled in jointure, pursuant to a power, the value is to be estimated as at the death of the husband. *Countess of Londonderry* v. *Wayne*, 2 Eden, 170.

3. Adultery by the wife is no bar to the specific performance of articles executed previous to marriage, providing a jointure for her. *Buchanan* v. *Buchanan*, 1 B. & B. 203.

4. A jointure will not be forfeited at law by the elopement or adultery of the wife. The same rule applies in a court of equity when the jointure is secured by articles. *Buchanan* v. *Buchanan*, 1 B. & B. 206.

JURISDICTION.

1. A defendant by filing a cross bill prevents his availing himself of an objection to the jurisdiction. *Burgess* v. *Wheate*, 1 Eden, 190.

2. Courts of law and equity supervise the acts of the spiritual court, when they are incidental to their own determinations; and therefore, if the spiritual court prove an act *inter vivos*, it will be considered as void, and *coram non judice*, as much as if that court had proved a will relative to lands only. *Pigott* v. *J'Anson*, 1 Eden, 469.

3. A man having an estate in fee at law, and an estate tail in equity, devises the lands by his will. Whether a court of equity will assist the remainder-man in equity against the devisee—*Quære*. *Bland* v. *Bland*, 2 Cox, 349.

4. It does not follow of course, that because a plaintiff has a defence at law, he cannot come into a court of equity for relief. *Campbell* v. *French*, 2 Cox, 366.

5. Where policies of insurance, effected by plaintiffs' clerk, with their money, which he had embezzled, were given over to defendants on account of a debt due from the clerk; the transaction, amounting to felony, under the statute 39 Geo. 3, c. 85, will not raise a civil contract: and the policies themselves not being the property of the plaintiffs, a demurrer was allowed to a bill, charging notice to the defendant, and praying to have the policies delivered up. *Cox* v. *Paxton*, 17 Ves. 329.

6. There is no general jurisdiction in equity to enjoin or regulate proceedings upon indictment, but circumstances may give that jurisdiction; as, where it is prosecuted by the relators in an information or plaintiffs in a suit, they being subject to control, by order personally affecting them; but this is not exercised with regard to defendants. *The Attorney General* v. *Cleaver*, 18 Ves. 220.

7. The court of Chancery has a jurisdiction in the case of a theatre, considered as a partnership. *Morris* v. *Colman*, 18 Ves. 437.

8. There is a great difference between legal and equitable jurisdiction upon fraud, which at law must be proved and not presumed; and the equitable jurisdiction may be exercised upon an instrument, unduly obtained, where a court of law could not enter into the question. *Fullagar* v. *Clarke*, 18 Ves. 483.

9. Legal jurisdiction is extended to subjects formerly not dealt with at law, as marriage brocage. *Ibid*, 18 Ves. 483.

10. The court of Chancery has jurisdiction as to the valuation of reversionary uncertain interests depending on lives. *Montesquieu* v. *Sandys*, 18 Ves. 311.

11. The court of Chancery has jurisdiction to order void securities to be delivered up. *Bromley* v. *Holland*, Coop. 20.

12. Immorality, as such, is not punished in equity, but it is considered in punishing contempt. *Ball* v. *Coutts*, 1 V. & B. 298.

13. Where a public officer has in his hands money issued by government for the use of an individual, a suit may be maintained by such individual, or those claiming under him, for the recovery of the money; but where government has ordered the money to be withheld, the question is only between government and the individual, or his assignee; and the court of Chancery has no jurisdiction. *Priddy* v. *Rose*, 3 Mer. 102.

14. Courts of law and equity can only enforce the rights of parties under acts of parliament, by the application of their known rules and principles, and if they are inadequate to that purpose the legislature alone can supply the defect. *Weale* v. *The West Middlesex Water Company*, 1 J. & W. 371.

15. The great seal has no jurisdiction to interfere to discharge a defendant from custody pending a writ of error from the Lord Mayor's court. *Speers* v. *Clarke*, 1 J. & W. 641.

16. A bill will lie in respect of land cheap (an ancient customary fine on the purchase of lands within the borough of Malden, in Essex), before the right is tried at law, where the parties are numerous; but where such right is in dispute between two lords of manors, it must first be tried at law. *Corporation of Malden* v. *Coates*, 4 Mad. 447.
See also *Duke of Norfolk* v. *Myers*, 4 Mad. 83.

17. Equity cannot relieve against a mistake, unless compensation can be made for the injury sustained by it. *M'Alpine* v. *Swift*, 1 B. & B. 293.

18. A court of equity never refuses to remove temporary bars to enable parties to try their right; unless there be fraud imputable to the plaintiff, or the defendant is purchaser for valuable consideration without notice. *Blennerhasset* v. *Day*, 2 B. & B. 137.

19. A plaintiff in a suit may have a remedy in a court of equity, concurrently with a right to sue the defendant at law, where the former court can give the parties mutual advantages not in the power of the latter. *Davies* v. *Dodd*, 4 Price, 176.

LANDLORD AND TENANT.

See also Tit. Agreement (*ante*).

I. Contracts and Obligations between.

1. There is a solemn obligation on the tenant to take care of the rights of his landlord.
Speer v. *Crawter*, } *Speer* v. *Taylor*, } 17 Ves. 225.

2. A tenant contracts among other obligations, to preserve the estate distinct from his own property during the tenancy, and to leave it so distinct at the end of it; and if the estate is so confounded with the tenant's lands, that at the end of the tenancy they cannot be distinguished and restored specifically, the tenant is

bound to substitute land of equal value. Such land or its value to be ascertained by commission. *Attorney-General* v. *Fullerton*, 2 V. & B. 263.

3. The holding over by a tenant paying rent at the same period, may be evidence of an agreement to hold on the same terms, and subject to the same covenants; but special covenants, as to cultivation, will not be implied from the mere act of holding over. *Kimpton* v. *Eve*, 2 V. & B. 349.

4. A tenant under an agreement to manage and quit the premises, agreeably to the manner in which the same had been managed and quitted by the former tenants, is not bound by the terms upon which they held, without notice. *Liebenrood* v. *Vines*, 1 Mer. 15.

See also *Northcote* v. *Duke*, 2 Eden, 319.

II. Lease.

See also Tit. Covenant, (*ante*).
———— Deed.

(*a*) *Construction of.*

1. Lease for years by a dean and chapter, of "woods, groves, hedgerows, and springs, (describing them) and all the trees, woods, and underwoods, growing, &c. or that hereafter shall grow, &c. within and upon the said woods, &c. except, and reserved to the lessors upon every fall of the said woods, &c. twelve staddles or storers of oak, ash, elm, or hornbeam, that should be most likely for timber, for every acre of the said woods," &c. with a covenant by the lessee upon every fall of the said woods, &c. to leave standing to the use of the lessors, upon every acre to be felled twelve staddles or storers of oak, ash, elm, or hornbeam, most fit or convenient to be timber, according to the statute in such case, made and provided: the staddles or storers to be appointed as follows; the lessors, for every acre felled, first to choose and appoint four of the best trees growing upon any acre so felled; then the lessee to take out to her own use four other of the next best trees upon any of the same acres; and then, thirdly, the lessors to choose and appoint eight other trees upon every of the said acres, at their pleasure, for making up the twelve staddles or storers for every acre felled; with liberty of ingress, &c. for the lessor, to cut and take the trees, staddles, or storers left standing: and a covenant by the lessee to leave the demised woods, &c. of certain specified growths, at the end of the term. The lease was granted on the surrender of a former lease, and on payment of a fine amounting to one year and a quarter's rent, calculated on the value of the coppice and underwood, and not of the timber. Held that the lease did not comprise timber trees, but merely coppice and underwood; and the lessors having, during the term, cut down on the demised premises a large quantity of timber, a bill filed against them by the lessees for an account, was dismissed with costs. *Herring* v. *The Dean and Chapter of St. Pauls*, 2 Wil. 1.

2. A dean and chapter have not the power of cutting timber on their lands, except for repairs of their property, and consequently cannot give any such right to their lessee. And if they had possessed such a power, and the lease could be construed as transferring it to the lessee, it seems a court of equity would not carry such a transaction into effect. *Ibid.*

See also *Withers* v. *The Dean &c. of Winchester*, 3 Mer. 421.

(*b*) *Covenants, usual and proper.*

1. Lessor, under an agreement for a lease, is not entitled, without express stipulation, to a covenant restraining alienation, without license of lessor, as a proper and usual covenant. *Church* v. *Brown*, 15 Ves. 258.

2. Execution of an agreement to grant a lease with proper covenants, *i. e.* according to the general practice as to such leases, and not contradicting the incidents of the lessee's estate, one of which is the right to have it without restraint, except what is imposed by law, and unless there is an express covenant for more. *Ibid*, 15 Ves. 264.

3. Proper covenants implied in an agreement for a lease as connected with the character and title of the lessor. *Ibid*, 265.

4. To avoid the consequences of bankruptcy, a landlord may take a clause that the lease shall determine upon the bankruptcy of the tenant: but whether this would be a usual or proper covenant—*Quære.* *Ibid.*

5. Nor under an agreement for a lease with usual covenants is he entitled to a covenant against assigning or underletting

without license. *Brown* v. *Rabun*, 15 Ves. 528.

(*c*) *Assignment or Underlease.*

1. Proviso in a lease, that lessees should not demise the premises without a license in writing. A parol license to underlet is not sufficient in equity any more than at law: but if such license is given as a snare, and under circumstances of fraud, equity will relieve. *Richardson* v. *Evans*, 3 Mad. 218.

2. The power of assignment is incident to the estate of a lessee, unless expressly restrained; and that without the word "assigns." *Church* v. *Brown*, 15 Ves. 264.

3. Lessee, under express covenant to pay rent and perform the covenants, is liable during the whole term, though he parts with the possession, and there are many subsequent assignments; and the assignee is liable during his possession: but whether after his possession determines—*Quære*. *Staines* v. *Morris*, 1 V. & B. 11.

(*d*) *Renewal.*

1. A fine paid for the renewal of a lease by one of two tenants, jointly holding seelands; a lien on the other moiety, though under settlement. *Hamilton* v. *Denny*, 1 B. & B. 199.

2. A renewal of a lease refused: the lessee omitting to nominate the lives within the time limited by the covenant; and the injury sustained by the lessor not admitting of compensation. *Mac Alpine* v. *Swift*, 1 B. & B. 285.

3. Where a tenant neglected for three years, after a demand made under the Tenantry Act, 19 and 20 Geo. 3, c. 30, to renew; his right of renewal decreed to be gone, though but one of the three lives in the lease had dropped. *Keating* v. *Sparrow*, 1 B. & B. 367.

4. When all the lives in a lease are gone, if the tenant, after a demand made on him, neglects to renew it, it is dereliction. *Ibid*, 1 B. & B. 373.

5. When but one or two of the three lives have dropped, it is negligence in the tenant not to renew after a demand made. *Ibid*, 1 B. & B. 374.

6. But when there is a refusal or neglect on the part of the tenant to renew, within a reasonable time after a demand had been made on him, it is wilful default. *Ibid*, 1 B. & B. 374.

7. A tenant, having by his conduct made his title to a renewal doubtful, and therefore rendering a suit for it necessary, was, on obtaining a renewal, decreed to pay all the costs. *Barrett* v. *Pearson*, 2 B. & B. 189.

8. Whoever has a lease, has an interest in the renewal; and when an additional term has been granted, the old term may be said to be still in existence. *Winslow* v. *Tighe*, 2 B. & B. 205.

9. It is usual, and perfectly reasonable, that in derivative leases the tenant should contribute to the renewal fines, in proportion to the quantity and quality of the land comprised in his lease. *Lord Frankfort* v. *Thorpe*, 2 B. & B. 379.

(*e*) *Where invalidated.*

1. When a party, under no distress or incompetency, makes a contract, it must be a strong case to induce a court of equity to rescind it. Where a lease was made of lands settled in jointure, the court refused to set it aside on the ground of inadequacy of price, but without fraud, and where the plaintiff had acquiesced, and received rent under the lease for ten years. *Smyth* v *Smyth*, 2 Mad. 75.

2. If the absolute legal interest in an estate be on a trust for the benefit of another, and a limited power of leasing be given to the trustee, a lease, not according to the power, though good at law in respect to the legal estate of the trustee, will be bad in equity as a breach of trust; and therefore where power was given to trustees to make leases in possession until *cestui que* trust came of age, and they made a reversionary lease, and also a lease after *cestui que* trust attained twenty-one: such leases are bad, and the receipt of rent by the *cestui que* trust for nine years, but in ignorance of the imperfection of the leases, will not operate as a new agreement: nor is it necessary in a suit to set aside such leases, for the plaintiff to prove any positive injury in consequence: but in this case, as the lessees might have expended money on the premises during the length of time which elapsed before the plaintiff asserted his rights, an account was directed from filing the bill only, and that without costs. *Bowes* v. *East London Water-Works*, 3 Mad. 375.

3. A lease granted to a creditor by the debtor on a further loan of money at a

stipulated rent, to be retained in the discharge of the debt, the lease to be void when the debt would be satisfied, is a security in the nature of a mortgage: and if such rent be reserved at the fair value of the land, the lease will not be set aside. *Morony* v. *O'Dea*, 1 B. & B. 109.

4. But a lease afterwards granted on a further loan of money, reserving the old rent, set aside, being on the face of it a fraud; and the creditor lessee directed to account for the full value of the lands from the date of the lease. *Ibid.*

5. A lease contained a clause, empowering the tenant to retain the rents, till a sum of money, advanced to the landlord at the time of granting the lease, was repaid; but for which no separate security was given, nor was the advance to bear interest. This lease is not impeachable on the grounds of being granted in consideration of a loan of money. *Prior* v. *Dumphy*, 1 B. & B. 27.

6. A lease granted in consideration of a loan of money, cannot, on principles of public policy, be supported, and it must be set aside. *Morony* v. *O'Dea*, 1 B & B. 116.

7. A lease, at a stipulated rent, the landlord at the same time obtaining from the tenant a sum of money, (two years' rent,) in which the tenant was secured by another lease of the same date for two years, at a nominal rent, the interest to be retained out of the first gale payable under the other lease. This is not a lease in consideration of a loan, as the relation of creditor and debtor did not exist, and the tenant could not by action recover the money. It is only an advance of the rent by way of fine or foregift. *Wilton* v. *Browne*, 1 B. & B. 125.

8. A lease by an administrator to a party having notice that a sale was required by the persons beneficially interested, cannot be supported, and will be set aside. *Drohan* v. *Drohan*, 1 B. & B. 185.

9. Leases obtained by an uncle from his nephew, but just come of age, and to whom he had been guardian and agent, set aside; being made at undervalue, and other considerations than the reserved rent being held out, for which no security was given. *Dawson* v. *Massey*, 1 B. & B. 219.

10. A lease deliberately executed cannot be set aside on the grounds of mistake, from omitting a covenant of a general warrantry, such not constituting part of the agreement of the parties. *Legge* v *Croker*, 1 B. & B. 506.

11. A bill will not lie at the suit of a remainder-man to set aside a lease by tenant for life, on the ground of its being accompanied with a loan of money: there being no privity between them, and the remedy being at law. *Corbet* v. *Segrave*, 2 B. & B. 98.

12. The court will not, on motion of a creditor coming in under a decree, directing a sale of lands devised for payment of debts, set aside a lease obtained *pendente lite* from the devisee under the will, with a leasing power. *Moore* v. *Macnamara*, 2 B. & B. 186.

13. The court will pay no regard to a lease taken *pendente lite* of lands the subject of the suit. *Ibid*, 2 B. & B. 187.

14. A lease at a fair rent, lessee paying two years' rent in advance, secured by lessor's bond and insurance on his life; not impeachable either as fraudulent on a power to lease, without fine, or as being accompanied with a loan of money. *O'Brien* v. *Grierson*, 2 B. & B. 323.

III. Distress and Ejectment.

1. The delivering in ejectment a particular, specifying a breach of every covenant in the lease, is an abuse of the proceeding. *Lovat* v. *Lord Ranelagh*, 3 V. & B. 30.

2. Equity will not assist a tenant to set off a legal demand against the distress of his landlord for rent, as certain allowances agreed to be made him when he left the premises: the policy of the law does not permit a set off against a distress for rent, and equity cannot relieve against the rule of law, where the claim to set off is a legal demand. Whether if the claim to set off had been an equitable demand—*Quære.* *Townrow* v. *Benson*, 3 Mad. 203.

3. The possession recovered by a landlord upon ejectment for non-payment of rent is not to be defeated by rights in remainder, even of infants, as the landlord is then reinstated in the property, as if no lease had been made. *Baker* v. *Morgans*, 2 Dow, 526.

4. Where a landlord has distrained for rent in arrear and the tenant has replevied, and sold part of the goods on his own account by permission of the landlord, if in the mean time the remainder are seized under an extent, testied after the distress, for a debt due to the crown, which is satisfied thereout, according to the exigency

of the writ, the court of Exchequer cannot, in the exercise of its equitable jurisdiction, interfere to enlarge the time for the return of the process, that the sheriff may proceed under it against the defendant's, (the tenant's) lands for the landlord's indemnity, on the ground that the defendant had not in fact goods and chattels sufficient to satisfy the crown debt; or in any way to use the crown process in favor of the landlord under such circumstances, but principally because on the levy being made the writ would be *eo instanti functus officio*. *Rex* v. *Hodder*, 4 Price, 313.

5. Where a reversioner conveys his legal title he cannot maintain an ejectment for non-payment of rent for arrears due in his own time: but there being some doubts when the deed conveying the reversion was delivered, an inquiry to ascertain that fact was directed. *Blennerhassett* v. *Day*, 2 B. & B. 104.

6. After a judgment in ejectment for non-payment of rent, every thing after an acquiescence of seventeen years will be presumed to have been regularly done. It is not necessary to serve any but those deriving legal interests under a lease with an ejectment for non-payment of rent, under the ejectment statutes, otherwise the landlord must file a bill to discover who had equitable claims upon it. *Ibid*, 2 B. & B. 124.

IV. Rent, Apportionment of.

1. Apportionment of rent under stat. 11 Geo. 2. c. 19, and by analogy to it with reference to time. *Aynsley* v. *Wordsworth*, 2 V. & B. 334.

2. Where rent is payable quarterly, and the tenant for life dies on the quarter-day, before midnight, the quarter's rent due on that day goes to the remainder-man. *Norris* v. *Harrison*, 2 Mad. 268.

3. Tenant for life with leasing power granted leases from year to year, some by parol, some in writing, but not conformable to the power, and died before the expiration of the year: the rents were held to be apportionable. *Clarkson* v. *Earl Scarborough*, 1 Swan. 354 (*n*). See also *Ex parte Smyth*, 1 Swan. 337.

V. Termination of Tenancy.

1. A tenancy at will may be determined at any time, as to any new contract; but not as to any thing which, during the tenancy, remained a common interest between the parties. *Peacock* v. *Peacock*, 16 Ves. 57.

2. Tenancy at will is determined by an agreement to purchase. *Daniels* v. *Davison*, 16 Ves. 252.

3. Under a parol demise from year to year, by a tenant for life, with power to lease by deed, &c.; the interest of the lessee determines with the life of the lessor, and the rent is apportionable. *Ex parte Smyth*, 1 Swan. 337.

4. Where, after judgment in ejectment and *habere* issued, the tenant gave up possession without putting the other party to the trouble of executing the writ; equity will not consider the giving up the possession under such circumstances as purely voluntary. *Baker* v. *Morgans*, 2 Dow, 529.

VI. Irish Tenantry Act.

(19 & 20 Geo. 3, c. 30.)

1. A landlord may file a bill to perpetuate the evidence of a demand made under the tenantry act to renew. *Keating* v. *Sparrow*, 1 B. & B. 372.

2. Tenants relieved under the equity of the Irish tenantry act, against the express covenants in their leases. *Mountnorris* v. *White*, 2 Dow, 463, 468.

3. If after demand, under the tenantry act, there is neglect, that is, a want of due diligence in paying, the cause of the neglect signifies nothing. *Ibid*, 470.

4. Demand, under the act, need not be accompanied by a threat of forfeiture. *Ibid*, 2 Dow, 466.

5. The Irish tenantry act is merely declaratory of what was the equity of Ireland with respect to leases for lives renewable for ever in cases of mere neglect to renew, before that act. *Barnett* v. *Burke*, 5 Dow, 15.

6. And the moment the demand is made, neglect to pay, when it goes beyond a reasonable time, is wilful; and a reasonable time is such as may be necessary to enable the tenant to ascertain when the *cestui que vie* died, to complete the sum due, and prepare the leases for execution. What is a reasonable time must therefore depend on the circumstances of each case, and no precise time can properly be fixed. *Ibid*, 16.

7. After a notice by the landlord on the 16th of December to renew, where the tenant had not his lease, was but just

of age, and embarrassed; where an erroneous account was furnished by the landlord's agent, after an application by the tenant in January; where a draft of a renewal in the February following was tendered, and the landlord prevented the tenant from selling timber to pay the rents and fines; a tender in the October following, was, under those circumstances, held to be in time, under the provisions of the tenantry act; and a renewal decreed on payment of costs. *Jessop* v. *King*, 2 B. & B. 81.

8. Whether a forfeiture in not paying rent as well as fines, in a reasonable time after a demand made under the tenantry act, will accrue—*Quære*. *Ibid*, 2 B. & B. 90.

9. By the ejectment statutes the rights of minors, femes covert, and persons abroad are saved. In the tenantry act there is no such saving. *Ibid*.

10. When no fraud or neglect to renew in a reasonable time after a demand, relief against lapse of time is given under the tenantry act, upon compensation being made. *Ibid*, 2 B. & B. 93.

11. The doctrine of the court, as applicable to contracts of the same nature, must determine what is "reasonable time," under the tenantry act. *Ibid*, 2 B. & B. 94.

LAND TAX.

1. Under the provisions of 42 Geo. 3. c. 116, s. 154, for the sale and redemption of the land-tax, there is no express direction, nor any thing to be inferred as to general policy or intention, whether the biddings subsequent to the first bidding are to be public or secret, nor as to the particular form; but it may be collected from the whole clause as to its meaning, that the person who, within fourteen days after the first offer affixed to the church door, shall make the highest offer, is the person entitled to call on the commissioners, to contract with him for the purchase, and it seems that a secret offer of one *per cent.* above the highest offer is a valid offer. *Williams* v. *Steward*, 3 Mer. 472.

2. The commissioners under the act are merely ministerial, and neither have nor can assume to themselves any personal responsibility; and therefore, there is no remedy against them in cases not provided for by the act, except in the King's Bench by mandamus; or should that court refuse to interfere, as most probably it would, by suit in the Court of Exchequer; nor is there any authority in the Court of Chancery to compel the commissioners to grant certificates to persons proposing to purchase or redeem, nor the registry of contract in the form directed by the act, though it seems a mandamus would lie for that purpose. A demurrer to a bill against the commissioners and a bidder, whose bidding was alleged to be invalid, was allowed, as to the commissioners, for want of jurisdiction, and as to the other defendant, for that his bidding being in fact the highest, if it was invalid, that of the plaintiff could not make him a purchaser within the act. *Ibid*.

3. Although particular modes of appeal in particular cases, are pointed out by the act, the legislature has not therefore virtually taken away the jurisdiction of other courts of justice in other cases, to which those provisions of the act do not apply. *Ibid*, 3 Mer. 502.

4. The court of Exchequer, upon the petition of tenant for life, ordered, that a sum of money which the deputy remembrancer had received for land, taken for the public service, under statute 44 Geo. 3, c. 95, might be paid in part satisfaction of a sum of money previously paid by the petitioner for the redemption of the land-tax, he not having taken advantage of the clause in the redemption act, which enabled him to sell part of the lands for that purpose, although the next in remainder was a minor; *Sed dubitante Thompson*, B. *In re Shepard*, Wigh. 131.

LEGACY.

I. WHO TAKE AS LEGATEES.

(*a*) *Under a general Description.*

1. Bequests to the children of testator's daughter, to the number of four, of the sum of £1000 each; if more living at his decease, then the £4000 to be divided between such as should be living at his death; but if his daughter should die without issue, then over. A child by another husband, born after testator's death, cannot take, and the bequest over is good, being not a limitation over by way of remainder, but an absolute legacy. *Salkeld* v. *Vernon*, 1 Eden, 64.

2. The word "grandchildren" in a will, comprehends great grandchildren, unless the intention appears to the contrary: in the present case it was so held, on the ground of the testatrix having in another part of the will described a great granddaughter as a granddaughter; but the widow of a grandson will not be comprehended under the description of a granddaughter. *Hussey* v. *Berkeley*, 2 Eden, 194.

3. A bequest of the residue of testator's property to his wife for life, and upon her decease, to the children of A, and his wife Jane, to be equally divided amongst them the said Jane's children, and not to any children by any other marriage of either party. The residue is divisible amongst the children of A. and his wife, who were living at the death of the widow, but will not extend to children born after that time. *Ayton* v. *Ayton*, 1 Cox, 327.

4. The testatrix gave a fund after the death of her daughter, to go as her daughter should appoint, and in default of appointment to such persons as would then, by virtue of the statute of distributions, be entitled to testatrix's personal estate, in case she had died intestate. The word "then" must be taken as an adverb of relation, and not of time; and the funds, therefore, go to such persons as were the next of kin of the testatrix at the time of her death. *Harrington* v. *Harte*, 1 Cox, 131.

5. Testator bequeathed the residue of his personal estate as follows: "As to the residue of my fortune I will and desire that the descendants, or representatives of each of my first cousins, deceased, partake in equal shares and proportions with my first cousins now alive." The residue is divisible *per stirpes*, amongst the first cousins, who were living at the testator's death; and such of the descendants of his first cousins who died before him, as were next of kin of the deceased first

cousins, and living at the time of the death of the testator. *Rowland* v. *Gorsuch*, 2 Cox, 187.

6. Gift by will to the children of a deceased sister is a gift to those who were living at the death of the testator. *Viner* v. *Francis*, 2 Cox, 190.

7. Testator directed the residue of his estate to be parted to "his next relations, as sisters, nephews, and nieces." Testator died, leaving three sisters, an only child of a deceased sister, and an only child of a deceased brother, his next of kin; and also two children of his eldest sister who was living. The residue must go according to the statute of distributions. *Stamp* v. *Cooke*, 1 Cox, 234.

8. Bequest of stock to trustees, in trust, after the death of A., to transfer the same to and amongst all and every the nephews and nieces, that should be then living, "to wit, the said J. B. or her children, and the said P. B. or his children, and D. L. or his children, and P. L. or his children, and S. E. or her children." Under this bequest, a nephew, not expressly named, is not entitled to any share. And the fund is equally divisible among such nephews and nieces, and their children, as were living at the time of the death of A. *Eccard* v. *Brooke*, 2 Cox, 213.

9. A bequest to A. B.'s children, "£50 to every child he hath by his wife, to be paid them as they come of age," and there were eleven children at the date of the will, thirteen at the testator's death, and three born afterwards. The thirteen children living at the death of the testator are entitled to their legacies, but not those born afterwards. *Ringrove* v. *Bramham*, 2 Cox, 384.

10. A legacy to each and every of the testator's children born, or thereafter to be born, and who should be living at the time of his death, to be paid at their ages of twenty-one, with interest from the day of his death. A child *en ventre sa mere* is entitled under this bequest, but the interest to be computed only from the birth. *Rawlins* v. *Rawlins*, 2 Cox, 425.

11. The general rule is, that a legacy to the children of A. will comprehend all those born before the time of distribution, unless a time of distribution is expressly provided, excluding those born afterwards, by the necessity of a previous distribution. *Walker* v. *Shore*, 15 Ves. 125.

12. Devise of a copyhold estate, in trust to sell and to pay the interest of the produce to A., the wife of B., for life: and after her death to divide the principal among the children of B. & C. equally; and of the testator's reversionary interest in Bank stock, on the death of D., if in his name at his decease; and if not, at D.'s death, equally among the same children. This bequest comprehends all the children living at the death of the testator, and those who were born after the death of the testator, and before the period of distribution, that is, during the lives of the tenants for life. *Walker* v. *Shore*, 15 Ves. 122.

13. Illegitimate children may take under the description of "children," if proved to have acquired the reputation of children, or were considered by the testator as such. *Swaine* v. *Kennerley*, 1 V. & B. 469.

Beachcroft v. *Beachcroft*, 1 Mad. 430.

14. Residuary disposition to the children of the testator's "brothers and sisters as aforesaid," (named previously as legatees), who should be living at his decease, on their attaining twenty-five, equally; but in case of the decease of any of the aforesaid brothers and sisters, having issue, then the child or children to have the same share as if the parent had been living at his decease, with maintenance and survivorship, in case of the death of any unmarried, and without issue. The first clear designation of nephews and nieces, living at the testator's death, as the sole objects of his bounty, is not altered or controlled by the subsequent designation of the brothers and sisters; but the construction is doubtful as to after-born children. *Barker* v. *Lea*, 3 V. & B. 113.

15. The gift by will of a residue, after a life-interest to his wife, to the testator's next of kin. This means the next of kin at the death of the wife, and not at the testator's death, they having express bequests under the will. *Miller* v. *Eaton*, Coop. 272.

16. Bequest, by a testator in India, of a residue, "to be equally distributed among my nearest surviving relations, in my native country, Ireland." Brothers and sisters living at testator's death, as well in Ireland as America, were held entitled, exclusive of nephews and nieces. *Smith* v. *Campbell*, Coop. 275. 19 Ves. 400.

17. The word "relations," or "near relations," from their indefinite extent, confined to the next of kin, under the statute of distributions. *Ibid*,
19 Ves. 403. Coop. 277.
Pope v. *Whitcombe*, 3 Mer. 689.

18. *Semble*, a bequest to "next of kin," without reference to the statute of distributions, or a division, as in case of intestacy, would be confined to the nearest of kindred, as brothers and sisters, excluding nephews and nieces. *Smith* v. *Campbell*,
Coop. 277. 19 Ves. 404.

19. Where the testator bequeathed the residue of his estate to his wife for life, with a direction to dispose of the residue amongst "*his relations*, in such manner as she should think fit" Appointment to relations not next of kin being void, those who were next of kin to the testator at the time of *his* death were held entitled. *Pope* v. *Whitcombe*, 3 Mer. 689.

20. A gift of residue to trustees, to "pay, apply, and divide the same among the several legatees, in proportion to the sums bequeathed to them, by this my will." Upon the construction of the whole will, this was confined to general pecuniary legatees, to the exclusion of those who took legacies payable out of a specific fund in future, or legacies given by codicil. *Henwood* v. *Overend*,
1 Mer. 23.

21. A bequest "to each and every the child or children of my brothers and sisters (naming them) which shall be living at the time of my decease; but, if any child or children of my said brothers and sisters, or any of them shall happen to die in my lifetime, and leave any issue, then the legacy or legacies, hereby intended for such child or children so dying, shall be for his, her, or their issue" The issue take only by substitution; therefore, only the issue of such children as were living at the date of the will, are entitled in the event of the death of their respective parents during the testator's lifetime.— *Sed quære* if the second clause had stood alone, and independent of the preceding. *Christopherson* v. *Naylor*, 1 Mer. 320.

22. Bequests, not to individuals but to classes of persons, cannot be altered, because some individuals of an intended class are incapable of taking, either into particular bequests to the individuals, or by sub-dividing the class itself. *Leake* v. *Robinson*, 2 Mer. 390.

23. Bequest of £3000 stock to the testator's son by a first marriage, his second wife, and a son by her being living, the interest to be appropriated to his maintenance, under the direction of trustees, till he attained the age of twenty-four; and of the residue of the testator's personal estate, the interest being given to his wife during her widowhood, after her decease or marriage, "unto any child or children I may have by my wife, to be equally divided between them that attain the age of twenty-one years, the survivor of my children to possess what is here bequeathed to the other; but should not either of my children attain the age of twenty-one years, or live to possess what is here bequeathed to them, I then bequeath to the children of my sister, the £3000 stock." The son by the second marriage dying in the lifetime of the testator, and there being no other issue of that marriage, the son by the first marriage is entitled to the stock, and to the residue. *Hill* v. *Smith*, 1 Wil. 134.
1 Swan. 195.

24. The testatrix bequeathed Bank stock in trust, to pay the dividends to her daughter M. for life, for her separate use; and after her death to her husband for life; and after his death to assign and transfer all such stock into and among all and every the children of her daughter M. (except an eldest son) equally; and if but one, the whole to such one or only child, to be vested interests, and transferable at their, his, or her ages or age of twenty-one years; and in case any such child should die under that age, leaving any child or children, then the share of every child so dying, to go to such their, his, or her children or child, in like manner as above mentioned; otherwise to go to the survivors or survivor of the children of her daughter, and to be transferable in like manner as their original share; and in case her daughter should have no children, or they should all die under twenty-one, without children, then to transfer the Bank stock to such persons, &c. as her daughter should appoint. She also bequeathed Imperial renewable Annuities and other stock to the trustees in trust to receive the dividends, and invest them in stock until the expiration of the term for payment of the Imperial Annuities; and thereupon assign and transfer all such stocks or funds, as well original as accumulated, unto and among all and every the children of her daughter (except

an eldest son) equally; and if but one, then the whole to such one or only child, the same to be vested interests and transferable, and the dividends or interests thereof applied at such time, &c., and with the like power of appointment by her daughter, as was directed concerning the Bank stock. At the date of the will, and at the testatrix's death, M. had two sons, J. & W. J., the eldest, died in the lifetime of his parents, before the expiration of the Imperial Annuities, and before W. attained twenty-one. Held, that W., having become an only son by his brother's death, was not entitled to any share, either of the Bank stock or the funded property, although a family estate, of which J. had been tenant in tail, did not by his death become vested in W., a recovery having been suffered by J., and the estate devised by him to his father. *Matthews* v. *Paul*, 2 Wil. 64.

25. Legacy to A., and failing him by decease before me, to his heirs. A. dies before the testator, having made a will containing a residuary bequest. The legacy belongs to the next of kin of A., living at the time of the testator's death. *Vaux* v. *Henderson*, 1 J. & W. 388. (*n*).

26. Bequest of residue, after the death of testator's wife, to five of his children, and "to the son of my son, John Tebbs, or his other children that are living," held to pass shares to children of the son, born after the testator's death, and before the death of his wife. *Tebbs* v. *Carpenter*, 1 Mad. 290.

27. Devise of a reversionary estate, subject to the payment of £500 to M. H. at her marriage, or attaining twenty-one; and if she dies before marriage or twenty-one, and there be no other child or children of R. H., then the £500 to revert to the devisee of the estate: but if there are other children of R. H., then to those children. Held, that as there was nothing in the will to confine the division, or mark the period when the children were to take, this must be intended a general failure of issue, and not a failure at a particular period; therefore the children of R. H., born after the death of M. H., were entitled. *Hutcheson* v. *Jones*, 2 Mad. 124.

28. Devise of lands to testator's wife for life, with a direction, that after her death the same should be sold, and the produce divided among his nephews and nieces, "the children of such of them as should be then dead, to stand in the place of their father and mother deceased." Held, that the benefit of the bequest extended only to such of the testator's nephews and nieces as were in *esse* at the time of the testator's death, that they were to take only if they survived the wife, and that if they died after the testator, and before his wife, their children would stand in their place. *Thornhill* v. *Thornhill*, 4 Mad. 377.

29. A bequest of the residue, "to all and every the children of nephews and nieces, lawfully begotten," includes children born after the death of testator's widow, who was first entitled to a life interest. *Browne* v. *Groombridge*, 4 Mad. 495.

30. Where there is a total want of persons properly answering the description, in a limitation, others who do not so completely answer it, may be let in; thus grandchildren have been let in, under a liberal construction of the word "children," if there are none; but there is no such instance of their sharing with them, if there are children. *Earl of Orford* v. *Churchill*, 3. V. & B. 69.

(*b*) *Under a particular Description.*

1. Residuary bequest to "the said A. C." there being two persons of that name, A. C. of St. I. and A. C. of H., to both of whom legacies had been given; but, from the manifest intent of the testator, apparent on the face of the will, the A. C. first mentioned in the will, was held to be entitled. *Fox* v *Collins*, 2 Eden, 107.

2. A., by will, gave to the two daughters of S. the sum of £10 each. B., by will, gave £82 short annuities, in trust, to pay the same to and between the two daughters of S. in equal shares and proportions; and if either of them should die before the expiration of the term for which the annuities were to run, then to pay the whole to the survivor; but if both should die before that time, then the same was to fall into the residue of the personal estate. At the times when both these wills were made, S. had three daughters. Under the first will, the three daughters shall take £10 each; and under the second, the three shall take the short annuities equally, with survivorship amongst them all. *Stebbing* v. *Walkey*, 1 Cox, 250.

3. Testator bequeathed a legacy of £500 to each of the daughters of C., if both, or either of them, should survive D. At the date of the will, and the death of the testator, C. had three daughters, all of whom survived D. The three daughters are entitled to £500 each. *Scott* v *Fenhoulett*, 1 Cox, 79.

4. A bequest of a residue to be divided equally "amongst all the children of my late cousin E. L. and my cousin P. F. and their lawful representatives," is a bequest to the children of E. L. and to P. F. himself, and not to the children of P. F. *Lugar* v. *Harman*, 1 Cox, 250.

5. The testator gave the residue amongst his seven children, A., B., &c. naming only six. The seven children shall all share equally. *Humphreys* v. *Humphreys*, 2 Cox, 184.

6. Legacy to "James, the son of Thomas A. of Eastcheap, printer." There was no person of this description, but there was a James A. of Eastcheap, printer, who had a son Thomas by his first wife, a relation of the testator, and another son, James, by a second wife. James, the son, was held entitled, notwithstanding the erroneous description. *Andreas* v. *Dobson*, 1 Cox, 425.

7. Legacy to the seventh, or youngest child of A. A. had six children at the testator's death; and had another who died at the age of two months. Afterwards the plaintiff was born, and was the seventh child living, but the eighth in order of birth. Other children were born afterwards. Under these circumstances the youngest child is entitled to the legacy, in preference to the plaintiff. *West* v. *Lord Primate of Ireland*, 2 Cox, 258.

8. Testator, besides a specific legacy to his daughter, and making her residuary legatee, gave £1000 to B. R. "whom failing, to revert and return to my heir under this will." B. R. died in testator's lifetime. The daughter takes the £1000 legacy by way of special substitution, and not merely by lapse as residuary legatee. *Rose* v. *Rose*, 17 Ves. 347.

9. Legacy "to the three children of A. the sum of £600 each." There were four children, and all born before the date of the will: held, that they were entitled to £600 each. *Garvey* v. *Hibbert*, 19 Ves. 125.

10. Legacy to the testator's "namesake, Thomas, the second son of his brother John." John had no son of the name of Thomas; but his second son, whose name was William, was held entitled. *Stockdale* v. *Bushby*, Coop. 229. 19 Ves. 381.

11. Legacy "to Robert C., my nephew, the son of Joseph C." Testator also gave a legacy to his "nephew, Robert C., the son of John C." but had only two brothers, John C. and Thomas C., each having a son Robert. It appearing by parol evidence that testator was intimate with Robert, the son of John C., and had but little knowledge of Robert, the son of Thomas C., the former was held entitled. *Careless* v. *Careless*, 1 Mer. 384. 19 Ves. 601.

(c) *Executors or Trustees.*

1. Legacies and an annuity were left to each of four executors, who should prove the will, and take upon themselves the execution thereof. They all proved the will; but one, without having acted, ran away with the testator's infant daughter, and went abroad. After this he was restrained by an order of the court from acting in the execution of the will. The mere fact of proving the will is not sufficient to support a claim to this legacy, unless it appears to have been done with an intention to act in it: and as in this case the only use made of the character of executor, was to enable him to violate the confidence reposed in him by the testator, he was held, not entitled to the legacy. *Harford* v. *Browning*, 1 Cox, 302.

2. A legacy given to a man who is appointed executor. He must prove the will in order to entitle himself to the legacy, though not made a condition by the will. But he may prove after the hearing, and it will entitle him, even though he may have said in his answer that he never intended to prove. But whether such a declaration in the answer would prejudice his title to interest—*Quære*. *Reed* v. *Devaynes*, 2 Cox. 285.

3. A residuary bequest to trustees and executors, described both by their character and their names, to be disposed of to such person and persons, and in such manner and form, and in such sum and sums of money, as they in their discretion should think proper and expedient, is an absolute interest to them beneficially;

or an absolute power of appointment; excluding the next of kin and the heir, as to the produce of real estate. *Gibbs* v. *Rumsey*, 2 V. & B. 294.

4. Legacy of fifty guineas to trustees, as a token of regard, and a recompence for their trouble, and to be paid within twelve months after testatrix's decease. The trustees, at the end of twelve months, will be entitled to the legacies, though they do not act in the execution of the will: but if within that time they refuse to act, or neglect, where necessary—*Quære*. *Brydges* v. *Wotton*, 1 V. & B. 134.

5. Testator gave a power to his wife to dispose of a moiety of leasehold estate, by a will, "duly executed and attested," and in default of such appointment, the same was bequeathed "unto the executors or administrators of her my said wife, to and for his, her, or their own use and benefit." A will by the wife neither signed, sealed, nor attested, not being a due execution of the power, and no executor being named therein, the administrator of the testatrix was held entitled to the moiety of the leasehold for his own benefit. *Sanders* v. *Franks*, 2 Mad. 147.

II. What Property passes by.

(a) *Generally.*

1. By a bequest of all testator's goods and chattels in and about his dwelling-house and out-houses at A. at his death, his running horses passed. *Gower* v. *Gower*, 2 Eden, 201.

2. Diamonds and pearls made up for wear, will not pass by a bequest of a cabinet, or collection of curiosities, consisting of coins, medals, gems, and Oriental stones, and other valuable things. The words "valuable things," must mean things *ejusdem generis*. *Cavendish* v. *Cavendish*, 1 Cox, 77.

3. D. being possessed of £4000, 4 *per cent*. Bank annuities, by his will gave part of it to a number of persons: he then made a codicil, in which he said, "I find I willed away only £5600, 4 *per cent*. Bank annuities, and I have there at present £6000. I give the interest of the remaining £400 to F." It appeared that he had disposed of only £3200 of the stock by his will. F. shall take the whole residue of the stock under the bequest in the codicil. *Danvers* v. *Manning*, 1 Cox, 203.

4. Testator gave to his son "all sum and sums of money due to me from him on bond or bonds, or any other security." The son was indebted to testator by bond at the date of the will, and afterwards became indebted to him by another bond; but the bequest does not include the subsequent bond. *Smallman* v *Goolden*, 1 Cox, 329.

5. A renewed lease does not pass by a previous will bequeathing the lease, or the premises held on lease. *James* v. *Dean*, 15 Ves. 238.

6. Bequest of leasehold premises, and all my estate, term, and interest therein, the interest acquired under a subsequent renewal of the lease will not pass. *Hatter* v. *Norton*. 16 Ves. 197.

7. Generally, a bequest of leasehold estate, by words in the present tense, passes only the lease then existing; but when in the future tense, the bequest will comprehend a future interest. *Ibid*, 16 Ves. 199.

8. Testatrix reciting that she was possessed of £12,700, 3 *per cent*. consolidated Bank annuities, standing in her name, gave and bequeathed the same, or so much of such Bank annuities as should be standing in her name at her death. At the date of her will, and at her death, she had nearly £15,000 in that fund, besides other stock. It was only the sum mentioned which passed by the bequest. *Hotham* v. *Sutton*, 15 Ves. 319.

9. A residuary bequest in general terms, and a revocation by a codicil as to "plate, linen, household goods, and other effects, (money excepted)." This exception of money prevents the usual construction of the words, "other effects," viz. *ejusdem generis:* stock, therefore, which does not pass under the word "money," was included in this bequest with all personal estate, except money and Bank notes, which come under the express exception. *Ibid.*

10. I. L. gave by his will £3000 upon trust, to apply the dividends to the maintenance of A. till twenty-one; and afterwards to pay the whole dividends to him for life, with power to trustees, before his age of twenty-six, to raise and pay, not exceeding £600, towards, or in order to his preferment or advancement in life, or other occasions as they should think proper: and at the age of 26 he gave to A. the £600 absolutely. Upon a claim of

the whole £600 as an absolute bequest at twenty-one, an inquiry was directed, what part of the £600 was necessary for his advancement. *Lewis* v. *Lewis*, 1 Cox, 162.

See also *Robinson* v. *Cleator*. 15 Ves. 526.

11. A bequest "as to all that my leasehold house in L. and all my household goods and furniture there and at S., and as to all my plate, linen, and China, pictures, live and dead stock, and all the residue of my goods, chattels, and personal estate, &c., I give and bequeath the same to A." By a codicil the testator revokes the bequest "of the residue" to A. and gives the "residue of his said personal estate" to B. This codicil revokes the gift of the general residue only, and not of the articles specified. *Clarke* v. *Butler*, 1 Mer. 304.

12. The testatrix bequeathed all her personal estate to trustees, in trust to sell, and out of the produce to pay all her debts, "and in the next place to pay to her niece £300 due to her from the testatrix, on bond." The above £300 shall be taken as a legacy, although only £120 was due upon the bond. *Whitfield* v. *Clemment*, 1 Mer. 402.

13. A bequest of "whatever debts might be due (to the testator) at the time of his death," will pass a bill of exchange paid into his banker's, and also a cash balance due on his banker's account. *Carr* v. *Carr*, 1 Mer. 541. (*n*).

14. The testator bequeathed "all debts due to him at the time of his death" to his wife, and "all his government stocks and funds" to trustees. After making his will, he sold stock, and lent the produce upon a bond, conditioned for replacing the stock on a day certain. The court held that as the day for replacing the stock had passed before testator's death, it was a debt due, and passed under the first bequest; and the circumstance that the debtor might still transfer the stock, could not alter or affect the rights of the parties. *Essington* v. *Vashon*, 3 Mer. 434.

15. Bequest of "all his (the testator's) money in the Bank of England," held to pass stock in the funds; testator having never had any cash in the Bank, and therefore there being no other property to answer the description. *Gallini* v. *Noble*, 3 Mer. 691.

16. On the construction of a will, the enjoyment of bequests given in terms indicating a future period, accelerated by implication. *Parrott* v. *Worsfold*, 1 J. & W. 594.

17. In the case of a legacy of £11,000 Bank stock, standing in the testator's name: and between the date of the will and the death of the testator, the stat. 56 Geo. 3, c. 96, was passed, under which, and before the testator's death, a bonus of 25 *per cent.* was given by the Bank; held that the additional capital did not pass to the legatee, under the bequest, but the £11,000 only. *Norris* v. *Harrison*, 2 Mad. 268.

18. The testator gives to his trustees £2000, 3 *per cent.* annuities standing in his name, and then, out of "such £2000 stock," first, gives a sum of £1000 stock, and then a further sum of £2000 stock, and again repeats the latter sum. It appeared the testator had £5000, 3 *per cent.* annuities: held to be a mistake in the aggregate amount given to the trustees, who were therefore entitled to £3000 of the annuities. *Alford* v. *Green*, 5 Mad. 92.

1. A bequest to testator's wife of such furniture as should be in or about his dwelling houses at D. C. and at W. at the time of his decease, will not pass the furniture, which, subsequently to the time of making the will, the testator had removed to another house. *Heseltine* v. *Heseltine*, 3 Mad. 276.

20. The testator gave to his wife all his ready money and bank-notes which he should have about his person, or at his residence, at his death: he gave specifically to others his exchequer-bills, stock, &c.: he became insane two years before his death; and during that time two large sums of money, amounting to near £3000, which had been paid at his house, were laid out for him in stock and exchequer-bills; this was held a due conversion of the money, and that the specific legatees of the stock and exchequer-bills were entitled to it. *Browne* v. *Groombridge*, 4 Mad. 495.

21. Testator having devised certain freehold manors, lands, collieries, &c., bequeaths waggon-ways, rails, staiths, and all implements, utensils, and things which at the time of his death might be used or employed for the working and management of the collieries, and might be deemed of the nature of personal estate, to be enjoyed by the persons respectively

entitled under the will to the said manors, lands, collieries, &c. Held, that coals, resting at the pits and staiths, debts due to the collieries, money (the price of coals sold) lying in the Tyne Bank, and other particulars enumerated, did not pass by this bequest under the general word "things." *Stuart* v. *Marquis of Bute*, 1 Dow, 73.

22. Where there is an anxious enumeration of particulars in a bequest, the presumption is, that it was not intended to pass the whole. *Ibid*, 1 Dow, 85.

23. Under the words in a will "to pay to each of my said (younger) children (three daughters), as and for their respective portions, a sum equal to one-fourth of what shall remain to my said (eldest) son William, payable to my said daughters respectively, at her or their respective ages of 21, or marriage" &c.: held that all the daughters together were entitled only to a fourth of what remained as above, or each of them to a seventh; and that the time of the testator's death was that at which the amount of his property, and the proportions of the shares were to be computed and estimated. *Colclough* v. *Garan*, 3 Dow, 267.

24. Testator gave the interest of the 4 *per cent.* Bank annuities, then standing in his name, with the interest of a sum of money then in the hands of his bankers, which he directed to be invested in the same stock, to his wife, for life, with a power of disposing of one third of the said property, after her decease. And, "as to the rest and residue of his estate, (after payment of the said bequest to his wife,) viz. two-thirds of the property he should die possessed of, he gave the same as follows: first, to the children of A. £60 of the 4 *per cent.* consolidated Bank annuities; also to the eldest of such children, and to his lawful heir, £30 *per annum* for life, payable out of interest." He then made a similar bequest in favor of the children of B., and he appointed his said wife and C. to be executrix and executor of his will; and he declared his intention, "that if the residue of his said property, after payment of the children of B., was not sufficient to pay the specified annuities of £30, the residue should be equally divided as above specified." The money in the hands of the bankers having been invested in the 4 *per cents.*, the whole of that sum was £5,306. It was held that the children of A. and B. respectively were entitled to £60 stock only; that the residue of the fund, after satisfying the two sums of £60 and the annuities of £30, was undisposed of; and that the interest given to the wife in one third of the property did not prevent her taking a share of the residue under the statute of distributions. *Oldham* v. *Carlton*, 2 Cox, 399.

(*b*) *As Residue or Surplus.*

1. Testator gives the residue of his personal estate to his two sons and a daughter, share and share alike, as tenants in common, and not as joint tenants; but by a codicil revokes the appointment of the daughter as one of his residuary legatees, and gives her a pecuniary legacy instead. Held, that this third part of the residue does not belong to the two other residuary legatees, but is undisposed of, and shall go according to the statute of distributions. *Creswell* v. *Chesslyn*, 2 Eden, 123.

Affirmed in *Dom. Proc.* 3 Toml. P. C. 246.

2. A fine was levied of certain premises, by a man and his wife to the use of the lessee, his executors, &c. for 999 years, and at the same time the lessor covenanted that if the lessee, his heirs, or assigns, should by deed express his will and mind to have the freehold and inheritance of the said premises, then such fine should enure to such persons, and for such estates as by such deed should be expressed. This lease is a mere chattel, and will pass by a general residuary bequest of personal estate. *Williams* v. *Bishop of Landaff*, 1 Cox, 254.

3. A general residue of personal property comprehends every thing not otherwise effectually disposed of; and there is no difference where a legacy falls into it by lapse, or as being void at law. An express bequest of residue will exclude the next of kin. *Dawson* v. *Clarke*, 15 Ves. 409.

4. There is a distinction between a residuary devisee and legatee; the former does not take a lapsed devise, the latter takes every thing that lapses. *Ibid*, 15 Ves. 409.

5. In the case of a trust by deed of money to accumulate until the grantor's grandchildren, then living, or to be born, should respectively attain the age of

twenty-one; and on attaining so, to pay to each, as they should respectively attain such age, their respective shares, to be ascertained by the number in being as they respectively attain twenty-one, without regard to such as might be born afterward. No interest will vest until time of payment; the measure of distribution is the number existing at each period; and those entitled to receive have no further claim upon the fund, increased by shares falling into it: therefore, where one dies under twenty-one, after all the others have received their shares, or die under twenty-one, the share of the one so dying is undisposed of by the deed, and will pass by the bequest of "all effects whatsoever," following specific descriptions of property. *Campbell* v. *Prescott*, 15 Ves. 500.

6. A general residuary disposition of real and personal estate, "not herein before specifically disposed of," comprehends specific legacies lapsed; the word "specifically" being construed "particularly." *Roberts* v. *Cooke*, 16 Ves. 451.

7. A pecuniary or residuary legatee has a right to follow the assets, in case of their misapplication, where a creditor or specific legatee could. *M'Leod* v. *Drummond*, 17 Ves. 169.

8. Legacies to charities, void by the statute of mortmain, fall into the general residue. *Page* v. *Leapingwell*, 18 Ves. 463.

9. Distinction between the bequest of a residue and of enumerated parts, with the words "personal estate," not described as residue. *Bootle* v. *Blundell*, 1 Mer. 228. 19 Ves. 523.
See also *Stuart* v. *Marquis of Bute*, 1 Dow. 73.

10. The principle that legatees are entitled to the surplus, in proportion to their legacies, under the general introduction, declaring the will a disposition of all the estate, overruled. *Smith* v. *Fitzgerald*, 3 V. & B. 6.

11. Legacies out of a specific fund, given over in case of lapse or death of the legatees, before the fund should be realised, cannot be extended by a subsequent recital of the fund as "willed to" those legatees over; the surplus, therefore, would pass under the residuary clause. *Ibid.* 3 V. & B. 2.

12. The court strongly inclines to construe a residuary clause, so as to prevent an intestacy with regard to any part of the testator's property. *Leake* v. *Robinson*, 2 Mer. 386.

13. With regard to personal estate, whatever is not well given by the will falls into the residue. It is immaterial how it happens, that any part is undisposed of, whether by the death of a legatee or by the remoteness and consequent illegality of the bequest. *Leake* v. *Robinson*, 2 Mer. 392.

14. The limitations of a particular bequest, and those of the residue, may be incongruous; but whatever turns out to be undisposed of, is not the less residue. *Ibid*, 2 Mer. 393.

15. Residue means all of which no effectual disposition is made by the will; but when the disposition of the residue itself fails, to the extent to which it fails, the will is inoperative. So, where the testator directed his executors to pay £500, part of his residuary estate, to his daughter, and afterwards erased her name, and substituted no other, held that the £500 having once formed part of the residue, was in this case undisposed of; but that the costs of ascertaining the right must be paid thereout, in exoneration of the general residue. *Skrymsher* v. *Northcote*. 1 Swan. 566. 1 Wil. 248.

III. What words will pass an absolute Interest.

1. Legacy to trustees to be put out on security, the interest to be paid to A., and in case she marry or die, the interest to be paid to B, an infant, in trust for her till she came to the age of twenty-one years: held that B was absolutely entitled to the legacy. *Hale* v. *Beck*, 2 Eden, 229.

2. Bequest of £30,000, South Sea Annuities, upon trust, to pay the dividends to A., until an exchange of certain lands shall be made between him and B., and then the capital to be equally divided between them. B. dies before the time limited by the will for making the exchange expires. Held that A. is absolutely entitled to the whole legacy. *Lowther* v. *Cavendish*, 1 Eden, 99.

3. Residuary bequest in trust for the use and benefit of A. and in case of her death, to be equally divided between the children of B. If A. survives the testator, she will be entitled, under this bequest,

to the absolute interest. *Ommaney* v. *Bevan*, 18 Ves. 291.

4. Indefinite bequest of the dividends gives the absolute property of stock. *Page* v. *Leapingwell*, 18 Ves. 463.

5. Legacy in trust to be laid out in stock, the dividends, as they come due, to A. for life, and after her decease, to pay the principal according to her appointment by will or otherwise, with power to her to purchase with it an annuity, with the approbation of the trustees, but not to sell it. A. has an absolute power of disposition, and her bill was held a sufficient indication of her intention to take the whole, making a formal appointment or writing unnecessary. *Irwin* v. *Farrer*, 19 Ves. 86.

6. Bequest of the produce of a fund is a gift of that produce in perpetuity, and consequently of the fund itself, unless there is something on the face of the will to show that was not the intention. *Adamson* v. *Armitage*, 19 Ves. 418. Coop. 285.

7. A bequest to L. A. of the "balance of my account, with the interest thereon, to be vested by my executors in the hands of trustees whom they shall choose and name, the income arising therefrom to be for her sole use and benefit," is an absolute interest, and not a life estate merely; the prior gift of the sum not being limited by the subsequent mention of its produce, and the direction as to trustees being directory and not restrictive. *Adamson* v. *Armitage*, Coop. 283. 19 Ves. 416.

8. The testator gave all his real and personal estates "to A. and his male issue; for want of male issue after him to B. and his male issue." These words give to A. the absolute interest in the personal estate. *Down* v. *Penny*, 1 Mer. 20. 19 Ves. 545.

9. Bequest of personal property, in trust for A., a feme covert, for her separate use; with a power of disposing thereof by a will, (except to particular persons.) "And in case she dies without a will, I give all that may remain at her decease to B." followed by a gift of "all the rest and residue" to A., who is appointed executrix. A. takes the absolute interest in the property, and not a power of disposition merely. And the gift to B. of "all that may remain at her decease" is void for uncertainty. *Bull* v. *Kingston*, 1 Mer. 314.

10. Where personal estate is given by will in words which would directly or constructively constitute an estate tail in land, the absolute interest in such personal estate will pass to him who would be the first tenant in tail. The testator having declared his intention that the principal should never be broken into, but the interest only to be received is not sufficient to turn the "heirs" into tenants for life, and is equivalent to a declaration as to an estate tail, that no heir shall alien; but if the words "for life" had been added to the words "heirs male," it would have operated as a gift for life only. *Britton* v. *Twining*, 3 Mer. 176.

11. Whatever would directly or constructively, constitute an estate tail in land, will pass an absolute interest in personal property. *Ibid*, 3 Mer. 183.

12. A gift of "all testator's stock of cattle, horses, and carriages," to his wife absolutely, and a subsequent gift of his farm, "and stock and crop thereon," to his said wife, during widowhood. Held, the live stock upon the farm given to the wife during widowhood, passed to her absolutely under the former clause. *Randall* v. *Russell*, 3 Mer. 190.

13. A specific bequest, for life, of things, "*quæ ipso usu consumuntur*," is a gift of the property, and there can be no limitation over after a life interest in such articles: but if included in a residuary bequest for life they must be sold, and the interest enjoyed by the tenant for life. *Ibid*, 3 Mer. 194.

14. A gift for life of a chattel is now construed as a gift of the usufruct only; but where the use and the property can have no separate existence, the old rule must still prevail, that a gift for life carries the absolute interest: in this case, where the gift was of a leasehold farm and stock and crop thereon, an inquiry was directed to ascertain of what the stock and crop of the farm consisted. *Ibid*, 3 Mer. 195.

15. Where in a will the first gift of a residue is absolute, and subsequent words restrict it to a life interest, upon a contingency which had not taken place at the time the legacy accrued: held such subsequent words, are no restriction on the preceding absolute bequest. *Forbes* v. *Ball*, 3 Mer. 437.

16. Bequest of £3000 to trustees in trust, to be by them employed in purchas-

ing in their names, upon the life of testator's brother, an annuity in the government life annuities of the value of £3000, to be paid to him every six months during his life; and also, a farther sum of £2000 for a similar annuity for the same person, but authorising the trustees to apply the £2000 in any other manner for the advantage of the annuitant, with his consent. Held, that the brother was entitled to have the £2000 paid to him absolutely. *Palmer* v. *Craufurd*,
2 Wil. 79.

17. The testator was in the habit of allowing his brother, who resided in Holland, an annuity of 3200 guilders, (amounting to £300); and after the date of his will, he, by letter, directed his agents there to continue the annuity till his executors should have arranged his affairs, and he left a written paper to the same effect. The brother survived the testator three years, and during that time received the annuity of 3200 guilders from the agents in Holland, but no government life annuity was ever purchased, the brother being unable to come to England to attend at the annuity office. Held that the brother's representatives were entitled to the £3000, and interest, deducting the money paid to him by the agents in Holland. *Ibid.*

18. Bequest of personal estate in trust, to pay the interest to the testator's widow during her life, and on her death to pay and divide the trust-monies unto, and equally between testator's daughters, for their own use and benefit absolutely, and in case of their death or the death of either of them, leaving a child or children living, to apply the interest for the maintenance of such children till 21, then to divide the trust-money among them; expressing that the testator's intention was, that the children of his daughters should be entitled to the same shares to which their mother would be entitled if then living, with an ultimate trust in case of the death of the testator's daughter without leaving issue living at their respective deaths, or of all their children dying minors. Held that the testator's daughter, having survived his wife, became entitled to the absolute interest. *Galland* v. *Leonard*, 1 Wil. 129.
1 Swan. 161.

19. An unlimited bequest of the interest of stock, passes the principal also. *Stretch* v. *Watkins*,
1 Mad. 253.

20. The testator directed estates to be sold, and the produce, together with the residue of his real and personal estate, to be divided equally amongst his sons, by name, share and share alike, as tenants in common, and to the issue of their several and respective bodies, lawfully begotten; but in case of the death of any or either of them without issue, lawfully begotten, living at the time of his or their respective deaths, then the part or share of him or them so dying, to go to the survivors and survivor equally, share and share alike, and to the issue of their several and respective bodies, lawfully begotten: held, that the bequests to the four sons passed absolute interests, with benefit of survivorship, in case any or either of them died without issue living at their death respectively. *Lyon* v. *Mitchell*, 1 Mad 467.

21. Bequest of personality to A. for life, and after A.'s decease to the heirs male of A.'s body, lawfully begotten, for ever; and for want of such issue, to B. for life, &c. A. takes the absolute interest, and the bequest over to B. is void. *Tothill* v. *Pitt*, 1 Mad 488.

22. A gift by will of the interest of personality, without limitation, passes the principal, unless there are words used to confine it to a life interest; therefore, where the interest of a residue was given to testator's mother for life, and after her death to C. C.: held that C. C., after the death of the mother, took the property absolutely. *Clough* v. *Wynne*,
2 Mad. 188.

23. Bequest to M. S. of "£2000 stock, of my four *per cent.*: and in case of her death," the said £2000 to be equally divided between the children: held, the words, "in case of her death," meant death, so as not to be capable of taking the legacy; that is, death in the testator's lifetime; and therefore, surviving the testator she took absolutely. *Slade* v. *Milner*, 4 Mad. 144.

24. Legacies to "C., and to the heir of his body;" to M. "to be secured to her, and the heirs of her body;" to F. "and to her issue," are absolute legacies. *Crawford* v. *Trotter*, 4 Mad. 361.

25. Lord Vere bequeathed certain chattels to trustees in trust, for his wife for life, then to his son for life, "and after the decease of the survivor, in trust for such person as should from time to time be Lord Vere; it being my will and intention that the same should, after the

decease of my wife, go and be held with the title of the family, as far as the rules of law and equity will permit." The testator at his death left his wife and son surviving, and also two children of his son The wife and son died. The eldest grandson afterwards died, leaving issue, a son, who died under twenty-one, the second grandson being still living. Held, that it was a direct gift of the chattels, and not an executory trust; and that the son and eldest grandson took only life interests, and that the great grandson deceased, took the absolute interest. *Lord Deerhurst* v. *Duke of St. Albans.* 5 Mad. 232.

26. Bequest of residue to testator's wife, requesting her to leave, at her death, £200 "to each of the Miss N.s, and the remainder of her property to my nephews, G. & W. Eade." Held, a valid bequest to the Miss N.s, but that the widow was entitled absolutely to the remainder, in exclusion of the nephews. *Eade* v. *Eade*, 5 Mad. 118.

IV. Life Interest.

1. Bequest of money in the funds, in trust for an infant, and for such younger son or sons as the infant should have, equally to be divided between them; and in case there should be but one younger son, then the whole to him. The infant takes only a life int rest, subject to which his younger children take the whole. *Garden* v. *Pulteney*, 2 Eden, 323.

2. A bequest to the sole use of N., or of her children for ever. Held, that N. took an interest for life in the legacy, and that it belonged to her children after her death. *Newman* v. *Nightingale*, 1 Cox, 341.

3. Bequest of an annual sum to be raised "for the support of the children of J. H., to be paid them from time to time as their necessities require, without regard to their father or mother." This cannot be restrained to any thing short of a life interest, though it was probably intended to be for their minority only. *Alexander* v. *M'Cullock*, 1 Cox, 391.

4. A bequest of residue to be invested in government securities, and the interest "to be paid only to bring up and educate M., her uncle to be her guardian, and the said M. to have the said interest to maintain her as long as she lives single, and no child; and when it shall please God to call her, that money shall come to my brothers and sisters children." Held, that the interest of the fund was well given to M. for life, but that she had no claim to any part of the principal. *Bird* v. *Hunston*, 1 Wil. 456.

5. Bequest of residue of real and personal estate unto L. J., to be placed at interest until twenty-one, or marriage, and then the whole, with the accumulation, to be paid to her, to and for her use during her life; and after her decease, unto the heirs of her body, lawfully begotten, equally to be divided between them, share and share alike, and for default of such issue, or in case of the death of the said L. J. before twenty-one, or marriage, such residue to J. C. and his heirs for ever. Held, to pass only an estate for life to L. J. in the residue of the personal estate, and not to her separate use; and she being married, and her husband a bankrupt, proposals were directed for a settlement on her and her issue. *Jacobs* v. *Amyatt*, 1 Mad. 376, (*n*).

6. A legacy to S. "and to her heirs." The word "heirs" being used as synonimous with children, imputing that they are to take after her death, it was held, that S. was only entitled for life, with remainder to her children. *Crawford* v. *Trotter*, 4 Mad. 361.

7. Bequest of household goods, &c., after payment of debts, &c., to testator's wife, for her life or widowhood, with power to her to sell the same as she should think proper, for her own benefit, and the maintenance of testator's nephew and daughter-in-law, during their minority, with a bequest over upon the death or second marriage of the wife of the same, or so much as should then remain to such nephew and daughter-in-law. Held, that the widow was entitled to the residue for her life or widowhood, with a power to apply any part of the capital for her own benefit, and the proper maintenance of the nephew and daughter-in-law during their minorities; and that on the death or marriage of the widow, the remainder of the capital unapplied was well limited over. *Surman* v. *Surman*, 5. Mad. 123.

8. Trust by will of the residue for testator's nephew and his heirs, the trustees to pay him the interest for life; with power to the trustees, in case they should see it would be for his benefit, to advance him any part of the principal for his ad-

vancement in life; and in case no part should be advanced, then the residue to be divided among the nephew's issue; and if he left no issue, then over. This is not an absolute bequest to the nephew, but a life interest only, with a discretionary power in the trustees to advance the whole property. *Robinson* v. *Cleator*, 15 Ves. 526.

V. JOINT TENANCY, OR TENANCY IN COMMON.

1. A bequest of personal property to more than one, without words of severance, is a joint tenancy. *Swaine* v. *Burton*, 15 Ves. 365.

2. Under a bequest over, after an interest for life, by words importing both a joint interest and a tenancy in common, as to three, "or the survivor, share and share alike;" the period to which the survivorship relates, depends not on any technical words, but on the apparent intention collected from the particular disposition or the general context. Right of legatee not bound by mere acquiescence under the mistaken construction of the executor. *Newton* v. *Ayscough*, 19 Ves. 534.

3. Bequest to testator's mother and sisters, "to be divided among you," creates a tenancy in common. *Ackerman* v. *Burrows*, 3 V. & B. 54.

4. A bequest to A. and B. with a direction that B. shall, during his minority, be maintained and educated out of the fund; and that if B. should wish to be put out apprentice, a competent sum should be raised out of the fund, as an apprentice fee, for the use of B., and in part of the share to which he would be entitled; held to create a tenancy in common. *Gant* v. *Lawrence*, Wigh. 395.

5. Bequest to two executors and the survivor, £1000, four *per cents*, in trust for testator's two nieces, to pay them the dividends thereof, from time to time; and from and after the decease of the two executors, the stock to go to the two nieces, their executors, administrators, or assigns, equally. The two nieces took absolute equitable interests in the stock, as joint tenants, during the lifetime of the executors; and upon the death of the survivor, the trust determined, and the nieces then took absolute legal interests, as tenants in common. *Gardiner* v. *But*, 3 Mad. 425.

VI. SURVIVORSHIP.

1. Testator gave legacies to his three children, payable after the death of his executrix, and if any of the children should die unmarried, and without issue, before the death of the executrix, the legacy to go to the surviving children. One of the daughters married, but died without issue in the lifetime of the executrix. Her legacy survived to the other children. *Hepworth* v. *Taylor*, 1 Cox, 112.

2. Words of survivorship in a legacy, are to be referred to the period of division and enjoyment, unless a special intent to the contrary is to be found in the will. *Cripps* v. *Wolcott*, 4 Mad. 11.

3. If there be no previous life estate given in the legacy, the period of division is the death of the testator, but if a previous life estate is given, then the period of division is the death of the tenant for life. *Ibid*, 4 Mad. 15.

4. Devise of real estate to be sold after the death of tenant for life, and bequest of specific sums out of the produce, to several grandchildren and a child, and of the residue to other children, to be respectively paid at 21, or marriage. "But if any of my said children or grandchildren shall happen to die before the time of such legacy becoming due and payable, then I give and bequeath the share or part of such child, or children, or grandchildren, so dying, unto and among those that shall be then living, share and share alike." Two of the children died before the testator: their shares are to be divided among the other children and grandchildren equally. *Walker* v. *Main*, 1 J. & W. 1.

5. No implication that the survivorship was to take place amongst the children and grandchildren, distinctly, from the inequality of legacies, or from the bequest to each class being made by distinct clauses. *Ibid.*

6. Bequest of an annuity to the children of A. in equal shares and proportions, to continue during their joint lives, and the life of the survivor of them. The children take as tenants in common, and there is no survivorship between them by implication; therefore the share of one dying goes to its representative. *Jones* v. *Randall*, 1 J. & W. 100.

7. Gift of real and personal estate, after a life interest to testator's widow, to

trustees, to be converted into money, and divided among several persons named, and the survivors or survivor of them. Those only are entitled, who survive the widow. *Hoghton* v. *Whitgreave*, 1 J. & W. 146.

VII. Specific.

1. A legacy to a natural daughter, of "£5000 sterling or 50,000 current rupees," afterwards described as "now vested in" East India bonds, and again mentioned as "the said sum of £5000 or 50,000 current rupees." This is not a specific but a general legacy, or demonstrative legacy, with a fund pointed out for payment. This construction favored by the testator placing himself in *loco parentis*, and intending a provision at all events, and by there being another legacy of £3348, "which said sum is in two bills" &c., which is clearly specific. *Gillaume* v. *Adderley*, 15 Ves. 384.

2. Residuary bequest of the personal estate not herein before specifically disposed of, not specific without a clear indication of that intention. *Bootle* v. *Blundell*, 1 Mer. 237. 19 Ves. 532.

3. A legacy of £50, for a ring, is not a specific legacy, and will therefore carry interest with other pecuniary legacies. *Aprecce* v. *Aprecce*, 1 V. & B. 364.

4. There is a distinction between the specific bequest of a debt, and legacies out of it. *Smith* v. *Fitzgerald*, 3 V. & B. 2.

5. The same legacies may be specific in one sense, as out of a particular fund; and pecuniary in another, as of definite sums of money; not a gift of the fund itself, or any aliquot part of it. *Ibid*, 3 V. & B. 5.

6. The gift of a sum of money, by will, though with a plain reference to amount of the fund, out of which it is given, is different from a bequest of the fund itself, with all the chances of its actual amount. *Ibid.*

7. Where the testatrix gave several specific legacies of "long annuities, stock," though it was doubtful whether they were intended as specific legacies, yet there being nothing in the will to shew the testatrix *did not* intend them as such, they were so decreed. *Attorney General* v. *Grote*, 3 Mer. 321.

8. Testator reciting that he has £1500 five *per cents.* gives it to A., and then gives to B. all other his stocks, that he might be possessed of at his death. The latter bequest is not specific, but is liable to debts in preference to the former. *Parrott* v. *Worsfold*, 1 J. & W. 594.

9. Semble, that a legacy of "all my stock that I may be possessed of at my decease," is not specific. *Ibid*, 601.

10. The word "my" alone is not enough to make a legacy specific, unless a particular fund is referred to. *Ibid*, 602.

VIII. Accumulative.

1. Testator gives to his executor an annuity of £200, charged on his real estate, and payable at certain specific periods; by a codicil, attested by two witnesses only, he gives him another annuity of £100, payable as mentioned in his will: held, that the executor was entitled to both, the latter annuity being payable out of his personal estate. *Wright* v. *Lord Cadogan*, 2 Eden, 239.

2. Generally, legacies given by different instruments, whether by will and codicil, or by two codicils, will be accumulative. *Foy* v. *Foy*, 1 Cox, 163. *Baillie* v. *Butterfield*, 1 Cox, 392.

3. And for this purpose the probate being granted as of *a will* and *codicil*, is conclusive to shew that they must be taken as distinct instruments. *Baillie* v. *Butterfield*, 1 Cox, 392.

4 Where a testamentary instrument, incomplete as a will, appears on the face of it to be intended as a substitution for a former complete will, the legacies given by the latter only, shall take effect, notwithstanding both instruments are proved in the spiritual court. *Jackson* v. *Jackson*, 2 Cox, 35.

5. Legacies to the same persons by distinct instruments are accumulative, but the presumption is subject to be repelled by internal evidence of the will, as where the same sum is given for the same cause, it is then repetition. But whether the mere equality of amount makes it repetition—*Quere*. *Benyon* v. *Benyon*, 17 Ves. 34.

6. Double annuities, by will, to be paid at different times or in a different manner, are accumulative. *Currie* v. *Pye*, 17 Ves. 462.

7. Where the testatrix left three testamentary papers, the first and last of which began with the same forms, and almost the same words, appointed the same legatee her executrix by the same description, and gave, with little variation, the same legacies to the same persons; the court held the third instrument to be intended as a substitution for the first, and consequently that the legacies, were not accumulative. *Attorney General* v. *Harley*, 4 Mad. 236.

IX. Legacy, contingent or vested.

1. Where the residue of the testator's estate was directed to be invested in government securities, and the interest paid to his wife, and after her death to be sold, and the money thereby arising to be divided into five equal shares, among his four daughters by name, and his two grandchildren. Held that the residue vested in the daughters during the mother's life. *Hatch* v. *Mills*, 1 Eden, 342.

2. Testator having four daughters, A., B., C., & D., gave £4000 to each of his daughters A. and B.; with a direction, that if either of them died unmarried, £3,600, part of the £4000, should be divided among his surviving daughters, and the child or children of such of them as should be then dead. A. died unmarried, C. had five children, of whom three died in the lifetime of A., and two survived her. The five children of C. took *vested* interests, in equal fifths, of the fund, as well those who died before, as those who survived A. *Stanley* v. *Wise*, 1 Cox, 432.

3. Testator gave and bequeathed to his daughter, an annuity of £200 for life, over and above her provision by marriage settlement; and in case she should survive her husband, and have no child or children who should be entitled under the settlement, he bequeathed all his interest in the settlement and annuity of £200, upon the contingency of her surviving her said husband, and not otherwise, to his said daughter: testator then directed that out of the general residue of his estate £6500 should be invested, for the use and benefit of his said daughter, or such persons as should be entitled thereto, in lieu and satisfaction of the said annuity, but not to be enjoyed or paid otherwise than upon the condition aforesaid. The daughter died in the lifetime of her husband. It was held a contingent legacy, and the contingency not happening it continued part of the residue. *Bird* v. *Le Fevre*, 15 Ves. 589.

4. In case of a trust to pay the dividends of stock to the niece of the testatrix for life, and after her death to divide the capital among the brother and sisters of the testatrix, and in like manner to the survivors or survivor of them. The shares of those who died in the lifetime of the niece, passed to their representatives. *Hallifax* v. *Wilson*, 16 Ves. 171.

5. Legacy to A. at the decease of testator's wife, to whom, after other legacies, he bequeaths the whole of his property. This is a legacy vested at the death of the testator, the payment only being postponed. *Blamire* v. *Geldart*, 16 Ves. 314.

6. A bequest over in case of the death of a legatee, before a certain period, takes effect on the death within that period, but during the testator's life. *Humberstone* v. *Stanton*, 1 V. & B. 388.

7. A bequest to executors of £4000, in trust, to invest the same in government securities, and to pay one-half of the interest to A. and the other half to B. during their lives; "and as their lives drop and expire, I direct that the principal and interest be reserved and equally divided amongst their children when they shall severally attain the age of twenty-one. A. dies without issue. The entire principal vests in the children of B. on their severally attaining the age of twenty-one. *Smith* v. *Streatfield*, 1 Mer. 358.

8. The testator, after making provision for the maintenance of his children, gives all the residue of his estate to his son, "to be a vested interest on his attaining twenty-one;" and if he should happen to die before twenty-one, then to testator's daughter, with remainders over. Held, that as the testator had fixed the time of vesting, this would not vest till the legatee had attained twenty-one: and the court directed an accumulation of rents and profits. *Glanvill* v. *Glanvill*, 2 Mer. 38.

9. Generally, where there is no gift but by a direction to transfer, "from and after" a given event, the vesting must be postponed till after that event has happened, unless, from particular circum-

stances, a contrary intention is to be collected. *Leake* v. *Robinson*, 2 Mer. 387.

10. When the gift is only in a direction to trustees to pay &c. " to such child or children, &c. as shall attain twenty-five," or " upon the attainment of the age of twenty-five," or " from and immediately after such child or children shall attain the age of twenty-five," the interest will not vest till the legatee attains the age of twenty-five, there being no antecedent gift of which the testator could intend merely to postpone the enjoyment. *Ibid*, 2 Mer. 363.

11. A gift of all the interest of a legacy furnishes a strong presumption of intention to vest the capital, and which is not afforded by a direction for maintenance out of the interest. *Ibid*, 2 Mer. 386.

12. A testator having attempted to give to after-born grandchildren, and also to postpone the period of vesting till twenty-five, which are two objects legally inconsistent, the court cannot choose between these inconsistent objects, so as to give effect to the one and disappoint the other. *Ibid*, 2 Mer. 388.

13. Testator gives all his personal estate upon trust, to pay the interest to his daughter for her life, and after her decease to pay and divide the principal among her children, and the issue of a deceased child, as she (his said daughter) should by will appoint; and in default of appointment to be equally divided among them, the portions of sons to be paid at their respective ages of twenty-one, and of daughters at their respective ages of twenty-one, or marriage. If no issue, or all die before their respective portions become payable, then over: the shares are so given as to vest immediately in the children of the daughter, though liable to be divested by all dying under twenty-one without issue. The share of a child so dying therefore passed to its representative. *Skey* v. *Barnes*, 3 Mer. 335.

14. If a limitation over in a devise of real estate, is not to take effect till a failure of the issue of all the devisees in tail, and the whole is then to go over, an inference arises that in the mean time the several devisees in tail are to succeed to each other. But with respect to personal property, if a share once vests, though liable to be divested on a contingency, the question of survivorship never can arise; if such contingency happens, the share goes over, if not, the share remains vested and passes to personal representatives. *Skey* v. *Barnes*, 3 Mer. 343.

15. A devise over upon a contingency, does not of itself prevent the shares from vesting in the mean time, provided the words of bequest be in other respects sufficient to pass a present interest, although such a devise over of the entirety may be called in aid of other circumstances, to show that no present interest was intended to pass. *Ibid*, 3 Mer. 341.

16. Bequest of specific sums out of the produce of the sale of an estate to several grandchildren and a child, and the residue to other children, payable at twenty-one or marriage; but if any die before the time of such legacy becoming due and payable, testatrix bequeathed " the share or part of such child or children, or grandchildren, so dying, unto and among those that shall then be living, share and share alike." A child and grandchild survived the testator, but died before the tenant for life, their shares were held vested, and transmissible to their representatives. *Walker* v. *Main*, 1 J. & W. 1.

17. Bequest of a legacy to A., to be paid at twenty-five, or between twenty-one and twenty-five, if the executors should think proper, and maintenance in the mean time, with a limitation over in case A. should not receive or dispose of it by his will or otherwise. The legatee attained twenty-five, and died intestate, and without having in his lifetime received the legacy. Held to be a vested legacy, and that the limitation over was void. *Ross* v. *Ross*, 1 J. & W. 154.

18. A bequest over in case of the death of a legatee, generally, and not expressly referrible to any certain time or event, within or before which such dying must occur to give effect to such remainder, held not necessarily to refer to a dying in the lifetime of the testator, but will be construed so as to give effect to such an intention on the part of the testator, as may be presumed, from the language of the will, to have been his object. Thus a bequest of personal property to A. for life; remainder to her three children, in equal shares; and in case of the death of either, or any of them, the share of such so dying to go to their children, is a vested interest, subject to be divested if either of the legatees in remainder die

during the life of the particular tenant, and his share then becomes the property of his children, and not of his personal representatives. *Hervey* v. *MacLaughlin*, 1 Price, 264.

See also *Slade* v. *Milner*, 4 Mad. 144.

19. A gift to testator's daughter of an annuity of £120, the interest of £4000 3 *per cent.* annuities, and a direction for "the interest, as it becomes due, to be added to the principal till she attains the age of twenty-one years, except £20 *per annum* for clothes." The directing accumulation of the interest till twenty-one does not prevent its vesting; and as there was no express gift over in case of death under twenty-one, the legacy was held to be vested. *Stretch* v. *Watkins*, 1 Mad. 253.

20. Legacy of stock to testator's wife for life, and, after her death, one-third part of the principal to testator's son, if he shall be then living, and, if dead, to his child or children; and a bequest, in the same manner, of one-third to each of his two daughters, with a proviso, that if either of his daughters should die unmarried, and without issue, the surviving daughter to take both shares; and if both die unmarried, and without issue, then the shares to go to the son, if living, or, if dead, to his children. Held, that the wife having died before the testator, the daughters took their shares absolutely upon his death, the contingency in favor of the issue being the chance of the daughter's dying in the lifetime of the wife. *Laffer* v. *Edward*, 3 Mad. 210.

21. Bequest to A. for life, and afterwards to B.; but if he should be "*then*" dead, to C. and D. in equal shares, or the whole to the survivor of them. B., C., and D., survived the testator, but died in the lifetime of the tenant for life. Held, that the particle "*then*" applied not to the vesting, but to the possession, and that it was a vested gift to C. and D. as tenants in common, subject to be divested, if one only should survive the tenant for life. *Browne* v. *Lord Kenyon*, 3 Mad. 410.

22. Bequest to testator's daughter of interest and dividends of personal property for life, and then to be equally divided amongst her three children, "or such of them as shall be living at her decease." The children all died in the lifetime of the tenant for life, and in that event the alternative part of the clause failing, the primary expression, which gave the children vested interests, took effect. *Sturgess* v. *Pearson*, 4 Mad. 411.

X. Conditional.

(a) *Condition, where valid.*

1. In the case of a legacy to a feme covert, on condition of her living with her husband, of £2 per month, and no more; but if she lived apart from her husband, and with her mother, £5 per month. Held, that she was entitled to the larger sum, and that the latter condition, being *contra bonos mores*, was void. *Brown* v. *Peck*, 1 Eden, 140.

2. Testator gave £1000 to D.; but if D. should not be alive, and there be certain intelligence thereof, the testator willed that the same should be divided between the plaintiffs. D. appeared to have been alive at the date of the will, but died in the lifetime of the testator, the plaintiffs are entitled to the £1000. *Parry* v. *Boodle*, 1 Cox, 183.

3. Legacy to trustees to pay the interest to the separate use of A. for life; then to B. for life; and after the death of A. and B. the principal to A.'s children; and, if no child, to pay the interest to the husband of A. during his life: and after his decease, if he should become entitled to the interest, then to pay the principal over to other persons. The husband died during A.'s life, and therefore was never entitled to the interest; but the limitation over is good, this not being the case of a condition precedent, but fixing the period at which the legatees over shall take, if the husband ever takes. *Pearsall* v. *Simpson*, 15 Ves. 29.

4. Bequest of residue to trustees, that in case S. P. should, within six calendar months after testator's decease, give security not to marry A., then, and not otherwise, such residue to be divided among the children of S. P., with a proviso, that if S. P. refuses or neglects to give such security, then the legacy over. This is a condition precedent; and the six months are exclusive of the day of the testator's death. *Lester* v. *Garland*, 15 Ves. 248.

5. A residuary bequest to A., "in case she should have legitimate children, in failure of which" to go over. A. had only one child born alive, who died before

her: she was nevertheless entitled. *Wall* v. *Tomlinson*, 16 Ves. 413.

6. A bequest of a residue to the testatrix's younger children: "but in case I shall have but one child living at the time of my decease," or all but one die under twenty-one, and unmarried, then to another family. The having a child is not a condition: the bequest over, therefore, took effect in the event of the testatrix's death, never having had a child. *Murray* v. *Jones*, 2 V. & B. 313.

7. Under a bequest of stock in trust to pay the dividends to the niece of the testator, "for and towards the maintenance, education, and bringing up of her children until they shall attain twenty-one; then to transfer the principal equally among them," with a bequest over in default of such issue. Held, that the dividends are payable to the niece, although she has no child. *Hammond* v. *Neame*, 1 Wil. 9. 1 Swan, 35.

8. A bequest, the interest of residue, "to be paid duly to M., her uncle to be her guardian: and the said M. to have the interest to maintain her as long as she remains single, and no child: and when it shall please God to call her, that money shall come to my brothers' and sisters' children." The testator had given a legacy to one of his brothers. Held, that M. took a life interest, although she married and had a child. *Bird* v. *Hunston*, 1 Wil. 456.

9. A legacy, upon condition "that the legatee shall change the course of life he has too long followed, and give up all his low company, frequenting public-houses, &c." This is a valid condition, and such as may be enforced; and the evidence not being sufficiently conclusive, an inquiry was directed, following the words of the bequest. *Tattersall* v. *Howell*, 2 Mer. 26.

10. Bequest of £300 to A., to be paid to him, his executors, &c. within twelve months after the death of B., "in case B. shall happen to survive my wife." The latter words do not constitute a condition, but only relate to the time of payment, and therefore do not make void the legacy, where B. died in the lifetime of the testator's wife. *Massey* v. *Hudson*, 2 Mer. 130.

11. In a case where a testator, after giving different parts of his property to his three children, directed the residue of his estate, real and personal, to be equally divided between them, with a proviso, that, in case of the death of any without issue, the dying child's or children's "share, or shares" should go over to, and be divided among the survivors; and, by a clause, directed, that any, or either of his said children, who should dispute his will, should have no benefit from any thing therein contained, but the "share, or shares," therein before given to him, her, or them, should go to the others. The court held, that the proviso in the will, as explained by the subsequent clause, extended to all the interest taken by the children under the will, and was not confined to the residue only. *Hardman* v. *Johnson*, 3 Mer. 347.

See also *Goldsmid* v. *Goldsmid*, 1 Wil. 140. 1 Swan. 211.

12. Legacy to three persons, to be paid as soon as the legatees should arrive in England, or claim the same, provided they should arrive or claim the same within three years after the testator's death: and if they should not, part of the amount of the legacies to go over. The legatee over filed a bill for the legacy; but the court would not make a decree till after a reference to the Master, to inquire whether the three persons had arrived in England, or claimed the legacy within the three years. *Burgess* v. *Robinson*, 1 Mad. 172.

See also *Tulk* v. *Houlditch*, 1 V. & B. 248.

13. Legacy, with direction to the executor to pay the interest to the legatee every year; but the principal "only in case of an establishment or acquisition for him, which seem advantageous to my executor," with a direction to the executor to pay the legacy, although there should be "at the actual moment neither establishment nor acquisition," is a conditional legacy. *Pink* v. *De Thuisey*, 2 Mad. 157.

14. A legacy given upon a condition, with a power to the executor, at his discretion, to dispense with the condition, does not give the legatee a right to claim the legacy without performing the condition; and a court of equity has no authority to control the executor in the exercise of his discretion. *Ibid.*

For Legacies in restraint of Marriage see Tit. Marriage (*post*).

(b) *Acceptance or Forfeiture.*

1. A legatee accepting a conditional legacy will be bound by his acceptance. *Byde* v. *Byde*, 2 Eden, 19. 1 Cox, 44.

2. Testator gave to his son for his life the interest of a mortgage upon an estate, of which he was tenant for life in remainder at testator's death; and also the furniture in certain houses, upon condition of his executing a release of all claims he might have upon the testator's estate, and of his not contesting the will. The son lived fourteen months after the father's death without executing a release; and upon his first hearing the will, had expressed his dissatisfaction, and an intention of filing a bill; but his never having paid any part of the interest of the mortgage, and having entered into possession of the furniture, and exercised acts of ownership, together with certain expressions of assent in his letters, were held to be evidence of his acceptance. *Earl of Northumberland* v. *Marquis of Granby*, 1 Eden, 489.

3. Legacy, on condition that the legatee notified to the executors his willingness to release his claims: held, that the legatee forfeited his right to this legacy by instituting a suit. *Vernon* v. *Bethell*, 2 Eden, 110.

4. Trust by will to permit testator's wife to receive interest and rents for life, for the maintenance of herself and children; and in case of her marriage, that the interest, &c. shall not be paid to her any longer, but be applied by his executors and trustees, she being an executrix with them, for maintenance of the children revoked on her marriage, and not restored by a general residuary disposition to her. *Duncan* v. *Duncan*,
Coop. 256. 19 Ves. 396.

5. When a period of payment is appointed, the subsequent failure, or breach even of an express condition annexed to a legacy, cannot affect the right to receive it. *Brydges* v. *Wotton*,
1 V. & B. 138.

6. Legacy, reciting the probability that the legatee was not living, given upon express condition, that he shall return to England, and personally claim of the executrix, or in the church porch: if the legatee does not so claim within seven years, he will be presumed dead, and the legacy will fall into the residue. *Tulk* v. *Houlditch*, 1 V. & B. 248.

7. The legatees dying abroad within seven years, without having returned, the legacy will not be considered due, the existence of the legatee, though otherwise appearing, being to be proved by the particular means prescribed by the will, and therefore not within the cases from the civil laws; where, the end being obtained, the means were not essential.
Ibid.

8. Legacies given, to be paid as soon as the legatees should arrive in England, or claim the same, provided they should arrive or claim within three years; and if they should not so arrive or claim, then the legacies to fall into the residue. The condition is not performed by one of the legatees arriving in England, and making his claim after the time specified, although ignorant till then of the will, or of the testator's death, and no advertisement for legatees. *Burgess* v. *Robinson*.
3 Mer. 7.

XI. Charged on Land.

1. Testator charged his real estate with £1000, to be applied as the residue of his personal estate was thereinafter directed. He then gave the residue of his personal estate, after his debts, legacies, and funeral expenses were paid to certain trustees, for the benefit of his relations, in manner therein mentioned. The personal estate was insufficient for payment of his debts. The £1000 is payable to the trustees for the relations, without being subject to the claims of the creditors. *Killet* v. *Ford*, 1 Cox, 442.

2. Where a former will makes a charge of legacies generally on land, and a subsequent will giving legacies is not attested so as to affect the land; yet the general charge of the former shall include the legacies given by the latter. Otherwise, where the charge is made of particular legacies. *Jackson* v. *Jackson*,
2 Cox, 35.

3. Devise of copyhold lands to A. charged with a legacy to B.; A. sells the estate, without having discharged the legacy. On a bill filed by B. the legacy, interest, and costs were decreed against the purchasers, with an inquiry as to whether A. had received the whole purchase money, and in that case a decree over against A. *Newman* v. *Kent*,
1 Mer. 240.

4. Generally, legacies form no charge on the real estate, to affect the heir or devisee, unless the testator has shown a manifest intention to that effect; but where the testator gave all his real and personal estate to his wife for her life, blending

them together as one fund, and after her death gave certain pecuniary legacies, and then the rest, residue, and remainder of his real and personal estate to his nephew, continuing to treat them as one fund, after his wife's death. The court held the legacies a charge on the real estate. *Bench* v. *Biles*, 4 Mad. 187.

5. Where regard being had to all parts of the will, it appeared to be the testator's clear intention to charge a particular legacy on his lands, in exemption of his personal estate, and the lands proved insufficient, yet the court held that it could not supply funds by making the personal estate liable. *Gittins* v. *Steele*, 1 Swan. 24.

6. Where a fixed, independent, distinct intention to give a legacy, is clearly marked, the legacy may stand, though the fund out of which it is directed to be paid does not exist. So a legacy of £10 a-year to a servant, to be paid, first, out of a real estate, which fails, and then out of a government fund, of which the testator possessed none at his decease, the legacy was decreed out of the general personal estate. *Mann* v. *Copland*, 2 Mad. 223.

XII. Charged with Debts.

1. Testatrix having made several specific bequests of stock, gives the residue of her funded property, after the payment of debts and legacies, to A. She gave the residue of her real and personal estates to others, and directed one particular legacy to be paid out of the stock. Held that the residue of the stock was the primary fund for payment of debts and legacies. *Choat* v. *Yates*, 1 J. & W. 102.

2. The testator gave specifically, parts of his personal estate, chargeable with his debts and legacies, and gave the residue of his personal estate to another: the debts and legacies fall upon the specific gift, and not upon the residue. *Browne* v. *Groombridge*, 4 Mad. 495.

XIII. Exempt of Duty.

1. A legacy of £3000 to trustees upon trust, to invest and pay the interest to A. for life, and after her death to transfer the principal to B. Under a decree, this legacy is paid into court, and invested in stock, in the name of the Accountant-General, previously to the imposition of the duty on legacies, by 20 Geo. 3. c. 28, B. being then an infant, and therefore, incapable of discharging the trustees. This is a sufficient *appropriation* of the legacy within the words of the act of 48 Geo. 3, c. 149, "paid, retained, satisfied, or discharged," before the 10th of October 1808; and, therefore, no legacy duty was chargeable upon the legacy, when it became payable. *Hill* v. *Atkinson*, 2 Mer. 45.

2. Where the testator by a codicil expresses his wish to increase a legacy of £4000, given by his will, exempt from the legacy duty, to £5000, and then revokes the gift of £4000, and gives £5000 upon the same trusts, &c. and by a second codicil, expressing that he is desirous of further increasing the same to £6000, he revokes the gift of £5000, and gives in lieu thereof £6000, upon the same trusts, &c. this is not a revocation but substitution in each instance, and therefore exempt from the legacy duty in the same manner as the original legacy. *Cooper* v. *Day*, 3 Mer. 154.

3. A testator having directed legacies to be paid at the expiration of six months after his decease, "without deduction, the legatees are entitled to the full amount, and the legacy duty must be paid by the executors. *Barksdale* v. *Gilliat*, 1 Swan. 562.

4. A legacy bequeathed to be paid out of the rents and profits, and the produce of sale of a real estate, devised to be sold for the payment of such legacy *inter alia*, being in a subsequent part of the will directed by a general clause, extending to all the legacies before given, to be paid in full, free of the duty. Held that the duty on that particular legacy must be paid out of the same fund and not out of the personalty, the exemption from the duty being an augmentation of the legacy, and therefore payable out of the specific fund. *Noel* v. *Lord Henley*, 7 Price, 241.

XIV. Interest upon.

1. Devise to A. for life, with remainder to his first and other sons, in tail; remainder to his daughters, in tail; and, in default of such issue, the premises to stand charged with two sums, to be paid after the death of A. without issue, and subject to such charge over, with a power to A., of jointuring the whole estate, which he executed. A. dying without issue, held that the sums charged, carried

interest, only from the death of the jointress, who survived A. *Reynolds* v. *Meyrick*, 1 Eden, 48.

2. It is the invariable law of the court, that where a legacy is given by a parent to a child otherwise unprovided for, the child shall have interest by way of maintenance, from the death of the parent, and a direction that if the child die before the time of payment, the legacy shall not be raised, will not prevail against the general rule. *Cary* v. *Askew*, 1 Cox, 241.

3. But if the parent makes an express provision for maintenance out of another fund, the legacy shall not carry interest until the time of payment. *Wynch* v. *Wynch*, 1 Cox, 433.

4. Legacies to the testator's maternal grandchildren, though not so described in the will, to be paid as they respectively attain the age of 23, and if they die before that time their respective legacies to sink into the residue. These legacies will not carry interest before the time of payment, nor entitle the legatees to maintenance. *Descrambes* v. *Tomkins*, 1 Cox, 133.

5. Legacy to children with interest from the testator's death, a child in *ventre sa mere* held to be entitled to interest from the birth only. *Rawlins* v. *Rawlins*, 2 Cox, 425.

6. Interest upon a legacy to a wife or a natural child, not allowed from the testator's death, as it is in favor of a legitimate child, by way of maintenance. *Lowndes* v. *Lowndes*, 15 Ves. 301.

7. Testator, by will, charged his real estate with the payment of simple contract debts of his brother, naming the sums and persons to whom payable; these will be considered as legacies, and as such carry interest from the death of the testator, at 4 *per cent.* *Shirt* v. *Westby*, 16 Ves. 393.

8. Interest was given from testator's death upon legacies to his grandchildren; by implication, where the object was provision and maintenance for the legatees, they being described as infant orphans, and some of them as illegitimate. *Hill* v. *Hill*, 3 V. & B. 183.

9. The testator gave £500, without any interest, in trust for A., provided the same should be claimed within five years after his death. But in case the same should not be claimed within five years, then he gave the same, without interest, as aforesaid, to B. This legacy not being claimed by A. within the five years, is payable to B., with interest, from the expiration of the five years. *Careless* v. *Careless*, 19 Ves. 601. 1 Mer. 384.

10. Where no direction is given as to surplus interest of a legacy, where the capital is made payable at a future time, such surplus interest falls into the residue; for though the interest of a residue goes with the capital, that of particular legacies does not. *Leake* v. *Robinson*, 2 Mer. 384.

11. A sum being bequeathed on trust, towards the maintenance and support of an adult, who was separated from her husband, the testator's nephew, with separate allowance, on condition of maintaining her children, and assisted by a voluntary annuity from the testator during his life, and the maintenance and education of her children until the youngest should attain 21, and after that event to her as long as she remained the wife or widow of her then present husband, with a direction in case of her death, or marriage before that event, to the trustees, to take the children under their care: held that such legatee is not entitled to interest from the death of the testator, the exception to the general rule in case of legacies by persons *in loco parentis* not extending in favor of an adult legatee, and the will expressly directing payment to certain annuitants within a year from the testator's death. *Raven* v. *Waite*, 1 Wil. 204. 1 Swan. 553.

See also *Lowndes* v. *Lowndes*, 15 Ves. 301.

12. Legacies to infants, payable at 21, with benefit of survivorship in the event of death under that age, and a power to the executors to apply any part of the legacies towards the maintenance of the legatees, held to bear interest from the death of the testatrix, the infants being her cousins, and destitute of other provision. *Pett* v. *Fellows*, 1 Swan. 561.

13. Tenant for life of a residue, under a will, has no claim to interest until one year after the testator's death. *Stott* v. *Hollingworth*, 3 Mad. 161.

14. Testator, after devising lands to uses in strict settlement, gives the residue of his personalty to be invested in lands, to be settled to the same uses. The tenant for life is not entitled to the interest of the residue till one year from the testator's death. *Taylor* v. *Hibbert*, 1 J. & W. 308.

15. The statute 39 and 40 Geo. 3. c. 98, prevents an accumulation, directed by will, of interest, during the minority of an unborn child. The excess forms part of the residue. *Haley* v. *Bannister*, 4 Mad 275.

16. Legacies charged on a reversion, directed to be raised by sale or mortgage, and declared to carry interest from the death of the testator, it not appearing from the will that the estate charged was a reversion. *Davies* v. *Davies*, 1 Dan. 84.

XV. INVESTMENT OR APPROPRIATION OF.

1. Where a particular estate is charged specifically with a legacy, payable at a future day, with interest from the testator's death, the legacy shall not be raised if the legatee die before the time of payment. The court will not direct a legacy to be raised out of land before the time of payment, although it will secure a personal fund for a future or contingent legatee. *Gawler* v. *Standerwicke*, 2 Cox, 15.

2. The testator gave and bequeathed to all the children of his sister, "whether now born, or hereafter to be born, the sum of £2000 each, payable at twenty-one," and directs his executors to appropriate a fund for payment of those legacies; the interest of such fund to be paid to his sister until the legacies become payable. The court will carry into effect this intention, in favor of children born after the death of the testator, as well as those living at the time of his death, by directing such a fund to be impounded, as will probably be sufficient to answer the purpose. *Defflis* v. *Goldschmidt*, 19 Ves. 566. 1 Mer. 417.

3. Trustees having invested in stock a sum of money to answer litigated legacies, in pursuance of an order made on their own application; the plaintiff, who was entitled thereto, not having appeared or consented to such investment, this was, nevertheless, held to be an appropriation, by which all parties were bound, and that the plaintiff was entitled to the stock, and all benefit accrued from their rise, subsequent to the investment. *Burgess* v. *Robinson*, 3 Mer. 9.

4. The court adopts, as a general rule, that the investment of money in the three *per cent* consols, is most beneficial to the suitors of the court, and never varies from this rule without special circumstances; and therefore, a reference to the master to ascertain whether it would be most for the benefit of infants, that money in the hands of executor should be laid out in mortgage, was refused. *Norbury* v. *Norbury*, 4 Mad. 191.

5. But where the testator had directed the dividends to be paid to the tenant for life, at Lady-day and Michaelmas, the court ordered the money to be laid out in three *per cent*. reduced, since the trusts of the will, as to the time of payment, could not otherwise be conveniently executed. *Caldecott* v. *Caldecott*, 4 Mad. 189.

6. A reference was made to the master, on a legatee's bill, to compute how much stock it would be necessary to set apart to answer the legatees: the master made his report, but before any order was made on the report, one of the infant legatees attained the age of twenty-one, and petitioned for his legacy. Stock had fallen since the report, and it was held, that he was entitled to so much stock as, at the time of the petition, would answer the legacy. *Rock* v. *Hardman*, 4 Mad. 254.

XVI. ABATEMENT.

1. A devise in trust, to pay several persons £1000 each, on the death of any in testator's lifetime: in case of a deficiency the others abate; but if the devise is in trust to pay debts and legacies, and one legatee dies, the trust is for the other legatees, if necessary. *Currie* v. *Pye*, 17 Ves. 466.

2. Devise in trust to sell, but not for less than £10,000; and out of the produce to pay several legacies, amounting to £7,800, and including £200 to charities, the overplus monies arising from the sale to A. This is a specific legacy of £10,000, and if the sale produces less, A. and the others must abate; the legacies to charities, being void, fall into the general residue. *Page* v. *Leapingwell*, 18 Ves. 463.

3. A legacy to A. of £12,000, and to B. of £4000. The testator directed the £4000 to be paid out of the money in the hands of his banker or agent. At the time of testator's death there was a sufficient fund in the agent's hands to answer this legacy; but the general assets did not extend to the payment of both. B. is entitled to a priority in respect of his legacy, the fund being appropriated to its

payment. *Acton* v. *Acton*, 1 Mer. 178.

4. Unless a contrary intent appears upon the will, it must be presumed that the testator considers he has property sufficient to answer all his legacies, and has an equal intention that all should be equally paid, and such presumption must prevail, unless there be a clear intent to the contrary; and a direction to pay different classes of legatees in succession, at different periods after his decease, is not sufficient evidence of such intent; therefore, where the testator directed his executors "in the first place," to pay all debts funeral, and testamentary expenses, &c. and "in the next place," to pay certain legacies and "afterwards," to raise and set apart certain other legacies; and after paying, raising, and setting apart the said debts, legacies, and sums of money, gave certain other legacies out of the surplus: and the assets proved insufficient to satisfy the debts, and two classes of legacies, the court held, that as the testator had expressed no intention which gave to the first class of legatees a claim to be paid in full, to the prejudice of the next class, the two classes must abate equally; and there being no surplus, the latter class of legacies failed altogether. *Beeston* v. *Booth*, 4 Mad. 161.

XVII. Payment of.

1. Where a woman, who is or has been married, is entitled to a legacy, the court expects a positive affidavit that the legacy has not been in any manner settled, before it will direct payment. *Hough* v. *Ryley*. 2 Cox, 157.

2. A legacy of £100 was on motion ordered to be paid to a person having a general power of attorney from the legatee, without any power authorising him to receive this legacy specifically, the legatee being in the East Indies, and upon an affidavit, that, at the time of executing the power, the legatee gave directions for the expenditure of this particular sum, for the maintenance of his wife and children. *Carr* v. *Eastabrook*, 2 Cox, 390.

3. Legacy left by will in a foreign country, and in foreign coin, must be paid according to the current value of that coin in that country, at the time the payment ought to have been made, without regard to the exchange or the costs of remittance. As a legacy of 30,000 sicca rupees, by a will in India, must be paid according to the current value of such rupees at Calcutta. *Cockerell* v. *Barber*, 16 Ves. 461.

4. A decree is not suspended by an appeal without a special ground, the subject of discretion, therefore a legacy may be paid out of court notwithstanding an appeal. *Way* v. *Foy*, 18 Ves. 452.

5. Legacy, on condition to be void in case the legatee should succeed to certain estates in the event of the death of A. without issue of her body, payment was decreed in the life of A. having issue, and without security. *Fawkes* v. *Gray*, 18 Ves. 131.

6. Bequest of stock to "his Majesty's government in exoneration of the national debt," was directed to be transferred to such person as the King, under his sign manual, should appoint. *Newland* v. *Attorney General*, 3 Mer. 684.

7. Where a legacy is left to a feme covert, and the assignees of the husband, a bankrupt, agree with the executors, on a claim made for a settlement, to take a part only of the legacy, and the feme covert dies, leaving a child, such child is entitled to the residue of the legacy, under the contract. *Lloyd* v. *Williams*, 1 Mad. 450.

XVIII. Adeemed.

See also Tit. Satisfaction (*post*).

1. Stock was, in contemplation of a marriage, vested in trustees for the separate use of the wife for life, and with full power for her to dispose of it by will. She made her will during coverture, survived her husband, and afterwards took a transfer of the stock into her own name. This does not operate as a revocation of the will, or an ademption of the bequest of the stock. *Dingwell* v. *Askew*, 1 Cox, 427.

2. A bequest of a debt is adeemed by the debt being paid to the testator in his lifetime, whether the payment be compulsory or voluntary, or whether the sum be expressed in the bequest, or the debt bequeathed generally, *Stanley* v. *Potter*. 2 Cox, 180.

3. Testator, by his will, gave to his nieces A. and B. "all the stock he had in the 3 *per cents.*, being about £5000, except £500," which he gave to C. and devised other specific parts of his property to be sold, for the payment of a certain mort-

gage debt: and afterwards himself sold out £2000, part of the £5000 stock, and with it paid off the mortgage. This adeemed the legacy *pro tanto*, and the specific legatees can have no relief from the funds appropriated by the will for payment of the mortgage: and A. and B. must bear the loss, C. being entitled to her legacy entire. *Humphreys* v. *Humphreys*,
2 Cox, 184.

4. A legacy of £1000 is not adeemed by a transfer, by testator, of stock into his and the legatee's joint names. *Wetherby* v. *Dixon*, 19 Ves. 407. Coop. 279.

5. Testatrix, by a codicil to her will, bequeathed an arrear of interest, due on a mortgage, amounting to £600 and upwards, "as she computed the same." After the making of the codicil, she lived eleven years, and received interest from the mortgagor to the amount of £618. On a reference to the master, he found that £646: 8: 3 was due to the testatrix for interest, when she made her codicil, and that a sum to that amount was due to her for interest when she died; but it appeared upon affidavit, that the interest received by the testatrix after the making of her codicil, was so received in respect of interest, as it accrued due after the making of the codicil, leaving outstanding the arrears of interest due when she made the codicil: held that such affidavit was admissible as proof of the testatrix's intention, and that the legacy was not reduced by the receipts of interest subsequently to the making of the codicil. *Graves* v. *Hughes*, 4 Mad. 381.

6. If the testatrix, after making the codicil, had, in fact, received the interest due at the time of making the codicil, whether the legacy would then have been adeemed—*Quære*, *Ibid.*

7. Wherever a legacy is specific, and the specific thing does not exist at the testator's death, the legacy is adeemed. So in a bequest of two policies on a life insurance, upon trust: this is a specific legacy, and is adeemed by the receipt of the amount of the policies by the testator in his lifetime. *Barker* v. *Rayner*,
5 Mad. 208.

8. Gift by a brother standing in *loco parentis*, an ademption of a legacy in his will. *Monck* v. *Lord Monck*,
1 B. & B. 298.

9. A legacy that has been adeemed is not set up by a codicil ratifying the will.
Ibid.

10. Testatrix recited a wish of herself and another, that "£500 which they had then on mortgage" should be given to S. A. G. and her family, and bequeathed "the £500, and all interest due thereon:" accordingly this legacy is not adeemed by their subsequently calling in the mortgage, it being merely descriptive of the then situation of the money, and no ingredient of the gift. *Le Grice* v. *Finch*,
3 Mer. 50.

XIX. Lapsed.

1. To prevent a legacy from lapsing by the legatee's death in the testator's lifetime, there must be in the will the substitution of another legatee in his stead. And where the testator gave a sum of money which the legatee owed the testator on mortgage, and directed his executors to give up to such legatee all bonds owing from the legatee to him, and which should be found in his custody at his decease, with all interest due thereon: this legacy lapses by the death of the legatee in the testator's lifetime. *Toplis* v. *Baker*, 2 Cox, 118.

2. A legacy charged upon land to be purchased with the residue of a personal estate, will lapse by the death of the legatee before the day of payment, in the same manner as if charged upon lands actually purchased. *Harrison* v. *Naylor*,
2 Cox, 247.

3. The testator, by a deed-poll, bearing even date with his will, declared a legacy he had given by his will was so given upon special trust and confidence, that the legatee, his executors, &c. as soon as he or they received the same, should pay it over to his kinsman therein named. The deed-poll was not proved as a testamentary paper. This is a legacy to the kinsman, and does not lapse by the death of the legatee named in the will in the testator's lifetime. *Inchiquin* v. *French*, 1 Cox, 1.

4. By the law of Scotland, as well as of England, a legacy lapses by the death of the legatee in the lifetime of the testator. *Rose* v. *Rose*, 17 Ves. 351.

5. A bequest to the son of the testator, on his completing and fully accomplishing his apprenticeship, with the dividends in the mean time for maintenance; and in case he shall die before he accomplishes his apprenticeship, then and in such case to the other children. The legacy lapsed

by the death of the legatee, having accomplished his apprenticeship in the testator's lifetime. *Humberstone* v. *Stanton*, 1 V. & B. 385.

6. A legacy will lapse by the death of the legatee in the lifetime of the testator, though he has survived the period at which the legacy was to vest, that event not being provided for. *Ibid*, 1 V. & B. 389.

7. A bequest in form of a letter to the testator's mother and sisters, "to be divided among you." This created a tenancy in common among the mother and sisters living at that time, and the shares of those who died in the testator's lifetime lapsed. *Ackerman* v. *Burrows*, 3 V. & B. 54.

8. A bequest by the obligee to one of joint obligors of a debt due on the bond, in these terms: "I remit and forgive to T. W. the sum of £500, which he stands indebted to me on his bond, and I direct said bond to be delivered up to him, and cancelled," is merely a personal legacy to T. W. and lapses by his death in the lifetime of the testator; for notwithstanding the terms in which it is bequeathed, such a bequest does not operate by way of equitable release, or as an extinguishment of the debt. Therefore, the surviving co-obligor, and the representatives of the deceased legatee, are not discharged from the payment of the money due on the bond. *Izon* v. *Butler*, 2 Price, 34.

9. A legacy to A., and testator willed his "legacies to be paid at the end of one year after the testator's death, or to their several and respective heirs." This was held to be a merely personal gift, and that it lapsed by the death of A. in the testator's lifetime. *Tidwell* v. *Ariel*, 3 Mad. 403.

XX. Void.

(a) For Remoteness.

1. Limitation over of personal estate, after general failure of issue, is too remote, and therefore void. *Salkeld* v. *Vernon*, 1 Eden, 64.

2. Bequest of the residue to the testator's daughter, and her issue, and for want of such issue, over; the limitation over is too remote, and therefore void. *Ibid*, 1 Eden, 64.

3. Bequest to testator's grandson, to be improved till he should attain the age of twenty-one, and in case he should die, before twenty-one, or afterwards, without issue, then the money to be equally divided between the testator's sons and daughter. The limitation is too remote, and therefore void. *Gray* v. *Shawne*, 1 Eden, 153.

4. Testator gives leasehold premises to his executors, upon trust, to renew the lease, and after payment of the rent reserved, to pay the residue of the rents, issues, and profits, to A., for life; and then that the testator's natural daughter should have the same for life; and in case she should die, leaving no lawful issue, he bequeathed the premises to his executors, to be sold for the purposes of the will; held, the bequest to the executors was not too remote. *Taylor* v. *Clarke*, 2 Eden, 202.

5. Appointments by will of a sum of money to several persons upon the death of testatrix's son, without issue, or without making any disposition by will or deed, is void as being too remote. *Gray* v. *Montagu*, 2 Eden, 205.

6. Bequest of money to testator's wife, and the issue of her body, and failing such issue, to such of the testator's heirs, whom he should appoint by written will; and if she died intestate and without issue, then over: held that, notwithstanding the power, the limitation over is void, as too remote, and that the wife took absolutely. *Howston* v. *Ives*, 2 Eden, 216.

7. A bequest of money in the public funds to A., but in case he should die without issue, then to be equally divided amongst such of testatrix's nearest relations, which should at that time be living. The bequest over was void, as too remote. *Destouches* v. *Walker*, 2 Eden, 261.

8. A bequest of personal estate to A., during his life, and if he has no heirs, then over; held, the bequest over was void, as being too remote. *Bodens* v. *Lord Galway*, 2 Eden, 297.

9. A limitation by will, of personal estate, after the death of one without "lawful issue," is void as being too remote. *Jeffery* v. *Sprigge*, 1 Cox, 62.

10. Testator gave the residue of his personal estate, to trusteees, for the use of one, for life, and to the lawful heirs of his body, after his demise; but in case of his dying without issue of his body, after his decease, the testator gave all such

residue over. This creates a contingency with a double aspect, and in the event of the tenant for life leaving no child, the limitation over is good. *Trotter* v. *Oswald*, 1 Cox, 317.

11. A bequest to one and the issue of her body, and in default of such issue, the said legacy to be equally divided between the daughters *then* living of J., and E. his wife. This limitation takes in daughters of J. and E. born after the testator's death, and therefore is too remote. *Jee* v. *Audley*, 1 Cox, 324.

12. The words "die without issue" have their legal signification, a death without issue generally; unless there are expressions or circumstances from which it can be collected that they are used in a more confined sense. *Barlow* v. *Salter*, 17 Ves. 482.

13. Though where a life interest only is given over, upon a failure of issue, it must necessarily be intended a failure within the compass of that life; yet where the entire interest is given over, the mere circumstance that one taker is confined to a life interest, furnishes no indication of an intention to make the whole bequest depend upon the existence of that person at the time when the event happens, on which the limitation over is to take effect. *Ibid*, 17 Ves. 482.

14. Devise for life, and in default of issue to another for life, and in default of his issue remainder over. The limitation over is void as to the personal property, either as too remote, or as giving an estate tail by implication. *Ibid*, 17 Ves. 481.

15. Devise of an estate, charged with two several legacies to A. and B., and in case A. or B. die without lawful issue, then the whole of the said two legacies to go to the survivor, his executors, &c. A. dies without issue in the testator's lifetime: held that the legacy lapsed, the contingencies on which it was given over, i. e. the failure of issue, being too remote. *Massey* v. *Hudson*, 2 Mer. 130.

16. The addition of the words, executors, administrators, &c. excludes the presumption that might otherwise arise, that the testator intended a personal benefit to the survivor and a failure of issue in the survivor's lifetime. *Ibid*, 133.

17. Gift over, after an indefinite failure of issue, is void. *Nicholls* v. *Skinner*, (*cited*) 2 Mer. 135.

18. Residuary bequest to A. for life, remainder to his children, but if he shall die without children living at his death, to B. for life, remainder to her children, and if she shall die without children living at her death, then to her executors, administrators, and assigns. By a codicil the same is given over, "after the decease of the before-mentioned persons in my will, A. and his heirs for ever, and B. and her heirs for ever." The meaning of the word "heirs," in the codicil, is not to be confined to children from comparison with the will, and the bequest over therefore is too remote. *Griffiths* v. *Grieve*, 1 J. & W. 31.

19. Testatrix by her will limited certain estates to her daughter, for life, remainder to such daughter's first and other sons, successively in tail male; remainder to daughters as tenants in common, in tail general; and if an only surviving daughter, to her in tail general; and in default of all such issue of testatrix's daughter, to trustees for 1000 years, upon trust, to raise certain legacies as she should bequeath by any codicil or codicils, &c.: afterwards by codicil she bequeathed certain legacies "after the decease and failure of issue" of her daughter. The daughter, having survived the testatrix, died without issue. Held, that though taking the expression, after failure of issue, literally, the legacies would be too remote, yet the testatrix having created a term for the sole purpose of paying the legacies, and used expressions importing that the legacies were immediately to be paid when the term arose, which was after failure of particular issue, the legacies were not too remote, but were payable when the same took effect. *Morse* v. *Marquis of Ormonde* 5 Mad. 99.

(*b*) *For Uncertainty.*

1. Bequest to the separate use of a married woman, with a power of disposition by will "and in case she dies without a will, I give all that may remain at her decease to B," followed by a gift of residue to A., the gift to B. is void for uncertainty. *Bull* v. *Kingston*, 1 Mer. 314.
See also, *Mohun* v. *Mohun*, 1 Wil. 151. 1 Swan. 201.

(c) *As to Subscribing Witness.*

1. A legacy to a subscribing witness to a will, though of personal property only, is void under the statute 25 Geo. 3. c. 6, which extends to all wills and codicils. *Lees* v. *Summersgill*, 17 Ves 503.

LENGTH OF TIME AND ACQUIESCENCE.

1. A mother, tenant for life, with remainder to her son in fee, covenanted upon his marriage to settle the estate on the children of the marriage. The court refused to interfere in the execution of this covenant after eighty-four years, during which the estate had become incumbered under the adverse title, and none of the parties had asserted their rights. *Howorth* v. *Deem*, 1 Eden, 351.

See also, *Milner* v. *Lord Harewood*, 18 Ves. 259.

2. Length of time no bar in the case of fraud. *Alden* v. *Gregory*, 2 Eden, 280.

3. Length of time and acquiescence may be an answer to a demand, in respect of misapplication of assets by executors. *M'Leod* v. *Drummond*, 17 Ves. 165.

4. To impeach a decree, directing a distribution of assets by an executor, as erroneous, the parties interested must come in due time. *O'Brien* v. *Grierson*, 2 B. & B. 336.

5 Courts of equity give effect to length of time as bar of suit, by analogy to the sta ute of limitations; and though length of time does not affect direct trusts, as between trustee and *cestui que* trust, yet a constructive trust may be barred by acquiescence, even though the true state of facts may be easily ascertained, and the ground of relief clear, or even arising out of fraud. *Beckford* v. *Wade*, 17 Ves. 97.

6. It is a principle of equity that the demand of relief should be prompt, that defendant's remedies against others may not be lost, but it would be difficult to maintain, under that principle, upon the loss of other remedies, that the party could have the benefit of a security invalid in law and equity: whether a court of equity would take away that benefit—*Quære*. *The Mayor and Commonalty of Colchester* v. *Lowten*, 1 V. & B. 246.

7. Mere possession, even at law, is not sufficient to bar the claim of the true owner of an estate, unless there has been a disseisin, or something tantamount. *Cholmondeley* v. *Clinton*, 2 Mer. 357

8. By the civil law, a mere permissive possession, however long, could not give a title by prescription. *Ibid*, 2 Mer. 359.

9. An equitable title may be barred by the length of time, but it cannot be shifted or transferred, and no equity can be acquired by length of possession merely. *Ibid*, 2 Mer. 360.

10. So long as a trust subsists, the right of a *cestui que* trust cannot be barred by the length of time, during which he has been out of possession. The *cestui que* trust can be barred only by barring and excluding the estate of his trustee, *Ibid*, 2 Mer. 361.

11. A party cannot be said to acquiesce in acts which he did not know at the time, that he had any right to dispute. *Ibid*, 2 Mer. 362.

12. Presumption from length of time in favor of long possession of whatever is necessary to constitute a right. *Chalmer* v. *Bradley*, 1 J. & W. 63.

13. Whether the *nullum tempus* act, 9 Geo. 3, c. 16, applies to advowsons —*Quære*. *Gibson* v. *Clark*, 1 J. & W. 159.

14. A settlement made under the direction of the court, ought to provide for the children as well as for the mother; but where that has been omitted, and the order acquiesced in for a long time, it will not be supplied. *Johnson* v. *Johnson*, 1 J. & W. 479.

15. An estate subject to a mortgage in fee, being in settlement, with an ultimate limitation to the right heirs of S. R. A., on the expiration of the previous estate, enters, claiming to be entitled under the limitation, and he, and, after his death, his son continue in quiet possession, paying interest on the mortgage for twenty years. The devise of the person really entitled under the limitation, is barred by the length of time. *Marquis Cholmondeley* v. *Lord Clinton*, 2 J. & W. 1.

Overruling the decision of Sir W. Grant, M. R. upon the same case, 2 Mer. 173.

16. Adverse possession of an equity of redemption for twenty years, is a bar to another person claiming the same equity of redemption, and works the same effect as disseisin, abatement, or intrusion, with respect to legal estates. *Ibid*, 2 J. & W. 191.

17. No relief in equity after twenty years, even in cases analogous to those in which a writ of right would lie at law. *Ibid*, 2 J. & W. 192.

18. In cases seeking a specific execution, laches is equally as strong against a plaintiff in not prosecuting, as in not commencing a suit. *Moore* v. *Blake*, 1 B. & B. 69.

19. Delay to prosecute a suit from 1782 till 1801. No step taken in the interval by defendant to dismiss the bill. The delay no bar to the relief. *Moore* v. *Blake*, 4 Dow, 247.

20. By the acquiescence of a debtor for nineteen years in a lease granted by him to secure a debt, he is precluded from proving the rent to be at under-value. *Morony* v. *O'Dea*, 1 B. & B. 109.

21. Where a party rests satisfied with an agreement, and for some time treats it as fair, it is most material to ascertain the time he first impeaches it; for although he may be entitled to relief, if applied for in due time, he may lose it by his laches. *Ibid*, 1 B. & B. 118.

22. The question of under-value is not, after a great length of time, entertainable. *Wilton* v. *Browne*, 1 B & B. 130.

23. Where facts constituting fraud are known, when no subsisting trust or continuing influence is proved to exist, an equitable title is barred in the same manner, and in the same time as a legal title in a possessory action. *Medlicott* v. *O'Donel*, 1 B. & B. 166.

24. When the inheritor *cestui que* trust is ignorant of the facts constituting the fraud, the trust continuing, he is not barred of relief against the trustee by length of time. *Ibid*, 1 B. & B. 170.

25. Length of time is a bar to an equitable title. *Burke* v. *Crosbie*, 1 B. & B. 503.

26. A decree establishing a charge carried into execution, though not proceeded on for forty years, there being an acknowledgment within twenty years of the subsistence of the charge. *Barrington* v. *O'Brien*, 1 B. & B. 173. 2 B. & B. 144.

27. When a title to an estate is defective in the knowledge of a party who had acquiesced in it, the possession under it will, as against him, be quieted in equity. *Shine* v. *Gough*, 1 B. & B. 444.

28. A decree, setting aside a sale, not carried into execution, from the length of time that had elapsed, and from the change of circumstances by the rise in land, and proportionate depreciation of money. *Earl of Egremont* v. *Hamilton*, 1 B. & B. 516.

29. Upon a bill by a lessee evicted for non-payment of rent seventeen years before, though imputing fraud, unsupported in proof, but praying for liberty to try the validity of the eviction at law, by the removal of a temporary bar, a mortgage of the tenant's interest vested in the landlord: held, that he was entitled to such relief, there being no equitable circumstances to bar him of that right; he having acquiesced in ignorance of his rights, and the defendant having, by the concealment of a fact, obtained a legal advantage, which, consistent with good conscience, should not be allowed to protect his title on such trial. *Blennerhasset* v. *Day*, 2 B. & B. 104.

30. Where the facts constituting fraud are in the knowledge of the party, and he lies by for twenty-five years, he cannot get relief. *Ibid*, 2 B. & B. 118.

31. A party acquiescing and receiving money under a misapprehension of his rights, not bound by it, as in the case of a contract for disputed title, or the compromise of a litigated right. *Ibid*, 2 B. & B. 128.

32. In cases of fraud, time, in order to bar the remedy, will not begin to run till the party acquires a knowledge of the facts constituting the fraud. *Ibid*, 2 B. & B. 129.

33. A fee farm grant, or lease at a fixed rent, was made of mortgaged premises, by the mortgagor to the mortgagee, in which there was an acquiescence for nearly fifty years: though the transaction was of a nature to be set aside, if impeached within a reasonable time, the House of Lords, affirming the decree below, held, that length of time was a bar to the relief. *Hickes* v. *Cooke*, 4 Dow, 16.

34. Acquiescence for a long time is material evidence to show that a contract was fair, though it be of that kind which courts of equity look at with great jealousy. *Ibid*, 4 Dow, 24.

35. The change which in a long course of time takes place in the value and circumstances of property, and the consequent difficulty or impossibility of doing that justice between the parties, which may be done when transactions are recently challenged, are reasons why length of time is a bar to relief in cases where the transactions, if recently impeached, would be set aside. *Ibid*, 4 Dow, 27.

LIEN.

See also Tit. Solicitor and Client, *and* Vendor and Purchaser, (*post.*)

I. Upon real Estate.

(*a*) *Judgment Creditor.*

1. A debtor being entitled to a reversionary estate which he had mortgaged, entered into an agreement, prior to any judgment being entered up, for the sale of the estate; and afterwards, when the purchase was completed, and which was subsequently to the judgment being entered up and docketed, the debtor and mortgagee conveyed the estate to the purchaser, taking back a term in the same premises, by way of mortgage, for part of the purchase money. This term he subsequently assigned to the defendant, he, the defendant, not having notice of the judgment till after the purchase had been completed, and the consideration paid: held, that the defendant, being a purchaser of an equitable interest in a freehold estate from the debtor, without notice of the judgment till after his consideration paid, will hold such equitable interest discharged of the claim of the judgment creditor; that a judgment is at law no lien upon a legal term: and where the interest of the debtor is legal, a judgment is no lien in equity. That notwithstanding this judgment, the debtor could well assign his legal term at his pleasure, and had therefore well assigned it to the defendant; and there being no lien upon the term in the hands of the debtor, there could be none upon the term in the hands of his assignee. *Forth* v. *Duke of Norfolk*, 4 Mad. 503.

2. A judgment creditor not deprived of his lien on the estate in the hands of a purchaser under a decree, by not proving his debt before the Master, in pursuance of advertisements for that purpose; his legal right to enforce payment of the judgment not being in the least affected by the decree. *Barrett* v. *Blake*, 2 B. & B. 354.

II. Personal Property.

(*a*) *Ship and Cargo.*

1. The master of a vessel being turned out of possession upon the vessel's being captured, does not deprive him of his lien for the freight in case of her recapture. *Ex parte Cheesman*, 2 Eden, 181.

2. There is a lien upon the goods of a freighter for general contribution for individual loss, by property thrown overboard for the safety of the ship, under the right of the master to require security; but it is not extended to an injunction against delive ing the cargo, on receiving the freight, or parting with any share of the ship. The mode of adjustment is not confined by usage to arbitration. *Hallett* v. *Bousfield*, 18 Ves. 187.

3. No lien on a ship abroad can be created by parol, nor by bills of exchange drawn by the master; unless upon mistake, clearly established, the instrument can be corrected, as in the case of a joint bond intended to be joint and several. *Ex parte Halket*, 19 Ves. 474. 2 Rose, 229.

4. Part owners of a ship are tenants in common and not joint tenants; there is no lien therefore on the share of one, a bankrupt, who had been managing owner, for outfit, freight, &c. due to the others. *Ex parte Young*, 2 V. & B. 242.

5. By a clause in a charter-party, the parties mutually "bound themselves, especially the owners the ship and tackle, and the freighter the goods to be taken on board," in a penal sum, "to the true and punctual performance of every article therein contained." This does not give to the ship-owners any lien, either at law or in equity, on the goods brought home, either for dead freight, or demurrage. *Gladstone* v. *Birley*, 2 Mer. 401.

6. There are liens which exist only in equity, and of which equity alone can take cognizance; but lien for freight is not one of them. *Gladstone* v. *Birley* 2 Mer. 403.

7. A ship, while the possession of it is retained, is specifically chargeable in respect of the expenses of repairs execute

in a port of this country: but the lien is lost with the possession. *Ex parte Bland*, 2 Rose, 91.

8. If in a foreign port a loan is necessary to enable a master of a ship to prosecute his voyage, a person making that advance is entitled to a lien on the ship, without an instrument of hypothecation. *Ex parte Halkett*, 2 Rose, 194. 3 V. & B. 135.

9. A lien is a right to possess or retain, therefore where A. consigns a cargo to B., with a direction to pay to C., out of the proceeds, a sum of money, C. has no lien on the proceeds. *Ex parte Heywood*, 2 Rose, 355.

10. A ship sailed with ballast from London to Jamaica, and was sold during her voyage there, and afterwards sailed from Jamaica to London, with goods shipped on a contract with the then owners. The creditors of the quondam owners have no lien on the freight due in respect of the voyage from Jamaica. *Ex parte Hill*, 1 Mad. 61.

(*b*) *Trader.*

1. The question, whether a tradesman has a lien on goods in his hands for the general balance due to him, or only for so much as relates to the particular goods, is decided on the same grounds in courts of law and equity. To extend such lien, the party claiming must shew an agreement to that effect, or something from which such agreement may be inferred. *Gladstone* v. *Birley*, 2 Mer. 404.

2. A factor's lien for his expenditure on the goods in his possession, and his general balance, is lost by his special contract for a particular mode of payment. It is the same in other trades where a general lien is customary. *Cowell* v. *Simpson*, 16 Ves. 280.

(*c*) *Legatee.*

1. The residuary legatee has a lien on the specific fund. *M'Leod* v. *Drummond*, 17 Ves. 169.

LIMITATIONS, STATUTE OF.

1. Courts of equity refer to the statute of limitations for a convenient measure of time, which ought to bar an equitable demand; but the rule does not affect direct trusts. *Beckford* v. *Wade*, 17 Ves. 96.

2. There is no analogy to the statute of limitations in taking an account under a breach of trust. *Attorney General* v. *The Brewers' Company*. 1 Mer. 495.

3. The rule, that trusts are not within the statute of limitations, applies only as between trustee and *cestui que* trust, and will not hold where a claim is made after a great length of time against a trustee by implication of law, more especially where such implication is to be raised upon a doubtful equity. *Townsend* v. *Townsend*, 1 Cox, 28.

4. Plea of the statute of limitations to a bill of discovery will be overruled, upon letters, assigning reasons for declining to pay, and recommending the plaintiff to bring an action; this being sufficient upon the authorities, though against principle, to take the case out of the statute. *Baillie* v. *Sibbald*, 15 Ves. 185.

5. As to reviving a debt within the statute of limitations under a trust for debts—*Quære*.

Ex parte Dewdney, } *Ex parte Seaman*, } 15 Ves. 488, 497.

6. The statute of limitations runs, notwithstanding a commission of bankruptcy. *Ibid.*

7. A devise in trust for payment of debts does not revive a debt, upon which the statute of limitations had taken effect, by the expiration of the time before the testator's death. *Burke* v. *Jones*, 2 V. & B. 275.

See also *Ex parte Roffey*, 19 Ves. 470.

8. Where provision is made by will for payment of debts, the statute does not run. It is an acknowledgment of the debt. *Burke* v. *Jones*, 2 V. & B. 288.

9. The statute of limitations is a bar to merchants' accounts, where all accounts had ceased above six years.

Martin v. *Heathcote*, 2 Eden, 169.
Barber v. *Barber*, 18 Ves. 286.

10. It is not debtor's, but the creditor's absence from the country which takes the debt out of the statute of limitations. *Fladong* v. *Winter*, 19 Ves. 200.

11. The statute of limitations not applicable to debt by decree, order, or award. The time while the debtor is in custody, not considered. *Mildred* v. *Robinson*, 19 Ves. 585.

12. Statute of limitations (32 Hen. 8, c. 2,) is not applicable as a bar to a bill in equity for tithes. *Meade* v. *Norbury*, 2 Price, 366.

13. A mere demand of a debt without process or acknowledgment, is not sufficient against the statute of limitations. *Hodle* v. *Healey*, 1 V. & B. 540.

14. Debts, upon which the time limited by the statute of limitations has run, are presumed to be paid. *Burke* v. *Jones*, 2 V. & B. 288.

15. Whether the statute 21 Jac. 1, c. 16, extends to writs of entry—*Quære*. *Widdowson* v. *The Earl of Harrington*, 1 J. & W. 532.

16. Although courts of equity are not bound by the statute of limitations, yet in cases of trust and constructive fraud it will regulate its decisions by analogy to it. *Morony* v. *O'Dea*, 1 B. & B. 119.

17. The statute of limitations is founded upon the soundest principles, and courts of equity are bound to adopt it, where the legal and equitable title correspond; differing only in the court where it is to be enforced. *Medlicott* v. *O'Donel*, 1 B. & B. 160.

LUNACY AND IDIOTCY.

I. Jurisdiction.

1. 36 Geo. 3, c. 90, s. 3, directing the transfer, in certain cases, of stock, standing in the name of a lunatic, or of his committee, does not extend to stock standing in the name of another, to which the lunatic is entitled as administrator. *Ex parte Adams*, 2 Mer. 112.

2. In the case of infants, the Lord Chancellor acts as the court of Chancery; in lunacy he acts under a special separate commission from the crown, authorising him to take care of the property for the benefit of the lunatic. *Ex parte Phillips*, 19 Ves. 122. *Sherwood* v. *Sanderson*, 19 Ves. 280. Coop. 108.

3. The keeper of the great seal is usually the person to whom the care of lunatics is intrusted. *Sherwood* v. *Sanderson*, 19 Ves. 283.

4. The Chancellor in the court of Chancery has jurisdiction to direct inquiry as to the marriage of an infant, whether of sound mind at the time, and whether for the infant's benefit that a commission should issue. *Ibid*, 19 Ves. 289.

5. Whether, after a commission of lunacy has issued, the court has jurisdiction to alter the place of execution—*Quære*. *Ex parte Baker*, 19 Ves. 340.

6. Where a lunatic had been tried for murder, and acquitted on the ground of his lunacy, but ordered by the judge to be detained, the Lord Chancellor declined ordering him to be removed out of gaol to a proper receptacle for lunatics, the proper application being to the king in council. *Ex parte Hill*, Coop. 54.

II. Commission.

1. A commission of lunacy, granted upon the application of a stranger, although the lunatic (a natural child) lived with his mother, who opposed the petition, where there was no doubt of the party being in a state to make him the object of a commission. *Ex parte Ogle*, 15 Ves. 112.

2. Commission of lunacy, uniformly executed at the residence of the party, and his mansion-house, or if none, his last place of abode is his residence

for that purpose, there is no instance of exception where he was within the realm. *Ex parte Baker*, 19 Ves. 340. Coop. 206.

3. A verdict of unsound mind is equivalent to idiotcy or lunacy, but mere incapacity to manage his affairs will not alone support a commission. *Sherwood* v. *Sanderson*, 19 Ves. 285.

4. Incapacity to comprehend the most simple proposition of figures is evidence of an unsound mind, to be estimated with reference to age, situation, and other circumstances by which it may be affected. *Ibid*, 19 Ves. 286.

5. On the accidental loss of a commission of lunacy after inquisition found, an order was obtained for a duplicate commission, and the inquisition, which was recovered, to be annexed to it. *Ex parte Raine*, 19 Ves. 589.

6. Where a person of weak mind and small property was entitled to prove a debt under a decree, the Lord Chancellor, to share the expense of a commission, ordered that the master shall be at liberty to receive any proof that should be satisfactory to him, by analogy to the practice of taking the answer of a person of weak mind by guardian. *Herbert* v. *Mathews*, 19 Ves. 611.

7. A commission of lunacy is not of course, upon establishing the mere fact of lunacy, but is the subject of discretion, regulated solely by what would be for the benefit of lunatic, with reference to the care of his person and property.

Ex parte Tomlinson, } 1 V. & B. 57.
——— *Broadhurst*, }

8. The nearest relations, though they oppose the granting a commission, shall have the carriage of it if granted; unless sufficient reason is shown why they ought not to have it. *Ibid.*

9. The old and settled law is, that the commission of lunacy should be executed at the place of residence of the supposed lunatic; and his place of residence is not that to which he has been carried while he had not mind enough to intend a change of residence: and where the object of inquiry is to ascertain when the lunacy commenced, it is material that the commission should be executed among persons who knew the state of the mind of the individual, prior to the lunacy; therefore, when the supposed lunatic resided in Cardiganshire, and was removed to Glamorganshire, the commission was directed to be executed in Cardiganshire, though evidence was given of his inability to bear removal. *Ex parte Smith*, 1 Swan. 4.

III. Traversing Inquisition.

1. It is in the discretion of the Lord Chancellor to grant leave to any person aggrieved, &c., to traverse an inquisition of lunacy; and it was refused to the husband of the lunatic, under circumstances which rendered the validity of the marriage doubtful. *In matter of Fust*, 1 Cox, 418.

2. The private examination for the purpose of a traverse of a verdict of lunacy, under a commission, is merely to ascertain the wish of the party to exercise the right of traverse. *Sherwood* v. *Sanderson*, 19 Ves. 284.

3. The party himself has a right to traverse, and also many of his alienees. *Ibid*, 19 Ves. 287.

IV. Acts of Lunatic.

1. Where the lunatic, after commission issued, by virtue of a license procured by his servant, married a mantua-maker in whose house he resided, the master, upon a reference, reported the marriage void, by the operation of the statute (12 Geo. 3, c. 11.) alone; and the court confirmed the report, holding a sentence of nullity in the ecclesiastical court unnecessary. *Ex parte Turing*, 1 V. & B. 140.

2. Where the lunacy is of some duration, and the lunatic has performed acts, the principle on which the crown extends its protection, requires an examination into the circumstances of competence or incompetence. *Ex parte Smith*, 1 Swan. 6.

V. Committee.

(a) *Appointment and Removal.*

1. In the appointment of a committee of a lunatic, relations are preferred to strangers, unless there is some specific objection. In this case the wife was appointed committee of the person, jointly with a relation. *Ex parte Le Heup*, 18 Ves. 221.

2. A committee of a lunatic may be appointed upon petition without a reference, where the property is small. *Ex parte Pickard*, 3 V. & B. 127.

3. On a petition to remove the committee of the person, the Court, not being prevented by the form of the prayer from granting relief according to the na-

ture of the case, directed an inquiry whether the comfort of the lunatic was sufficiently provided for, regard being had to the sum allowed. *Ex parte Proctor*, 1 Swan. 531.

4. The court will not remove the committee of a lunatic, merely because he is a bankrupt, whether he has or has not obtained his certificate, but the bankruptcy is a circumstance deserving particular attention. *Ibid.*

(b) *Accounts and Allowances.*

1. Where the annual receipts of the lunatic's estate, beyond the maintenance allowed by the master, did not exceed £8, the court ordered that the same, from time to time, when received by the committee, should be paid into the Bank; the amount to be verified by affidavit of the committee: and that the general order, directing the committee to pass his accounts annually, be dispensed with. *Ex parte Pickard*, 3 V. & B. 127.

2. Costs of the committee of a lunatic trustee, conveying within the statute 4 Geo. 2, c. 10, must be paid out of the lunatic's estate. *Ex parte Brydges*, Coop. 290.

3. The costs of the committee of a lunatic mortgagee, requisite to enable him to reconvey to the mortgagor, under the statute 4 Geo. 2, c. 10, including the costs of the reference, are to be paid out of the lunatic's estate, whether the application be made by the mortgagor, or by the committee, which is the most usual course. *Ex parte Richards*, 1 J. & W. 264.

VI. Estate, protection and disposition of.

1. The court will not permit any part of a lunatic's estate to be laid out on private security. *Ex parte Calthorpe*, 1 Cox, 182.

2. The residue of a lunatic's property, after payment of his debts, may be ordered to be invested in a government annuity for his maintenance, upon the master's report that it is for his benefit. *Ex parte Stonard*, 18 Ves. 285.

3. Land-tax on a lunatic's estate, redeemed, by order, out of the produce of decaying timber, ordered to be cut for payment of debts, under the master's report that it was for his benefit. No equity for a charge in favor of the next of kin. *Ex parte Phillips*, 19 Ves. 118, 123.

4. The Lord Chancellor, acting in lunacy, under a special commission, does what is for the lunatic's benefit, taking the advice and assistance of the presumptive representatives, in managing the property: thus, cutting timber or selling real estate to pay debts, &c. not regarding the different forms of disposition, the power over each species of property upon a lucid interval being the same. *Ex parte Phillips*, 19 Ves. 123.

5. Timber on a lunatic's estate *ex parte paterna*, cut and applied in discharge of a mortgage on his estate *ex parte materna*, no equity between the heirs. *Ibid.*

6. The practice of making an allowance to the immediate relations of a lunatic, other than those the lunatic would be bound to provide for by law, will be extended to the case of brothers and sisters and their children. This is founded not on any supposed interest in the lunatic's property, which cannot exist during the lunatic's lifetime, but upon the principle that the court will act with reference to the lunatic, and for his benefit, as it is probable the lunatic himself would act, if of sound mind; the amount and proportions of such an allowance are, therefore, entirely in the discretion of the court. *Ex parte Whitbread*, 2 Mer. 99.

7. Where a charge on a lunatic's real estate is paid off, out of her personal property, by order of the court, the securities are to be assigned without prejudice to the conflicting claims of the real and personal representatives of the lunatic to the benefit of the payment. *Ex parte the Earl of Digby*, 1 J. & W. 640.

8. In the case of a lunatic mortgagee, where the mortgagor is willing to pay, the committee should apply for a reference under the statute 4 Geo. 2, c. 10; and, it seems, he would not be allowed to bring an action. *Ex parte Richards*, 1 J. & W. 264.

9. The tenant of a lunatic's estate was restrained, on petition, from committing waste, though no bill was filed. *In the matter of Creagh*, 1 B. & B. 108.

10. After the death of a lunatic, a reference to ascertain his next of kin, in order that money in the hands of the committee might be distributed, will not be granted on motion, though made on the behalf of the committee. *Ex parte Gilbert*, 1 B. & B. 297.

11. Such reference will only be granted on bill against the committee, for an account of the lunatic's property. *Ibid.*

VII. TRUSTEE UNDER STATUTE 4 GEO. II.

1. A lunatic trustee within the statute 4 Geo. 2, c, 10. must be one without interest or duty: therefore where the trust was for payment of debts, the trustee, being one of the creditors, is not within the Act. *Ex parte Tutin,* 3 V. & B. 150.

2. The heir of one who had covenanted to surrender copyhold to the uses of a settlement on his daughter's marriage, being a lunatic, a surrender cannot be made under the statute 4 Geo. 2, c. 10. *Ex parte Currie,* 1 J. & W. 642.

VIII. COSTS.

1. No costs can be given to a party suing out a commission of lunacy, which was never acted upon, but afterwards superseded; because, the property never having come into possession of the crown, there is no fund out of which costs can be given. *Ex parte Glover,* 1 Mer. 269.

2. Traverse of a verdict of unsound mind under a commission, being the right of the party, cannot be refused, and prevents the crown taking the custody, and consequently allowing the costs of the proceedings, however meritorious. *Sherwood* v. *Sanderson,* Coop. 105. 19 Ves. 280.

3. In this case costs were given out of a fund of the lunatic's, in court, in a cause; on the principle on which the court protects persons in a state of incapacity, though adult, and not objects of a commission, assigning guardians, &c. The costs of the traverse also, though not of course, allowed, the lunatic having been permitted herself to traverse after a personal examination. *Ibid,* 19 Ves. 280.

MARRIAGE.

I. JURISDICTION.

1. The article of an allegation admitted, which pleaded, that a license, granted by the Bishop of Winchester's commissary for Surrey, would not be valid, for a marriage contracted within the diocese of Winchester, but without the jurisdiction of the commissary for Surrey. *Balfour* v. *Carpenter,* 1 Phil. 204.

2. Where a trustee, whose consent is the condition of a legacy, refuses his consent from a vicious, corrupt, or unreasonable cause, the court has jurisdiction on the ground of fraud. *Clarke* v. *Parker,* 19 Ves. 18.

3. The court has jurisdiction also where such trustee refuses to act. *Goldsmid* v. *Goldsmid,* Coop. 225. 19 Ves. 368.

II. VOID OR VOIDABLE.

1. A voidable marriage cannot be rendered void after the death of either of the parties. *Elliott* v. *Gurr,* 2 Phil. 16.

2. The canonical disabilities, as consanguinity, affinity, and certain bodily infirmities, only make the marriage voidable, not *ipso facto* void. *Ibid,* 2 Phil. 19.

3. Civil disabilities, as prior marriage, want of age, idiotcy, &c. make the contract void *ab initio,* and not merely voidable, and therefore no sentence of avoidance is necessary. *Ibid.*

III. VALID OR INVALID.

(*a*) *Affinity.*

1. Marriage annulled by reason of

affinity, the husband being the brother of the wife's former husband. *Aughtie* v. *Aughtie*, 1 Phil. 201.

2. A slight interest is sufficient to bring a civil suit to annul an incestuous marriage: a marriage with the sister of a former wife was annulled on a suit brought by the sisters of the husband, they holding a contingent interest under their mother's will. *Faremouth* v. *Watson*, 1 Phil. 355.

(*b*) *Impotency.*

1. A marriage annulled on account of the impotency of the husband. *Greenstreet* v. *Cumyns*, 2 Phil. 10.

(c) *Consent of Guardian.*

1. A marriage annulled at the suit of the husband by reason of his minority, and the want of his father's consent. *Balfour* v. *Carpenter*, 1 Phil. 221.

2. Where a marriage has been solemnized, the law strongly presumes that all legal requisites have been complied with; so a marriage of a minor by license was established upon the implied consent of the father. *Smith* v. *Huson*, 1 Phil. 287, 306.

3. In a suit to annul the marriage of a female minor, as being had without consent of the mother, the only parent living: held, that it was not necessary that the mother should have appeared to give her consent at the time the affidavit was made; and that the mother having lived many years after the marriage, and died in the daughter's house without expressing dissatisfaction, was a complete acquiescence, and the marriage was established. *Osborn* v. *Goldham*, 1 Phil. 298 (*n*).

4. Also in a similar case, where the mother signified pleasure after the marriage, and acquiesced for thirteen years, the marriage was confirmed. *Selby* v. *Selby*, 1 Phil. 299 (*n*).

5. The father, whose consent to a marriage is required by the Marriage Act, is the legitimate father. *Horner* v. *Liddiard*, 1 Phil. 310 (*n*).

6. Nullity of marriage established at the suit of the wife, the husband, at the time of the marriage, being an illegitimate minor, and no guardian having been appointed to consent. *Turner* v. *Felton*, 2 Phil. 92.

7. Guardian appointed, on petition, to an orphan infant without property, for the purpose of consenting to her marriage. *In re Woolscombe*, 1 Mad. 213.

(*d*) *Misnomer or Misdescription.*

1. Where an illegitimate child had always gone by the name of the putative father, a marriage by banns, which had been published in that name, was declared valid. *Wilson* v. *Brockley*, 1 Phil. 132, 148 (*n*).

2. Where the wife was illegitimate, an allegation, pleading the nullity of the marriage, by reason of the banns being published in the name of the putative father, instead of the name of reputation, which was that of the mother's husband, was admitted to proof. *Wilson* v. *Brockley*, 1 Phil. 132.

3. Where the wife was illegitimate, and had passed under five different names previously to her marriage, upon proof that the name by which she was married was the one impressed upon her at her birth, and used in the most solemn acts of her life, and by which she was known to the parties. It was held to be her own name, and the marriage by such name consequently valid. *Wakefield* v. *Mackey*, 1 Phil. 134 (*n*).

4. Error about the family or fortune of an individual, though produced by disingenuous representations, does not affect the validity of a marriage. *Wakefield* v. *Mackey*, 1 Phil. 137 (*n*).

5. Where, under circumstances, a party has no real name, such party is not within the marriage act. *Ibid*, 1 Phil. 140 (*n*).

6. In a case of marriage by banns, of a party of the name of Follon, where the entry by the minister was by the name of Fanon, though such entry was signed by the same name of Follon: Held, that the entry alone will not void the marriage, and an allegation pleading identity, courtship, cohabitation, and issue, was admitted. *Copps* v. *Follon*, 1 Phil. 145 (*n*).

7. A woman of the name of Nicholson, passing herself to the man under the name of Ross, a marriage by banns, published by the latter name, invalid. *Frankland* v. *Nicholson*, 1 Phil. 147 (*n*).

8. Publication of banns in the name of Long, when the true name was Longley, and in a parish to which the parties did not belong, declared false and fraudulent. ——— v. *Longley*, 1 Phil. 148 (*n*).

9. A marriage under a license, in which the woman was described by a false chris-

tian and sirname, held to be valid, she having passed and been known by such names for many years previously. *Cope* v. *Burt*, 1 Phil. 224.

10. Marriage of a minor without consent, annulled on the ground of a fraudulent and false publication of banns. The christian name of the minor being described as William, his baptismal name being William Peter, and his usual, and almost the only known name being Peter. *Pouget* v. *Tomkins*, 1 Phil. 499.

11. Where both parties in a marriage are of age, and the man being acquainted with the real name and circumstances of the woman, causes publication of banns by a wrong name; this will not invalidate the consequent marriage. *Mayhew* v. *Mayhew*, 2 Phil. 11.

12. Publication of banns of marriage of a minor, by the name of Dobbyns, the real name being Dobbyn, is not sufficient to affect the validity of the marriage. *Dobbyn* v. *Corneck*, 2 Phil. 102.

13. Whether publication by the christian names of Maria Phillipa, the real christian name being Maria only, is sufficient to affect the validity of the marriage —*Quære*. The court admitted the libel to proof, *Ibid.*

14. Where the publication of banns is such as not to designate, but to conceal the parties, it is no publication; and this may be effected as well by the insertion of a name, as by the omission of one. So a libel, pleading that the husband, who was of age, for the purpose of effecting his marriage with a minor, caused himself to be described in the publication of banns by an additional christian name, and that the marriage took place without consent, was admitted to proof. *Fellowes* v. *Stewart*, 2 Phil. 238.

(*e*) *Non-residence.*

1. When a clergyman celebrates marriage by banns, without making the inquiry directed by the marriage act, he will be liable to ecclesiastical censure at least, and perhaps to other consequences. The marriage, however, is good, though neither party was resident in the parish. *Nicholson* v. *Squire*, 16 Ves. 259.

2. A marriage by banns is legal, though only one of the parties resided in the parish. *Robinson* v. *Grant*, 18 Ves. 289.

3. A libel in a suit for nullity of marriage, admitted so far as it pleaded that banns were published under an additional christian name, which did not belong to the woman; but rejected as to that part which stated the non-residence of the parties in the parish where they were married. *Tree* v. *Quin*, 2 Phil. 14. 1 V. & B. 114.

(*f*) *Solemnized in Scotland.*

1. Marriage solemnized in Scotland, without banns or license, is valid. *Ex parte Hall*, 1 Rose, 32.

IV. Restraint of.

(*a*) *Condition, where valid.*

1. A bequest of part of a residue to testator's daughter, to be paid on attaining her age of twenty-eight, or day of marriage, with consent of trustees: the interest in the mean time to be applied to her use, and the other part of the residue among the testator's four other children; and in case any of the children die before his or her share become payable, such share to go to all the survivors then living, and the issue of a deceased child or children *per stirpes* and not *per capita*. The daughter survived the testator, married at the age of eighteen without consent, and died at the age of twenty, leaving a child. Held, that consent was a condition precedent, and that in consequence of the daughter's marrying without consent, she took nothing under the will; but that her child took, under the description of the "issue of a deceased child." *Hemings* v. *Munckley*, 1 Cox, 38.

2. A condition for consent of strangers or their representatives to marriage is valid. *Clarke* v. *Parker*, 19 Ves. 15.

3. A condition, requiring the consent of executors to marriage, is not applied to a daughter, married in the testator's lifetime, with his consent or subsequent approbation; but where the fact is not proved, an inquiry will be directed before the master. *Parnell* v. *Lyon*, V. & B. 479.

4. When a legacy is to vest, or be paid at a particular age, and there is a clause of forfeiture on marriage without consent, the court will construe it as having relation to a marriage under the specified age; but where no age is specified, whether the court can limit the condition to a marriage without consent under twenty-one—*Quære*. Clearly not,

where the party so marrying was above twenty-one at the date of the will. *Lloyd* v. *Branton*, 3 Mer. 116.

5. A subsequent condition of forfeiture on marriage without consent, where there is no devise over, will not be enforced. The reason of this rule is differently assigned; either because the devise over affords a manifestation of intention that the condition is not merely *in terrorem*; or on account of the interest of the devisee over. *Ibid*, 3 Mer. 117.

6. The testator bequeathed to his wife, "should she survive and continue unmarried, all his goods, chattels, estate, and effects, at the time of his death, to use, occupy, and possess the same during the term of her natural life: and from and immediately after her death" he disposed of the same. The wife afterwards married. This is a condition subsequent, and being of personal property, and no bequest over, on breach of the condition it must be considered as only *in terrorem*. *Marples* v. *Bainbridge*, 1 Mad. 590.

7. Where the testator declares, that, on the happening of the condition, the legacy shall fall into the residue, that is an express disposition. But whether a mere residuary bequest amounts to a disposition—*Quære*. *Lloyd* v. *Branton*, 3 Mer. 117.

8. Devise and bequest of lands and furniture to A. and her assigns, for life, in case she continued single and unmarried; and after her decease, as she should by deed or will appoint; and for want of appointment, then over: but in case A. should marry in the lifetime of testator's widow, and with her consent; or after her death, with the consent of two other persons named, or the survivor, signified in writing, then that A. and her assigns should enjoy the lands and furniture, in the same manner she would have done, if she had continued single and unmarried. The testator's wife, and the two other consenting persons died, and A. married. Held, that A. took an estate for life, with a power of appointment, subject, as to her life-estate only, to the condition of her remaining sole and unmarried, which was a condition subsequent; and as the compliance with it became impossible by the act of God, her estate for life became absolute, and she might execute the power of appointment in manner and form directed by the will. *Aislabie* v. *Rice*, 3 Mad. 256.

(*b*) *Performance or Forfeiture.*

1. Testator gives £24,000 upon trust as to £6000, to pay the interest to S. B., his niece, during her life; and after her decease, the principal among her children; if she should die without issue, over. He declares similar trusts as to three other sums of £6000 each, residue of the said sum of £24,000, for his three other nieces, and their children; with a proviso that, in case of any of his said nieces marrying without such consent as therein prescribed, each, &c. so marrying, should forfeit the interest of their £6000, and all other sums to which she may be entitled to under his will; and the respective sums of £6000, and all other such sums should fall into his residue; and he gives the residue in trust for his two nephews and their children; and in case of the death of either without issue, his moiety to go over to, and be divided among his said nieces. Afterwards, by codicil, he gives to each of his nieces £2000 in addition, "subject to the same powers, provisos, directions, and limitations as are contained in the will, respecting the sums of £6000." S. B. who was of age at the date of the will, marries without the consent required. This occasions a forfeiture extending, not only to the future interest of her £6000, but to the capital; and also to the £2000 given by the codicil; and to a fund set apart to answer an annuity, to which S. B. would otherwise have been entitled on the death of the annuitant. Whether the forfeiture would also extend to her share of the residue, in the event of the contingency, upon which it is given over to the testator's nieces—*Quære*. *Lloyd* v. *Branton*, 3 Mer. 108.

2. Legacies to two daughters, the principal to be paid them on marriage, with consent of trustees, with survivorship, in case of death of either before attaining the age of twenty-five, or marriage with such consent. This is a condition precedent, and a consent subsequent to the marriage does not satisfy the words of the will; if there had been no bequest over, the condition would be void. Whether a second marriage with consent would be a performance of the condition—*Quære*. *Mulcolm* v. *O'Callagan*, 2 Mad. 349.

3. Where consent to a marriage has been obtained without misrepresentation, it cannot be retracted; otherwise, where it

has been obtained by deceit or fraud: so where consent was given by a trustee, who referred the party to another person, to prepare a settlement, and a sum of money was settled accordingly; but, in consequence of disputes, the trustee forbad the marriage, and the husband gave up his addresses, and some time afterwards the parties were married without further application to the trustee: it was held a marriage with consent. *Merry* v. *Ryves*, 1 Eden, 1.

4. A gift by will of real and personal estate to testator's niece, on marriage, with consent and approbation of three trustees, with a limitation over in case the devisee should marry without their full consent, or refuse to execute such settlement as the trustees should think proper. The treaty of marriage commenced with consent of the two acting trustees, and the settlement was prepared avowedly on behalf of all, but without the authority, though with slight knowledge and no dissent of the third, who had not acted in the trusts of the will; and the execution of the settlement was deferred only from the circumstances of a debt claimed by the two acting trustees. The parties afterwards married. Held, that previous consent by all the trustees and settlement were necessary to prevent the gift over taking effect. *Clarke* v. *Parker*, 19 Ves. 1.

5. There are instances of implied consent to marriage by not expressing dissent, and no good reason suggested, and of relief against withholding consent from a corrupt motive where consent in writing was not required. *Ibid*, 19 Ves. 11.

6. The consent of the majority of the trustees was never held sufficient, unless consent of the others was withheld from a vicious or unreasonable motive. *Ibid*, 19 Ves. 13.

7. There are cases not only where the consent to marriage may be withdrawn, but where it may be the positive duty of the trustees to countermand it. *Ibid*, 19 Ves. 13.

8. Trustee for consent to marriage is not required to shew his reason for dissent. It must be shewn that he has unreasonably refused assent. *Ibid*, 19 Ves. 22.

9. Where the consent of a trustee under a will is necessary to a marriage, such consent was held given, though only expressed in general terms, as, that he would not stand in the way of any arrangement of the co-trustee, &c. The trustee having advised the settlement and encouraged the proposal, and having also a prospect of benefit from the forfeiture, though no fraud was imputed. *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225.

10. Where a trustee, whose consent was made necessary by the will, refused to interfere, either by consenting or objecting to the marriage, the court referred it to a master to consider of the propriety of the proposed marriage. *Goldsmid* v. *Goldsmid*, Coop. 225. 19 Ves. 368.

11. Bequest of personal estate to A., provided she marry with consent of B., (a trustee in the will), but if she marry without such consent, then to C. A general commission given by B. after A. attained 21, to contract marriage as she might think fit; subsequent approbation of a marriage contracted under such general commission without his knowledge, is a sufficient compliance with the condition. *Pollock* v. *Croft*, 1 Mer. 181.

MARRIAGE SETTLEMENT.

I. JURISDICTION.

1. The court of Chancery has no means of enforcing a settlement on marriage of an adult, unless the husband seeks to obtain her property in court: but if the marriage is a contempt, the court, vindicating its jurisdiction, is enabled, by imprisonment, to compel a settlement. *Ball* v. *Coutts*, 1 V. & B. 300.

II. ARTICLES, OR COVENANT FOR.

(a) *Where executed.*

1. Specific performance of marriage articles refused, on the ground of their being inconsistent, uncertain, and unintelligible. *Franks* v. *Martin*, 1 Eden, 309.

Affirmed Dom. Proc. 5 Toml. P. C. 151.

2. A bill by the husband of the infant, *quasi* tenant in tail, for a specific execution of the marriage articles, giving the husband an estate for life, dismissed. *Lecky* v. *Knox*, 1 B. & B. 210.

3. In case of the covenant by husband, in consideration of £——, received as the purchase-money of an estate of the wife, within two years to convey lands in the county of N., of the value of such purchase money, by way of settlement. The husband having died without performing the covenant, performance of the same was decreed against his representatives, by laying out, in the purchase of land, so to be settled, so much money as would be equal to the present value of estates in N., which, at the time when the covenant ought to have been performed, would have been worth the amount of the purchase-money, with interest at 4 *per cent.* from the death of the covenantor. *Suffield* v. *Suffield*, 3 Mer. 699.

4. Articles may be executed against a voluntary settlement. *Pulvertoft* v. *Pulvertoft*, 18 Ves. 92.

(b) *Construction, or Operation of.*

1. A mother, tenant for life, with remainder to her son, under age, in fee, that they would settle, within two years, an estate on the heirs male of the marriage. This is not a covenant upon which the court can decree a strict settlement. *Howorth* v. *Deem*, 1 Eden, 351.

2. Where articles were entered into previous to marriage, for settling by the wife's father lands to the use of the husband and wife for their lives, and the life of the survivor; and after the death of the survivor, to the use of the heirs of the body of the husband on the wife begotten, remainder over; and a settlement was made after the marriage, reciting the articles, and said to be made in pursuance thereof, and in consideration of the marriage. Upon a bill brought by a son of the marriage, the court refused to decree the articles to be carried into execution by a strict settlement against a purchaser for a valuable consideration, who had notice of them, on the grounds of the articles not being produced, by which alone the court could know the parties intended a different settlement; and also of notice by recital of the articles in the settlement actually made. *Cordwell* v. *Mackrill*, 2 Eden, 344.

3. At the hearing of a suit instituted by the mother and only child, after the death of the father, for the purpose of compelling an execution of a marriage settlement, it appeared that the settlement differed materially from the articles entered into upon the marriage, and to the prejudice of the plaintiff; but the court decreed an execution of the articles, though in direct contradiction to the specific prayer of the bill. *Durant* v. *Durant*, 1 Cox, 58.

4. Devise in strict settlement, with power to the tenants to jointure, on condition that two-thirds of the marriage portion be settled, one-third upon the eldest son of the marriage, and one other third upon the younger children; and with power also to charge the estate with a sum not exceeding £5000, as portions for the younger children. Upon the intention that the settlement should be conformably to the limitations of the real estate, a trust for the father for life was established, and the interest of the eldest son not to be divested, but by his death, under twenty-one, without issue male; and the £5000 to be in trust for the younger children of that, and any future marriage. *Burrell* v. *Crutchley*, 15 Ves. 544.

5. Powers of selling, exchanging, and investing in new purchases, are usual in settlements; and therefore powers of sale and exchange, were decreed to be inserted in a settlement under a clause in the articles for all usual powers. *Peake* v. *Penlington*, 2 V. & B. 311.

6. It is a common clause in marriage settlements, to intrust the husband with a power of appointing among the children when the property is small. *Dillon* v. *Dillon*, 1 B. & B. 91.

7. An obligation to make a settlement on the wife and the issue, includes an obligation to make a settlement on the issue, after the death of the wife. *Prebble* v. *Boghurst*, 1 Swan. 319.

8. A settlement made under the directions of the court, ought to provide for the children as well as the mother; but when that has been omitted, and the order acquiesced in for a long time, it will not be supplied. *Johnson* v. *Johnson*,

1 J. & W. 479.

9. Marriage articles, limiting "an estate to A. for life, remainder to her husband for life, remainder to the heirs of the body of A. by her husband, to be begotten, with like limitations, of another moiety to B. the sister of A.," with a power to the husband of A. to dispose of the premises amongst the issue of the marriage, carried into execution, by limiting the estates in strict settlement to A. and B. with cross remainders amongst their issue, with power to the husband of A. to appoint both estates amongst his children by A. *Dillon* v. *Dillon*,

1 B. & B. 77.

10. Articles are considered in equity as the heads of an agreement, and construed by what appears to have been the intention of the parties, rather than by the legal effect of the words. *Ibid*,

1 B. & B. 89.

III. Valid or Invalid.

See also Tit. Bankruptcy XII. (v) *ante*.

1. A settlement in consideration of marriage will be good against creditors, notwithstanding false recitals, that the property settled belonged to the wife; nor will the estates settled be charged for the benefit of the creditors, on account of any voluntary expenditure by the husband after the marriage, in improvement by building and enfranchising copyholds; but jewels and furniture purchased by him after the marriage, and given to the wife, will be liable to his debts. *Campion* v. *Cotton*,

17 Ves. 263.

2. The consideration of marriage will support a settlement even of moveable effects, and neither the joint possession of furniture nor the want of an inventory, nor the fact that the settler was indebted at the time, and that his wife knew it, will affect the validity of the settlement. *Ibid*, 17 Ves. 271.

3. Consideration of marriage considered as extending to persons not directly within it, as to brothers, uncles, and other relations, upon the marriage of a son, as being within the contract between him and his father. *Pulvertoft* v. *Pulvertoft*,

18 Ves. 92.

4. Every limitation in a marriage settlement is not necessarily protected and rendered valuable by the consideration of marriage; and though equity has executed covenants in settlements, in favor of collateral relations, it will not carry them into execution in favor of mere strangers. *Sutton* v. *Chetwynd*, 3 Mer. 249.

5. The consideration of marriage not like the consideration in other contracts, for the mutual issue, being purchasers, have a right to call on both parties to perform; and the one party is not discharged by the neglect of the other to perform his part. *Lord Rancliffe* v. *Parkyns*,

6 Dow, 209.

See also, as to consideration, *Prebble* v. *Boghurst*,

1 Swan. 319. 1 Wil. 167.

6. Though a female infant will not be bound by her covenant upon marriage to settle her real estate, yet the court refused to set aside a settlement upon the suit of the heir of the wife, where the property was church leases for lives, which had been, both during and since the coverture, renewed by the husband, who had settled his own estate; and the settlement had been confirmed by repeated acts of the feme, fines of other parts of her freehold estates, and orders of the court of Chancery, and children having been born, and the husband having held adversely during eighteen years, against a former heir. The bill by the heir of the feme, claiming as special occupant, and not against the assets of the husband, but praying an account against his devisee for life, whose possession commenced long since the fall of the surviving life in the original lease, was dismissed. *Milner* v. *Lord Harwood*, 18 Ves. 259.

7. Settlement, on marriage, of freehold estates of inheritance, and leaseholds, for lives and years, by a man not indebted or in trade, to the use of himself for life, unless he shall embark in trade, and in the life of his wife become a bankrupt; and from his decease or bankruptcy to se-

cure an annuity for his wife, and subject thereto for his heirs, executors, &c. on his afterwards engaging in trade, and becoming bankrupt, is void, as against his creditors. *Higginbotham* v. *Holme*, 19 Ves. 88.

8. Limitation of a wife's property until the bankruptcy of her husband, or a lease determinable on the bankruptcy of the lessee, would be good. *Ibid*, 19 Ves. 92.

9. Limitation in a marriage settlement to the brothers of the settler, after other limitations to the first and other sons of the settler in tail male, are not valid against a subsequent purchaser for a valuable consideration. *Johnson* v. *Legard*, 3 Mad. 283.

10. Limitations in a marriage settlement in favor of the issue of a second marriage by the settler, held good against a purchaser for a valuable consideration; such limitations being interposed between the limitations to the sons of the first marriage and the daughters of such marriage. *Clayton* v. *Earl Wilton*, 3 Mad. 302 (*n*).

11. Limitations to collaterals in a marriage settlement by tenant in tail are void, as against a subsequent purchaser or mortgagee, for valuable consideration, in the same manner as if the settler had the fee. *Cormick* v. *Trapaud*, 6 Dow, 86.

12. Creditors cannot set aside a settlement of the wife's property, though made after marriage, but reciting a parol agreement before marriage, to make such settlement. *Dundas* v. *Dutens*, 2 Cox, 235.

13. A widow before her second marriage, and without fraud, conveys her estates to trustees, to her own separate use, without the knowledge of her second husband; this deed is good against the second husband. *Countess of Strathmore* v. *Bowes*, 2 Cox, 28.

14. A settlement made on the faith of a decision of the court below, is still a transaction *pendente lite*, and subject to all the legal and equitable consequences of an appeal. *Gore* v. *Stackpoole*, 1 Dow, 18, 31.

IV. Voluntary.

1. A settlement made to a party who has no right to demand it, or who could not compel the execution of it, is voluntary, as a settlement after marriage made in pursuance of a parol promise before marriage is voluntary since the statute of frauds. *Spurgeon* v *Collier*, 1 Eden, 55.

2. Where a husband living in a state of adultery, upon a separation taking place between him and his wife, settled an estate of £300 per annum upon his wife, for her separate maintenance, and on the children of the marriage; the forbearance of the wife to enforce her rights against the husband in the Ecclesiastical Court, is a consideration sufficient to support this settlement, which therefore is not fraudulent as against creditors under the statute 13 Eliz. *Hobbs* v. *Hull*, 1 Cox, 445.

3. A voluntary settlement, though it is a fair provision for a wife and children, is void under the statute 27 Eliz. c. 4. as against a subsequent purchase for valuable consideration, even with notice, and there is no equity under such a settlement to prevent a sale by the settler, though, till a sale, the objects of the settlement are entitled to an execution of the trusts. *Pulvertoft* v. *Pulvertoft*. 18 Ves. 84.

4. Where the limitations of a settlement extend to brothers or other relations, all within the consideration, they are not cases of voluntary settlement. *Pulvertoft* v. *Pulvertoft*. 18 Ves. 90.

5. Purchase money cannot be laid hold of in favor of claims under a previous settlement, void under the statute 27 Eliz. c. 4. as being voluntary. *Pulvertoft* v. *Pulvertoft*. 18 Ves. 91.

6. A court of Equity will not act in favor of a mere voluntary settlement, and therefore, upon a subsequent purchase without notice and covenant to lay out the money to the same uses, will not lay hold of the money. *Ibid*, 18 Ves. 93.

7. Voluntary settlement good between the parties. *Ibid*. 18 Ves. 92.

8. Notwithstanding a voluntary settlement in favor of near relations, a contract for sale by the settler may be enforced in Equity after his death against the objects of the settlement. *Buckle* v. *Mitchell*. 18 Ves. 100.

9. Covenant in marriage articles in favor of a stranger, held to be merely voluntary, and not supported by the consideration of the marriage. *Sutton* v. *Chetwynd*, 3 Mer. 249.

10. A voluntary settlement without fraud, by a husband not indebted, in favor of his wife and children, is valid

against subsequent creditors. On a bill by the wife, the court established the settlement, without directing an inquiry, no creditor attempting to impeach it; and there being no allegation that the husband was indebted at the time. *Battersbee v. Farrington*, 1 Wil. 88. 1 Swan. 106.

11. A voluntary settlement of real or personal property in favor of strangers, by one not indebted at the time, nor meaning a fraud, is good against subsequent creditors. *Holloway v. Millard*, 1 Mad 414.

12. D., by articles bearing date 1796, in consideration of his intended marriage, covenants to settle certain lands, to be purchased with a certain sum of money, to uses in strict settlement, and two years after enters into a bond to the crown. In 1812, he purchases lands, generally, in fee, a mortgage term was assigned to attend the inheritance, and the estate then settled to the uses declared by the articles, in which D. himself took a life interest. Held, that the settlement was voluntary, and the particular estate not being specifically bound by the deed of 1796, the term did not protect the inheritance against the claims of the crown upon the land. *Rex v. St. John*, 2 Price, 217.

V. CONSTRUCTION OF.

(*a*) *As to the Person taking.*

1. The marital right of the husband, as administrator by law, is excluded by a limitation to the next of kin of the wife. *Anderson v. Dawson*, 15 Ves. 532.

2. Under a limitation in a marriage-settlement of the wife's property, in default of her appointment, for her next of kin, or personal representative; the husband, taking a prior partial interest under the settlement, is not entitled. *Bailey v. Wright*, 18 Ves. 49. Affirmed on appeal, 1 Wil. 15. 1 Swan. 39?

3. Where the introductory clause of a limitation in a will and settlement is to the issue of children; but the operative part is to children and grandchildren only: a great grandchild will not be entitled under it. *Earl Oxford v. Churchill*, 3 V. & B. 59.

4. Under a marriage-settlement, the son of a second marriage was held, by virtue of the contract, to take as heir male of the body of father and mother, although a son by a former marriage was living. *Seymour v. Bowman*, (*cited*) 2 Mer. 347.

5. Limitation in a settlement of personal property to the executors, administrators, and assigns of A., after the death of B. and C., does not fail by the death of B. and C. in the lifetime of A. *Horseman v. Abbey*, 1 J. & W. 381.

6. Whether, in that event, A. herself is entitled to take—*Quære*. *Ibid*.

7. In the statute of distributions, a distinction is taken between kindred in equal degree, and next of kin taking by representation; and therefore a settlement of personalty, to "next of kin in equal degree," was held to pass the property to a surviving sister, in exclusion of children of a deceased brother. *Anon.* 1 Mad. 36.

And see *Wimbles v. Pitcher*, 12 Ves. 433.

8. A limitation by settlement of personalty, "to the next of kin of the said A. P., of her own blood and family, as if she had died sole and unmarried," the next of kin take, as under the statute of distributions. *Cotton v. Scarancke*, 1 Mad. 45.

9. The meaning of the word issue is, *prima facie*, descendants; but wherever in a deed or will it appears, that the word issue was not intended to mean descendants but children, the court will give it such a construction; so, where in a settlement the words "lawfully begotten by the settler," were added to the word issue, it was held to mean children. *Hampson v. Brandwood*, 1 Mad. 388.

(*b*) *Interest passing.*

1. Settlement, after marriage, of stock, which had been the wife's property, in trust for the husband for life, then to the wife for life, and then to the "heir male" of the body of husband and wife; in default of such issue, to the heirs female, &c. with a clause that, if the husband should settle lands of equal value to the like uses, the stock should be re-assigned to him: a son was afterwards born, who died in the lifetime of the father, without issue, and under age. Held, that the property, subject to the wife's interest, vested in the husband, and passed by his will. *Le Rousseau v. Rede*, 2 Eden, 1.

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2. Where the husband, before marriage, executes a deed poll, purporting to settle all his real and personal estate on the wife, and the heirs of her body by him begotten, obliging her to give each of her children by him begotten £1000, as they respectively attain twenty-one, and to divide the residue equally amongst them at her death: under this deed poll, the wife takes an estate for life only; and after her death the children take an estate in fee in the real estate, as tenants in common, and an absolute property in the personal estate. *Lowther* v. *Earl of Westmorland*, 1 Co., 64.

3. Settlement by feme sole, previous to marriage, of part of her portion in trust, to pay the dividend to herself for her separate use for life, and after her death to her intended husband, and after the death of the survivor, to transfer the capital according to her appointment; and if she should die without appointment, and her husband should then be dead, in trust for her next of kin, their executors, &c. according to the stat. of distributions. This is an interest for life only in the widow, with a power of disposition by will. *Anderson* v. *Dawson*, 15 Ves. 532.

4. There is as great a difference between a limitation to the executors and administrators, and one to the next of kin, as there is between a limitation to the right heirs and to the heirs of a particular description, giving the ancestor, having a particular estate, the whole property in the former but not in the latter case. *Ibid*, 15 Ves. 536.

5. Bond upon marriage, to devise, convey, or assure all such goods, personal estate and effects, that the husband should at any time, during the joint lives of him and his wife, be possessed of, to the use of them and the survivor. This attaches on capital not income, unless laid up as capital, admitting therefore expenditure and debts, in a fair application of income, and not liable to a minute account; therefore, an estate purchased by the husband with money, partly his own and partly borrowed on his personal security, and some paid off by him, was, after his death, held to belong to the heir, but charged for the benefit of the trust with the money that was his own, the debts paid on account of that purchase and expenditure in repairs, improvements, &c. *Lewis* v. *Madocks*, 17 Ves. 48.

6. Money charged on land, by articles on marriage, to be laid out on government security or freehold estate, in a particular situation, with consent of the wife, to be settled upon trust for her separate use for life; and after her death to be conveyed or assigned to her husband, his heirs or executors; if she survive, for the issue, if more than one, subject to her appointment by deed or will, equally at twenty-one, their heirs, if land; their executors, if money; if no issue, subject to her appointment; and, in default, to his or her next of kin, their heirs or executors. The husband died after having disposed of his personal estate by will, and leaving an only son, who died under age. Held, that the property charged was personal property, to the interest of which the widow was entitled for life, with a power to appoint the principal by deed; and as to the question of receiving the money out of court, she had liberty to apply after the execution of the power. *Van* v. *Barnett*, 19 Ves. 102.

7. By deed poll, executed upon the marriage of J. S. H. Lady S. (his mother) covenants that £9500, then due to her on mortgage, shall become his absolute property at her decease. The mortgage being paid off, the produce is laid out in exchequer bills, which are sold by J. S. H., under a power of attorney from Lady S., and the produce laid out, under the same authority, in the purchase of stock in the name of Lady S. She subsequently makes an assignment of £14,348 three per cents. standing in her name to the plaintiff, a banker at Vienna, without notice of the deed poll, as a security for advances. The personal representatives of J. S. H., or those claiming after him under the settlement, are entitled to so much of the stock so assigned to the plaintiff, as is proved to have been purchased with the produce of the mortgage money, and the plaintiff's security fails him to that extent. *Liebman* v. *Harcourt*, 2 Mer. 513.

See also *Denton* v. *Davies*, 18 Ves. 499.

8. A bond executed upon marriage, and conditioned to be void, if, in the event of the wife surviving the obligor, his executors &c. should, within three months after his decease, pay to trustees £1000, in trust for his wife; and if, in the event of obligor surviving his wife, and there being any child or children of the marriage living at his decease, the executors, &c. should, within three months after his decease, pay to trustees

£1000, in trust for such child or children; and farther, if the obligor should at any time during his natural life become seised of any messuages, &c. in possession, and should settle the same upon his wife, and the issue of the marriage, by such good conveyances in the law as council should advise, in such parts and proportions, and to such use and uses as should be thought requisite, "the better to make a provision for his said wife, in case she should happen to survive the obligor" After the death of the wife the obligor married again, and then and not before became seised of real estates, and at his death left issue by both marriages. All the real estates of which he became seised during his life, were held subject to the obligation, and settled on the issue of the first marriage, as tenants in common in fee. *Prebble* v *Boghurst*,

1 Wil. 161 1 Swan. 300, 580.

9 A party, entitled as equitable tenant in tail, under a settlement, in which is a covenant to convey lands to the uses of such settlement, afterwards, and upon his own marriage, covenants also to convey lands of less value, though he obtains a decree for the execution of the first mentioned covenant, the second covenant is no lien in equity upon the lands conveyed according to the decree. *Gardner* v. *Marquis of Townsend*, Coop. 301.

10. A settlement of "all and singular, the two-third parts of all and every the whole of my property, goods, &c. belonging to me in the empire of Great Britain, and the East Indies, lately willed and devised unto me by Major John Mussing," held to pass only two thirds of such property as then remained, and did not extend to such parts of the property as had been spent previously to the settlement. *Cotteen* v. *Missing*,

1 Mad. 176.

VI. Fraud on Marriage.

1. In cases of frauds on marriage, though the husband be a party to such fraud, yet his interest cannot be affected, if either a wife or child, who is an object of such settlement, be living. *Thompson* v. *Harrison*, 1 Cox, 345.

2. Where upon a treaty of marriage the mother of the husband represented to the father of the wife, that a certain farm and stock (to one-third of which the mother was entitled), were the property of her son, and that he was not indebted, when, in fact, she held a bond from him for the value of her part of the farm and stock, and by such representations the father of the wife was induced to give his consent to the marriage, and a portion to his daughter, and the farm and stock were settled upon the marriage. This bond will be considered a fraud upon the marriage, and as such will be relieved against in Equity. *Scott* v *Scott*,

1 Cox, 366.

3. Where, on a treaty of marriage, the brother of the wife makes a false representation to the husband of the wife's fortune, and the manner of its being secured, but without fraud, he being himself deceived, and he is afterwards made a party to the marriage settlement made upon, and reciting such representations, and the marriage takes place accordingly; there being no imputation of fraud in the transaction, the brother himself having misconceived the subject, he will not be liable to make good his representations. *Merewether* v *Shaw*, 2 Cox, 124.

4. Marriage settlements of personal property in general terms, "All monies, debts, bills, bonds, notes, &c" There is no inference of fraud from the cancellation, during the treaty, upon a fair, moral consideration, of a promissory note, the only instrument of that description; the marriage not taking place upon a representation of the particulars, or the amount of the property. *De Manneville* v. *Crompton*, 1 V. & B. 354.

5 Material representation in the circumstances of a person contracting marriage will be made good, even at the instance of persons concerned in fraudulently defeating such representations. *Ibid*,

1 V. & B. 355.

VII. Marriage Brocage.

1. Relief given against securities passed in lieu of marriage-brocage bonds; the party passing them being involved in difficulties, not *sui juris*, and being compelled by necessity to enter into such terms." *Shirley* v. *Martin*, 1 B. & B. 358.

See also *King* v. *Burr*, 3 Mer. 693.

MERGER.

1. A devise of premises, subject to a mortgage for £3500, to testator's three daughters, to be divided equally. One dies; mortgagee bequeaths to the two surviving daughters and the survivor of them, all the money due on the mortgage, and the interest, so that it do not altogether exceed £4000; and if it do not amount to £4000, then to be made up; the other daughter dies, leaving all her real and personal estate to the third: held, that the charge is merged in the inheritance. *Price* v. *Gibson*, 2 Eden, 115.

2. Where a person is entitled to a sum of money charged upon an estate, and secured by a term of years, and afterwards becomes entitled to the fee simple of the estate, a court of equity extinguishes the equitable lien, except in the cases of creditors or infancy. *Donisthorpe* v. *Porter*, 2 Eden, 162.

3. Wherever legal and equitable estates meet in the same person, the equitable estates merge in the legal. *Wade* v. *Paget*, 1 Cox, 74.

4. If tenant for life, at the time he pays off a debt, charged upon the estate, merges the security by taking an assignment, connecting it with the legal estate of inheritance, upon that transaction there is no charge; but as tenant in tail represents the inheritance, the presumption is, whether he takes an assignment or not, that the debt is gone; there is no charge, unless there is evidence of an intention that it should continue an incumbrance. *St. Paul* v. *Viscount Dudley & Ward*, 15 Ves. 173.

5. Mortgage held not merged by union with the fee, the actual intention not established by the acts of the party, but presumed in favor of the personal representative, it having been to the advantage of the party that it should not merge. *Forbes* v. *Moffatt*, 18 Ves. 384.

6. A person becoming entitled to an estate, subject to a charge for his own benefit, may keep up the charge; upon this subject a court of equity is not guided by rules of law, but will sometimes hold a charge extinguished, where it would subsist at law, and sometimes preserve it, where at law it would be merged, depending on the intention, actual or presumed, of the person in whom the interests are united: where, as in most instances, it is, with reference to the party himself, of no sort of use to have a charge on his own estate, it will sink, without some act by him to keep it on foot. *Ibid*, 18 Ves. 390.

7. The owner of a charge is not, as a condition of keeping it up, called upon to repudiate the estate; his election is not to take the charge or the estate, but whether, taking the estate, he means the charge to sink into or continue distinct from it. *Ibid*, 18 Ves. 391.

8. In all cases of a charge merging, it was perfectly indifferent to the party in whom the interests had united, whether the charge should or should not subsist. *Ibid*, 18 Ves. 393.

9. Where the term and freehold would, if legal estates, merge, being vested in the same person, the term in equity in such case is construed to attend the inheritance, unless there be a declaration or other act to evince an intention to sever them. *Kelly* v. *Power*, 2 B. & B. 253.

MINES.

1. The inference of abandonment from non-user of a right is not applicable to the case of mines. *Seaman* v. *Vawdry*, 16 Ves. 392.

2. No presumption of a grant of mines against an express reservation on a sale many years before, merely from the landlord's permitting expenditure without making a claim. *Adair* v. *Shafto*, 19 Ves. 156.

MORTGAGE.

I. LEGAL.

(a) *What shall constitute a Mortgage.*

1. Absolute conveyance, and a deed of defeazance on payment of mortgage money, during the joint lives of mortgegor and mortgagee: held a restraint upon mortgagor, and a redemption decreed to his representatives, although the estate had been the subject of a voluntary settlement on the mortgagee's niece, there being also fraudulent and oppressive conduct on the part of the mortgagee. *Spurgeon* v. *Collier*, 1 Eden, 55.

2. Conveyances executed with a parol agreement that the parties should be at liberty to redeem, which was apparent though not directly admitted by the defendant's answer, were held to be mortgages and not absolute conveyances; and defendant having insisted upon their being absolute conveyances, the plaintiffs were allowed to redeem and their costs. *England* v. *Codrington*, 1 Eden, 169.

3. A mortgage of anticipation of a West India estate, and the mortgagor being found, upon an account taken, to be greatly indebted to the mortgagee, releases the equity of redemption to the mortgagee and his heirs; it not appearing, however, at the time to have been intended as an absolute sale, and the mortgagee having both by letter and parol declared himself to be only mortgagee in possession, a redemption was decreed. *Vernon* v. *Bethell*, 2 Eden, 110.

4. Construction of several instruments together as a mortgage, though one imported a purchase. *Sevier* v. *Greenway*, 19 Ves. 413.

5. Where possession has been obtained under a forfeiture, and has been acquiesced in for seventeen years, a bill to charge the party as mortgagee in possession should not be entertained. *Blennerhassett* v. *Day*, 2 B. & B. 125.

6. Where the grantee of lands, subject to a limited power of redemption, has not all the remedies of a mortgagee, the conveyance is not a mortgage but a conditional sale; therefore, where lands were conveyed in lieu and satisfaction of a portion charged on them, with a clause of redemption if the portion were paid in ten years, there being no covenant for payment of the portion, or any collateral security, a redemption was refused after the ten years; for if the produce of a sale of the lands were insufficient to discharge the portion, the grantee could have no remedy against the grantor, to recover the deficiency. *Goodman* v. *Grierson*, 2 B. & B. 274.

7. Any clause introduced into a mortgage deed to limit the period of redemption is in equity totally disregarded; as the parties cannot by such clause restrict the equity of redemption, for it would be an oppression on the mortgagor. In equity the rule is once a mortgage, always a mortgage. *Ibid*, 2 B. & B. 278.

8. In a mortgage, the absence of a covenant of repayment and of a collateral bond cannot vary the transaction; for every mortgage implies a loan, and every loan a debt for which the mortgagee's personal estate is liable; and although an

action of covenant would not lie, still it may be a mortgage. The absence of a covenant for the payment is a strong circumstance to indicate the intention of the parties to the deed. *Ibid*, 2 B. & B. 278.

9. The fair criterion in equity to decide whether a deed be a mortgage or not, is: Are the remedies mutual and reciprocal? Has the grantee all the remedies a mortgagee is entitled to? *Ibid*, 2 B. & B. 279.

(*b*) *Construction of.*

1. Deed of mortgage at 5 *per cent.* contained a proviso that as often as the interest should be paid half yearly on the days appointed, or within three months next after each, so much should be deducted as would make the interest $3\frac{1}{2}$ *per cent.* and by a separate agreement, the mortgagee covenanted not to call in the money within five years, unless the interests should be in arrear. The first half year's interest not having been tendered till after the three months, but the second half year's interest before held, first, that the mortgagee was entitled to interest at 5 *per cent.* for the half year which had been tendered after the time, and that in consequence of the default, he was entitled to call in his money. *Stanhope* v. *Manners*, 2 Eden, 197.

2. A mortgage with a recital in the declaration of trust, as to mortgagor's disposal of the land upon proper ground-rents; it was nevertheless held that the security did not extend merely to the ground-rents, but to the whole of the mortgagor's interest in the premises. *Sheldon* v *Cox*, 2 Eden, 224.

3. Mortgage to partners, their heirs and assigns, to secure debts due or to become due to them or the survivor, whether available to a new partnership formed by the addition of another, in whose time the debt accrued—*Quære* *Ex parte Watson*, 19 Ves. 459.

II. Equitable.

(*a*) *Where created.*

1. A parol agreement to mortgage, with a subsequent delivery of the title deeds, will amount in Equity to a mortgage, and will be effectual from the time of the agreement. *Birch* v. *Worthington*, 1 Cox, 211.

2. A deposit of title deeds, as a security, is an equitable mortgage. *Hankey* v. *Vernon*, 2 Cox, 12.

3. A bankrupt, having mortgaged his estate, makes a lease without the assent of the mortgagor, and assigns the rent reserved as a security for money borrowed. The assignment containing a covenant for further assurance is in Equity a covenant to make a mortgage, and though the lease is void as against the mortgagor, it is not as against the lessor, and the case must be considered as an equitable mortgage. *Ex parte Wills*, 2 Cox, 233.

4. The delivery of title deeds to an attorney, to prepare a mortgage deed, does not of itself amount to an equitable mortgage; otherwise, if deposited expressly as a security for a particular debt. *Ex parte Bulteel*, 2 Cox, 243.

5. Equitable mortgage held to be created by delivery of deeds for the purpose of preparing a legal mortgage. *Ex parte Bruce*, 1 Rose, 374.

6. A mere deposit of title deeds, upon an advance of money, without a word passing, creates an equitable mortgage. *Ex parte Kensington*, 2 V. & B. 83.
——— *Langston*, 17 Ves 230.

7. A legal mortgage is no security for subsequent advances, though such advances are made on the strength of a parol agreement to that effect. *Ex parte Hooper*, 1 Mer. 7. 2 Rose, 328. 19 Ves. 477.

8. A transfer of deeds from a depository, in whose possession they constituted an equitable mortgage, to the person who discharges his debt, held not to be considered as an assignment from him so as to overreach an act of bankruptcy against the express words of a defeazance on a warrant of attorney, which stated that the deeds had been deposited by the bankrupt himself. *Ex parte Combe*, 17 Ves. 369. 1 Rose, 268.

9. Equitable mortgages by deposit of deeds not favored, especially when contradicting a written instrument. *Ibid.*

10. Deposit of deeds until a mortgage, as evidence of an agreement for a mortgage, is a good equitable title. *Ex parte Wright*, 19 Ves. 258. 1 Rose, 308.

11. The court will not extend the doctrine of equitable mortgage, by deposit of deeds, beyond the first depository; so where a party advanced money upon the security of a lease at that time deposited

with another creditor, it created no lien upon the lease. *Ex parte Whitbread*,
19 Ves. 209.
1 Rose, 299.

12. An equitable mortgage may be created by deposit of copy of court rolls. *Ex parte Warner*, 19 Ves. 202.
1 Rose, 286.

13. A parol agreement to deposit a lease, when granted as a security for a sum advanced, does not constitute an equitable mortgage. *Ex parte Coombe*,
4 Mad. 249.

14. No objection to deposit of lease by way of mortgage, that it contains a covenant against assigning without license.

Ex parte Baglehole, 1 Rose, 432.
——— *Sherman*, Buck, 462.

15. A mortgagee having advanced to the mortgagor a further sum upon his bond: the bond, though obscurely worded, was held to be evidence of an agreement for a further charge upon the mortgaged premises. *Ex parte Hearn*, Buck. 165.

16. The bankrupt agreed with A. to execute a mortgage of certain premises for the security of a debt; and, in order that A. might prepare the mortgage, sent him all the title deeds, except the immediate conveyance to himself. The bankrupt, being also indebted to B., took that conveyance, and deposited it with him as a security for his debt, at the same time promising to send him the remainder of the title deeds. Held that A. and B. had not either separately or collectively an equitable mortgage upon the premises. *Ex parte Pearse*, Buck, 525.

17. Messrs. M. & Co. being in possession of all the title deeds of certain leasehold premises belonging to the bankrupt, as a security for the debt due from him, at his request deliver to the solicitor of the original lessor, upon an engagement of re-delivery of the original lease and the immediate assignment of the bankrupt, for the purpose of enabling the bankrupt to procure an extension of the term of the lease. The bankrupt receives the lease and assignment from the solicitor of the original lessor, and deposits them with Messrs. C. & V., as a security for money advanced. After the bankruptcy, Messrs. C. & V. upon payment of their claim thereon, deliver the lease and assignment to the assignees under the commission. Held, that Messrs. M. & Co. were in equity to be considered as in possession of the lease and assignment, and that they had, therefore, a priority of lien.

Ex parte Meux, } 1 G. & J. 118.
Ex parte Cawthorne, }

18. A. and B. being seised of a freehold estate of inheritance, subject to a mortgage term for £300, for the life of A.; remainder to trustees to support, &c. remainder to the survivor in fee; C. agrees to advance £800 for the purpose of paying off the mortgage and stocking the farm of A., on an agreement that the estate should be mortgaged to C. for £1000, to secure the £800 and also £200 owing to him, as executor of his father, from B; the £800 being advanced by C. out of which the mortgage is paid off by A., who thereupon receives the title deeds from the mortgagee (he having assigned the term to attend the inheritance) and delivers them up to C. A. and B. direct a mortgage deed to be prepared to C., which is engrossed and executed by A., (B. refusing to execute); and afterwards A. dies, and then B. dies, both having paid the interest on the £1000 up to the death of each. Held, on the determination of a suit, instituted against the infant heir at law of both A. and B., that the delivery over of the deeds by the tenant for life, did not, under the circumstances, create such a lien on the estate, in the way of equitable incumbrance, as to have the effect of charging the inheritance with any part of the £1000. The proof of B.'s assent to the deed being deposited for the security of the money, or any part of it, not being sufficiently direct and positive to establish the fact of his intention, that the deeds should be delivered to C. for that purpose. The plaintiff, however, was decreed to be entitled to the benefit of the term, and to stand in the place of the mortgagee, *quoad*, the mortgage money paid off out of the money advanced. *Williams* v. *Medlicot*, 6 Price, 495.

19. A deposit of title deeds by a simple contract debtor of the crown, for securing part of the purchase money to be paid in consideration of other lands sold to him, is an equitable mortgage, and binds the crown; and that although the purchaser have also given his bond for the whole amount. *Casberd* v. *Ward*,
6 Price, 411.

20. To constitute such a deposit for securing money due an equitable mortgage, it is not necessary that there should be any

agreement accompanying the transaction, that the depositor shall execute a legal mortgage to the depositee; it is sufficient if it can be shewn by satisfactory testimony that the object and intent of the deposit was the security of money. It is, however, obviously advisable that there should be, in all such cases, a written memorandum of that intention, accompanying the deposit. *Ibid.*

21. In a case where the crown had seised lands of a simple-contract debtor, effected by such a deposit of its debt, the court ordered the money due to the depository, to be paid out of the proceeds of the sale, before the crown should be paid, the claimant having filed a bill for that purpose against the purchaser of the land, under the order of the court for the sale, the person against whom the extent issued, and the Attorney-General. *Ibid.*

(b) *Extent of Lien.*

1. Equitable mortgage by a deposit of deeds will be held to cover subsequent advances, upon evidence that such advances were made upon that security. *Ex parte Langston*, 1 Rose, 26. 17 Ves. 227.

2. Equitable mortgage by deposit of deeds, may be extended, beyond the original purpose, to advances after an alteration of the firm, by implication or by parol. *Ex parte Kensington*, 2 V. & B. 79.

3. A security to a firm continued after an alteration in the members of it, upon the construction of a letter raising an agreement to that effect. *Ex parte Marsh*, 2 Rose, 239.

4. Where the original mortgage is a legal mortgage, or constituted by contract in writing, it cannot be added to by parol. *Ex parte Hooper*, 2 Rose, 328. 1 Mer. 7. 19 Ves. 477.

5. Equitable mortgage by deposit of title deeds, by an accountant of the crown, in the hands of one who has an opportunity of knowing that the depositor is or may become a debtor of the crown, is not available against an extent. *Broughton* v. *Davis*, 1 Price, 216.

6. A lessee having deposited his lease as a security for money due, granted an underlease, stating the original lease, and which the underlease afterwards assigned [illegible] the underlessee had notice of the deposit of the original lease, and the same attorney prepared the underlease and assignment: held that the party holding the original lease had a lien against all claiming under the lessee with notice of the deposit, but not against the assignee without such notice, as there was no imputation upon him for not inquiring after the original lease; that the assignee is not bound by his attorney's previous knowledge of the deposit, for the attorney cannot, as agent, stand in the place of the principal, so as to affect him with notice, until the relation of principal and agent is constituted; and as to all information the agent has previously acquired, the principal is a mere stranger. *Mountford* v. *Scott*, 3 Mad. 34.

III. Priority or Postponement.

1. Where a third mortgagee, at the time of advancing his money, has no notice of the second mortgage, he may, by obtaining an assignment of the first mortgage, postpone the second mortgage, even though such assignment is obtained pending a suit by the second mortgagee, and after an offer in the first mortgagee's answer to assign to the plaintiff in the suit, on payment of the money due on the first mortgage. *Belchier* v. *Butler*, 1 Eden, 523.

2. The custody of the deeds creating a term, accompanied by a declaration of trust in favor of a second incumbrancer, without notice of the prior mortgage, will give him an advantage over the first incumbrancer, which a court of equity will not deprive him of; and a party claiming under such second incumbrancer, does not relinquish such advantages by having covenanted, upon the purchase of the equity of redemption from the mortgagor, to retain part of the purchase money to redeem the prior mortgage; it having been also agreed that he might use the money adversariously in case he could not adjust the matter amicably. *Stanhope* v. *Earl Verney*, 2 Eden, 81.

3. A prior incumbrancer will not be allowed to turn interest into principal by indorsement, as against a subsequent incumbrancer, of whom such prior incumbrancer has notice. *Digby* v. *Craggs*, [illegible] Eden, 200.

4. Where estates are sold under a decree, the lien of an incumbrancer is not thereby transferred to the purchase money,

so as to take it out of the registry act, but such first incumbrancer will nevertheless, for want of being registered, be subject to postponement. *Hannand* v. *Moore*, 1 Eden, 327.

5. Notice of an unregistered mortgage will affect subsequent mortgagees, who have registered. *Sheldon* v. *Cox*, 2 Eden, 224.

6. The register of a mortgage will not, by itself, affect subsequent incumbrancer, without actual notice. *Cator* v. *Cooley*, 1 Cox, 182.

7. Lord Chancellor Eldon doubted if a third mortgagee, taking in the first mortgage, could exclude the second mortgagee, where there is bad faith on the part of the first mortgagee, as, that he knew of the second mortgage at the time of the conveyance. *Mackreth* v. *Symmons*, 15 Ves. 335.

8. The first mortgagee was held entitled to tack a subsequent judgment, docketed, though no execution had issued at the time of the bankruptcy of the mortgagor. *Baker* v. *Harris*, 16 Ves. 397.

9. The purchaser of an equity of redemption cannot set up a prior mortgage of his own, or a mortgage which he has got in, against subsequent incumbrances of which he had notice. *Toulmin* v. *Steere*, 3 Mer. 210.

10. Where trustees held an estate, first upon trust to raise a certain sum of money, next to indemnify the lenders of the money against a rent charge upon the estate, and also portions payable to younger children; and in execution of their trust they raised a part of the money upon annuity, secured upon the estate by a term of years, but kept the title deeds in their hands; and afterwards mortgaged the estate without notice of the first incumbrance: upon a bill by the mortgagor, praying that the annuitant might be postponed, the court held that, if it could be maintained that a prior incumbrancer is to be postponed simply for leaving the title deeds in the hands of the mortgagor, such a doctrine can only be applied to cases where the possession of the title deeds is legally incident to the estate of the first incumbrancer, and where it might be said that he had failed to use reasonable diligence for his protection; but this was not such a case, as here it would have been a breach of trust for the trustees to have given to one incumbrancer the instruments which they were bound to keep for the common security of all persons advancing money upon the credit of their trust. *Harper* v. *Faulder*, 4 Mad. 129.

IV. Mortgagor, estate and interest of.

1. The equity of redemption in this court is the fee simple of the land. It will descend, may be granted, devised, or entailed; and such entail is barred by a common recovery, which proves that, in consideration of this court, it is such an estate as there may be a seisin of. *Burgess* v. *Wheate*, 1 Eden, 225.

2. An equity of redemption after forfeiture, is merely an equitable right, and the possession of the mortgagor is more precarious than that of any other *cestui que* trust. In point of possession, the mortgagor is a mere tenant at will, even in equity. *Cholmondeley* v. *Clinton*, 2 Mer. 359.

3. A *cestui que* trust, having a substantive, independent possession, may gain the legal estate by disseisin; but a mortgagor cannot disseise his mortgagee, as his possession is that of the mortgagee. *Ibid.* 2 Mer. 360.

4. The position that the mortgagee is trustee for the mortgagor, must be received with considerable qualifications. *Ibid.* 2 J. & W. 182.

5. The trustee of a mortgage holds the same in trust to the extent of the mortgage for the mortgagee; subject thereto for the mortgagors. And he cannot do any thing to prejudice the mortgagors. *Blennerhasset* v. *Day*, 2 B. & B. 133.

6. The trust of a mortgage as between mortgagor and mortgagee differs from that of an outstanding term of a third person, unconnected with either of the parties seeking the legal estate: the only question there being which has the better equity to call for the legal estate. *Ibid.*

V. Redemption.

(a) *Who may redeem.*

1. When the estate is in mortgage prior to a judgment, or when the judgment is obtained, the legal estate is in any

manner out of the debtor, so that the creditor could not recover an *elegit*, equity, in order to protect a purchaser, will not permit the creditor to redeem. *Barrett* v. *Blake*, 2 B. & B. 357.

2. Husband having two mortgages on his estate devises it to his wife in fee, and dies. Wife having married again joins her second husband in another mortgage of the estate, consolidating the two former mortgages into one, at a different rate of interest, and reserving the equity of redemption to the husband and his heirs, without any recital or special circumstance to show that it was the intention of the parties to make a new settlement of the estate. Husband, after the death of the wife, deals with the property as his own, disposes of part for a valuable consideration, and dies. Bill by heir at law of the wife against the purchaser, representatives of the husband and mortgagee, to redeem, and decreed accordingly, and the decree affirmed in *Dom. Proc.* with alterations as to the manner of taking the accounts. *Ruscombe* v. *Hare*, 6 Dow, 1.

3. The rule is, that where husband and wife mortgage the wife's estate, and the equity of redemption is reserved to the husband and his heirs, without recital or special circumstance, to shew the intention to make a new settlement of the estate, the husband has the equity of redemption, as he before had the legal estate only *jure uxoris*. *Ibid.*

4. Where lands are in settlement, and the husband and wife join in a mortgage of them, if the deed creating the security is no more in effect than a simple charge upon the lands, and does not alter the limitations further than is necessary to create the charge, the right of redemption, although it be reserved by the deed to the husband and wife, or either of them, their or either of their heirs, &c. belongs only to those who are entitled under the settlement, and not to the heirs of the husband if he survive the wife. *Jackson* v. *Innes*. 1 Bligh, 1, 104.

5. But where the lands of A., upon her marriage, were settled to the use of husband and wife successively for life, remainder in strict settlement, remainder to the wife and her heirs, with a power of revocation and appointment of new uses; and she joined with the husband in a mortgage, and by the deed to lead the uses of a fine which the husband and wife afterwards levied according to covenant, the lands after the determination of the term created to secure the repayment of the money borrowed, were limited to the husband and wife, and survivor for life, remainder in tail special, remainder for default of such issue to the right heirs of the survivor of husband and wife. The wife having died without issue, leaving the husband survivor, it was held that this was more than a mere mortgage transaction, that there was evidence of an intention to effect a change of the beneficial interest, and that there was upon the face of the deed a clear manifestation of such intention, equivalent to a declaration, and consequently that the husband and his heirs, and not the heirs of the wife, were entitled to the equity of redemption. *Ibid.*

(*b*) *Upon what Terms.*

1. The principle that, where two distinct estates are mortgaged for two distinct debts, a separate redemption cannot be decreed, operates so long as the equities of redemption remain united in the same person. *Willie* v. *Lugg*, 2 Eden, 78.

2. A mortgagee of two distinct estates upon distinct transactions from the same mortgagor, is entitled to hold both until the payment of the whole money due on both mortgages, and even against the purchaser of the equity of redemption of one of the mortgaged estates, without notice of the other mortgage. *Ireson* v. *Denn*, 2 Cox, 425.

(*c*) *When barred.*

1. There is no general rule in equity for presuming a mortgage satisfied, merely upon the ground of non-payment or no demand of principal or interest, for twenty years, or for any other time: and if a jury should, on this ground, presume a bond satisfied, which is given as a collateral security to the mortgagee, the mortgagee is not thereby prevented from shewing the truth of the case in a court of equity, if in fact the money has not been paid. *Toplis* v. *Baker*, 2 Cox, 118.

2. The court will not decree a redemption after a possession by the mortgagee, for twenty years, if the possession be such as shews the mortgagee held it as his own estate: but if any interest has been re-

ceived, or any of the mortgage accounts been settled between the mortgagor and mortgagee, or by any solemn act of the mortgagee, such as a will or settlement made by him, it appears that he considered himself as having a redeemable interest, it will, as against him, and those claiming under him, be held to be such, and the time will only run from the date of such acknowledgment; but there must be no fraud or improper covenants, whereby the mortgagor is prevented from redeeming; but a bill to redeem, after twenty years' possession, upon parol evidence of a conversation with the mortgagee, was dismissed. *Whiting* v. *White*, 2 Cox, 290. Coop. 1.

3. Where a mortgagee has been in possession twenty years, without impediment in the mortgagor to assert his title; or if such impediment has been removed ten years, it will be a bar to the redemption. *Beckford* v. *Wade*, 17 Ves. 99.

4. Redemption will be decreed against the heir of mortgagee and a purchaser, without notice, upon an acknowledgment of the mortgage within twenty years before the bill filed, though such acknowledgment was in transaction with other persons, and not with the mortgagor or his heirs. *Hansard* v. *Hardy*, 18 Ves. 455.

5. The rule as to the redemption of mortgages in courts of equity, proceeds either upon the statute of limitations, or by analogy to it; and though there may be a redemption after an uninterrupted possession for twenty years, yet the plaintiff should state, in his bill, the circumstances which take his case out of the rule. *Foster* v. *Hodgson*, 19 Ves. 184.

6. Equity of redemption will be barred by possession for twenty years, unless the mortgagor can prove an acknowledgment of his title by the mortgagee within that period, as accounts delivered by the mortgagee; but if such accounts are proved by parol evidence, it must be clear and unequivocal. Accounts delivered, without any authority from the mortgagee, by a receiver and manager of the estate, his employer being in a state which rendered him incapable of managing his affairs, was held insufficient. *Barron* v. *Martin*, 19 Ves. 327. Coop. 189.

7. As to the effect of accounts kept by the mortgagee in his own books, without any communication on the subject with the mortgagor to keep open the right of redemption—*Quære*. *Ibid*, 19 Ves. 333.

8. A letter by mortgagee within twenty years, referring to an anterior agreement, in which he recognised the mortgage, and containing a proposition concerning a redemption, will take the case out of the rule. *Hodle* v. *Healey*, 1 V. & B. 536.

9. There cannot be a redemption of a mortgage after twenty years, upon parol evidence of conversation with mortgagee, unless it is clear and unequivocal, and shews a deliberate intention of giving a redemption. *Reeks* v. *Postlethwaite*, Coop. 161.

10. Time is no bar to a Welch mortgage, unless the party had held over for twenty years after the principal and interest were fully paid by perception of the rents and profits. *Fenwick* v. *Reed*, 1 Mer. 114.

11. An assignee of the equity of redemption pending a suit for redemption, is bound by the decree. *Metcalfe* v. *Pulvertoft*, 2 V. & B. 207.

12. A mortgagor will not be allowed to redeem under the statute 7 Geo. 2, c. 20, if the mortgagee is entitled to take out execution. *Amis* v *Lloyd*, 3 V. & B. 15.

(d) *Out of what Fund.*

1. Where the heir inherits a mortgaged estate, if he executes a new covenant and bond, with a new equity of redemption, he makes the debt his own, and his personal estate shall be primarily liable. *Donisthorpe* v. *Porter*, 2 Eden, 162.

2. When the mortgagor of a copyhold devised it to his wife, together with his personal estate, and appoints her executrix, and she died without paying off the mortgage. Held, that her heir is not entitled to have the mortgage money paid out of the personal estate of the mortgagor. *Scott* v. *Beecher*, 5 Mad. 96.

(e) *Enlarging Time for Payment.*

1. It requires a strong case to induce the court to make a fourth order, enlarging the time for the payment of mortgage money decreed to be paid: but where the defendant had used his endeavours to obtain the money, and had been baffled in his purpose by unexampled delay, and there appeared a strong probability of the money being raised, the court allowed three months further time, notwithstand-

ing the former order was peremptory. *Edwards* v. *Cunliffe,* 4 Mad. 287.

2. The time for payment is not enlarged upon a bill of redemption as upon a bill of foreclosure. *Novosielski* v. *Wakefield,* 17 Ves. 417.

3. Mortgagor applying for time, after having obtained the order under 7 Geo. 2, c. 20, need not have his money ready as at law. *Wakerell* v. *Delight,* Coop. 27.

4. The slightest ground will induce a court of equity to extend the time of sale in a foreclosure cause. *Jessop* v. *King,* 2 B. & B. 97.

VI. Accounts.

1. A mortgagee is not entitled to make the mortgagor account for past rents. *Ex parte Wilson,* 2 V. & B. 252. 1 Rose, 444.

2. Where the title deeds were stolen from a mortgagee, the account was directed under a bill of foreclosure, with an inquiry respecting the title deeds. *Stokoe* v. *Robson,* 3 V. & B. 51.

3. In a decree to account against a mortgagee in possession, annual rests are not directed from the middle of the time, but either from the beginning, in a special case, or not at all. *Davis* v. *May,* 19 Ves. 383. Coop. 238.

4. The mortgagee of a term is not entitled, after the term has expired, to a retrospective account of rents and profits. *Gresley* v. *Adderley,* 1 Swan. 579.

5. And where the term is created for raising portions, and has expired, the mortgagee is not entitled to an account of rents and profits in the hands of a receiver, accrued before the expiration of the term. *Ibid,* 1 Swan. 573.

6. On a decree against a mortgagee in possession to account, the Master cannot make rests unless specially directed so to do by the decree: but in this case, under the circumstances, annual rests were directed. *Webber* v. *Hunt,* 1 Mad. 13.

7. A mortgagee holding over, after payment of principal and interest, must be considered as a mere naked trustee, and as such will be charged with interest upon the balance retained by him, from the period the demand of the balance was made, which in this case was the filing of the bill, and the estate being in the West-Indies, but the mortgagee called to account in this country, at the rate of 4 per cent. *Quarrell* v. *Beckford,* 1 Mad. 269.

8. A mortgagee cannot be paid as receiver of the mortgaged estate; nor generally, when he takes possession, can he appoint a receiver; but he may, where, from the nature of the estate, great time and trouble must be sacrificed in the receipts of the rents. So where the mortgage property, consisting of twenty small houses in town, was assigned, in trust, for one who lived at Dorking, he and his executor were allowed the expense of a receiver actually employed, notwithstanding the trustee lived near the property. *Davis* v. *Dendy,* 3 Mad. 170.

9. On a bill against a mortgagee in possession to redeem, where the interest has never been in arrear, and the annual rents exceeded the amount of the annual interest, the Master will be directed to make rests; but the court sometimes relaxes the rule, where the interest is in arrear, when the mortgagee takes possession. *Shephard* v. *Elliot,* 4 Mad. 254.

10. Tender of payment by mortgagor to agent of mortgagee, and refusal by the agent to accept, alleging he had no authority. Neither principal nor interest demanded by mortgagee for twenty-four years thereafter; yet payment of principal and interest for the whole time decreed, and the decree affirmed. *Meade* v. *Earl of Bandon,* 2 Dow, 268.

11. A mortgagee of a leasehold interest paying renewal fines, reimbursed out of the estate. *Hamilton* v. *Denny,* 1 B. & B. 202.

12. Expenses incurred by a mortgagee in possession for the protection of the estate, acquiesced in by the mortgagor, allowed. *Lord Trimleston* v. *Hamill,* 1 B. & B. 377.

13. A mortgagee in possession never renders annual accounts: but the mortgagor, when he conceives the mortgage debt to be satisfied, calls on mortgagee for a final adjustment. *Ibid,* 1 B. & B. 383.

14. A creditor going into possession as a *quasi* mortgagee is not entitled to receiver's fees. *Ibid,* 1 B. & B. 384.

15. If a mortgagee entered into possession of the lands of the mortgagor, he must account at their utmost value. *Ibid,* 1 B. & B. 385.

16. A mortgagee in accounting, if he enter into the receipt of the rents of the mortgaged premises will be charged at the rate of the rents reserved. *Ibid.*

17. A mortgagee in possession will be

allowed the expenses necessarily incurred for the protection of the estate. *Ibid.*

18. An agreement that a mortgagee shall enter into possession of the lands of the mortgagor, at a fair rent, in discharge of his debt, is an exception to the rule that a mortgagee in possession must account for the full value of the lands; and such agreement will be supported in Equity, not being against public policy, nor working a private injury. *Morony* v. *O'Dea*, 1 B. & B. 117.

VII. Mortgagee, Estate and Interest of.

See also Div. I. (*b*) *ante*.

1. The entry of the devisee, who is also a mortgagee, is presumed to be as devisee, if no trace appears of any of the steps, a mortgagee usually takes to get into possession. *Forbes* v. *Moffatt*, 18 Ves. 391.

2. A mortgagee has no right to show the title of his mortgagor. *Lambert* v. *Rogers*, 2 Mer. 490.

3. Equitable mortgagees under a deposit of title deeds by way of pledge, cannot effect a valid assignment of the premises comprised therein, in the event of the person so pledging them becoming bankrupt, unless the assignees of the bankrupt join in the conveyance; and although a power of sale be given by the agreement entered into at the time of the deposit, on notice to repay the money intended to be secured, if no such notice has been given. *Hawkins* v. *Ramsbottom*, 1 Price, 138.

See also *Corder* v. *Morgan*, 18 Ves. 344.

4. An estate was conveyed to trustees upon trust, *inter alia*, to pay a debt due to P.; P. filed a bill against the trustees for payment, stating his debt, the amount of which the trustees disputed: upon the payment into court of the amount of P.'s claim, and a further sum as security for costs, and undertaking to go immediately into the account, the court ordered P. to release the mortgaged premises, and give up his securities; but this order was afterwards discharged, as a mortgagee cannot be compelled to give up his security, till he actually receives the mortgage money. *Postlethwaite* v. *Blythe*, 2 Mad. 242.

5. Tenant in tail, under a will which limited estates tail in remainder to his brother, executes a settlement on his marriage, giving estates tail to the issue of the marriage, and then an estate for life to the brother, remainder to his first and other sons in tail. He afterwards suffers a recovery, and mortgages the estate; and upon bill of foreclosure by the mortgagee, the question was, whether the brother took a new estate under the settlement, and consequently an interest which was voluntary and void, as against the subsequent mortgagee for valuable consideration. Decree below for the mortgagee affirmed in Dom. Proc. *Cormick* v. *Trapaud*, 6 Dow, 60.

See also *Mountford* v. *Scott*, 5 Mad. 34.

VIII. Foreclosure;

1. Dismission of a bill for redemption, for want of prosecution, has not the effect of foreclosure, as it does not prevent the filing another bill. *Hansard* v. *Hardy*, 18 Ves. 460.

2. Where the mortgagor is an infant, and the mortgagees consent to a sale, the court will not allow the foreclosure without an inquiry whether it would be for the infant's benefit. *Mondey* v. *Mondey*, 1 V. & B. 223.

3. Under a bill of foreclosure by devisee of a mortgagee, the mortgage deed being lost, a reconveyance was directed with an indemnity and costs against plaintiff. *Stokoe* v. *Robson*, 19 Ves. 385. 3 V. & B. 51.

IX. Pleading and Practice.

1. Advantage of length of possession may be taken by the mortgagee against the right of redemption by demurrer. *Hodle* v. *Healey*, 1 V. & B. 539.

2. One tenant in common of a moiety, having obtained a decree for redemption of his moiety, takes a conveyance of the equity of redemption of the other tenant in common, and files a supplemental bill for the redemption of that other moiety, stating that a prior conveyance of that equity of redemption by the other tenant in common and his assignee, (he having been a bankrupt,) was void, having been made under a commission of bankruptcy which had been superseded. The bill dismissed, being supported by the evidence of the bankrupt only. *Waugh* v. *Land*, Coop. 129.

3. The court has no authority, on the petition of an equitable mortgagee by deposit of deeds, to order a sale of the estate, where there is a subsequent mortgagee of the equity of redemption who objects, and has not proved under the commission, the proper remedy being by bill. *Ex parte Topham*, 1 Mad. 38.

4. A bill for a foreclosure cannot be set down as a short cause, unless by consent. *Rashleigh* v. *Dayman*, 2 Mad. 147.

5. A. mortgages to B., C. is the only witness to such mortgage. B. dies and bequeaths to the wife of C. and also to others, the mortgage. C. and wife, and the others, file a bill of foreclosure against A. and subsequent incumbrancers. Proof of C.'s hand writing by a third person, was held sufficient proof of the execution of the mortgage made by A. to B *Inman* v. *Parsons*, 4 Mad. 271.

6. On a motion for a reference under the stat. 7 Geo. 2. c. 20, for a foreclosure, the court refused to direct the master to take into the account costs incurred at law, no mention of proceedings at law being made in the bill; but the court gave leave to amend the bill in that respect, and directed the motion to stand over, until the bill was amended. *Millard* v. *Magor*, 3 Mad. 433.

X. Costs.

See also Tit. Bankruptcy XXIII. (*ante*).

1. Where the devisee of a mortgagee filed his bill against the heir and executor of the mortgagor, for a foreclosure, and makes the heir of the mortgagee a party to establish the will against him; this latter party cannot have his costs out of the estate, but they must be paid him by the plaintiff. *Skipp* v. *Wyatt*, 1 Cox, 353.

2. The rule that a mortgagee shall have his costs, is almost universal; but there are exceptions, and where the mortgagee's conduct was oppressive, having refused repeated tenders of the mortgage money, the court refused him costs. —— v. *Trecothick*, 2 V. & B. 181.

3. When a mortgagor files a bill to redeem, he must pay the costs of those who claim under the mortgagee, though made necessary parties by his act. For as the estate of the mortgagee, after the mortgage is forfeited, is absolute at law, he may deal with it as his own; and if the mortgagor comes for redemption which equity gives him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts. *Wetherell* v. *Collins*, 3 Mad. 255.

4. Where, on a bill to redeem, the mortgagee objected that the mortgagor was not proved dead, and after the references to a master, to which the mortgagee excepted, the court directed an issue, the result of which was a finding, which agreed with the master's report: upon the exceptions being overruled, it wa held that the mortgagee must not pay the costs of the issue, as he cannot be charged with vexation, when the court thought there was so much weight in his objection as to direct an issue. *Wilson* v. *Metcalfe*, 3 Mad. 45.

5. Mortgagee resisting the right to redemption, on the ground of a decree of foreclosure collusively obtained, was decreed to pay so much of the costs as was occasioned by his resistance. *Harvey* v. *Tebbutt*, 1 J. & W. 197.

6. Where a sale or mortgage is a fraud on a prior incumbrancer, the court will give costs against the vendee or mortgagee, on setting aside the deeds. *Taylor* v. *Baker*, 5 Price, 306.

7. Secus, where there is no fraud. *Gowland* v. *De Faria*, 17 Ves. 20.

8. A defendant fraudulently conducting himself, will be deprived of his costs in equity, though considered as mortgagee in possession. *Morony* v. *O'Dea*, 1 B. & B. 109.

9. After a decree for redemption on payment of principal, interest, and costs, a mortgagee, though overpaid, is entitled to his costs. *Lord Trimleston* v. *Hamill*, 1 B. & B. 377.

MORTUARIES.

1. Mortuaries are not recoverable in a court of equity; whether they are at law, or whether they must not be sued for in the spiritual court under the stat. 21 H. 8. c. 6.—*Quære*. *Mundy* v. *Curtis*, 8 Price, 295.

NAME.

1. The King's license is nothing more than a permission to take the name, and does not impose it. *Leigh* v. *Leigh*, 15 Ves. 92.

2. An act of Parliament giving a new name, does not take away the original name; but a legacy may be taken by it. *Ibid.*

3. A name acquired by reputation may be superseded by another name of habit and reputation. *Wilson* v. *Brockley*, 1 Phil. 147.

NE EXEAT REGNO.

I. Jurisdiction.

1. The Chancellor has no jurisdiction to grant a writ of *ne exeat regno* upon a legal demand against an attorney, on the ground of his privilege, by analogy to the case of an equitable demand. *Gardner* v. ——, 15 Ves. 444.

2. The court of Chancery holding a concurrent jurisdiction with courts of law upon the head of account, will grant a writ of *ne exeat regno*, though the case would admit of bail at law, as where a creditor files a bill for an account and administration of the assets; provided there is a clear affidavit of assets received. *Jones* v. *Alephsin*, 16 Ves. 470.

II. Writ, where granted.

1. Writ of *ne exeat regno* will be granted on affidavit, not by the plaintiff, but by another person, to information and belief of intention to quit the kingdom, according to the nature of the information, as where received from persons of the defendant's family, that they were about to go to the Isle of Man. *Collinson* v. ——, 18 Ves. 353.

2. Writ of *ne exeat regno*, obtained on behalf of a lunatic by his committee, on a note as given for the balance of an account, restraining the captain of an East-India ship from proceeding on his voyage. *Stewart* v. *Graham*, 19 Ves. 313.

3. The writ of *ne exeat regno* is a high prerogative writ, and is applied to the purpose of equitable bail. *Dick* v. *Swinton*, 1 V. & B. 373.

4. Writ of *ne exeat regno* was granted against a person generally resident in Ireland, and in this country for a temporary purpose only, a balance being sworn to, for which bail might have been had, and that the plaintiff had filed a bill in Ireland, where the transactions arose, for an account; and a proposal for reference, but the writ was discharged upon the defendant's giving security. *Howden* v. *Rogers*, 1 V. & B. 129.

5. Writs of *ne exeat regno* are granted where the defendant's residence is in the West Indies, Scotland, or Ireland. *Ibid*, 1 V. & B. 133.

6. Writ of *ne exeat regno* granted at the suit of an English subject against a native of Russia, generally resident and carrying on business in partnership at St. Petersburgh, and in this country only for a temporary purpose, upon a balance of account in respect of goods consigned to him and his partner. *Flack* v. *Holme*, 1 J. & W. 405.

7. The writ will issue on a balance of account sworn by the deponent to be due to the best of his belief; but it will not be granted if the mode of computing the account be mentioned, and it appears to comprise unascertained sums. *Ibid.*

8. Whether the writ will be granted where the debt has been contracted while the plaintiff and defendant resided in a foreign country, by the laws of which arrest for debt is not permitted—*Quære. Ibid*, 1 J. & W. 405.

9. Writ of *ne exeat regno* granted against the obligor in a bond given to trustees at the suit of a party beneficially interested in the money secured by it. *Leake* v. *Leake*, 1 J. & W. 605.

10. A residuary legatee cannot have a writ of *ne exeat regno* against a debtor of the testator, on the ground that he colludes with the executor. *Graves* v. *Griffith*, 1 J. & W. 646.

11. A writ of *ne exeat regno* granted on the application of a defendant against a plaintiff, whose bill was dismissed with costs, when, from the declarations of the plaintiff, it was apprehended that he would leave the country before the service of the process to pay costs could be made effectual. *Stewart* v. *Stewart*, 1 B. & B. 73.

III. Writ or Security, where discharged.

1. A recognizance of the defendant, and two sureties, for £2000, discharged as to the principal as well as sureties, on payment of that sum, although in the mean time a larger sum appeared to be due. *Baker* v. *Jeffries*, 2 Cox, 226.

2. A writ of *ne exeat regno* is a high prerogative writ, and cannot issue without a positive affidavit of defendant's threat or purpose of going abroad; a writ issued upon affidavit of information and belief only was quashed. *Jones* v. *Alephsin*, 16 Ves. 470.

3. A writ of *ne exeat regno* having issued against the captain of an East India ship when just sailing for India, after a considerable residence in this country, was discharged with costs, the demand having arisen several years before, and being an ascertained balance, and no reason appearing why the writ had not been issued in time for the answer being put in long before. *Dick* v. *Swinton*, 1 V. & B. 371.

4. A writ of *ne exeat regno*, obtained *ex parte* upon filing the bill, was discharged on the ground that the defendant had been previously arrested at the suit of the plaintiff for the same debt, and discharged, the plaintiff having discontinued his suit. *Raynes* v *Wyse*, 2 Mer. 472.

5. Whether a *ne exeat* can be maintained on affidavit of a sum alleged to be due under an agreement, the specific performance of which is resisted by the defendant—*Quære*. *Ibid.*

6. The Court will always hear a defendant moving to discharge the writ, but it will only inquire whether there is reasonable ground to suppose that the plaintiff will succeed in the suit. *Flack* v. *Holme*, 1 J. & W. 405.

7. Exemption from arrest for a debt of the same nature by the laws of Russia, is not a sufficient ground for discharging the writ, where one of the parties is an Englishman and is resident in this country. *Ibid.*

8. The analogy between the writ of *ne exeat regno* and a bailable writ at law is not universal. The Court of King's Bench formerly would not hear defendant to reduce the amount of bail, but this court always heard defendant attempting to get rid of the writ of *ne exeat regno*. *Hyde* v. *Whitfield*, 19 Ves. 344.

9. Writ of *ne exeat regno* discharged, as having issued improperly on the affidavit of a plaintiff resident out of the jurisdiction, in Scotland, sworn before a justice of the peace there, not positive, and as to information and belief only of defendant's intention to leave the kingdom, a defect not supplied by the avowal in defendant's affidavit of his intention to return to his house of business in Jamaica, where alone he has the means of settling the account. *Ibid*, 19 Ves. 342.

11. Defendant arrested under a writ of *ne exeat regno*, for a debt due to an intestate, discharged; the plaintiff not having obtained administration. *Swift* v. *Swift*, 1 B. & B. 326.

IV. Pleading and Practice.

1. Neither the oath of the defendant, nor evidence of the plaintiff's admission that no debt is due, will avail against a positive affidavit. *Jones* v. *Alephsin*, 16 Ves. 470.

2. Prayer for the writ of *ne exeat regno* in the bill, not essential, nor affidavit of the debt where it is established by the master's report absolutely confirmed. *Collinson* v. ———, 18 Ves. 353.

3. No notice of motion necessary for the writ of *ne exeat regno*. *Ibid.* 18 Ves. 353.

4. Sureties will be ordered to pay money into court, on forfeiture of recognizance entered into on a writ of *ne exeat*,

regno. *Musgrave* v. *Medex*, 1 Mer. 49.

5. In a similar case the money was ordered to be paid into court within six months, with costs of the application. *Utten* v. *Utten*, 1 Mer. 51.

6. That the debt will be endangered is sufficient to obtain a *ne exeat regno*, without stating that the object is to avoid the jurisdiction. *Stewart* v. *Graham*, 19 Ves. 313.

7. To support a *ne exeat regno* which issues only on an equitable debt, as at law, to hold to bail, the affidavit must be positive, except that belief of the balance of an account is sufficient. *Hyde* v. *Whitfield*, 19 Ves. 342.

8. The ground upon which the writ issues is always stated in the body of it. *Ibid*, 19 Ves. 345.

9. Defendant being committed for want of answer, his bail, under a writ of *ne exeat regno*, not discharged. *Stapylton* v. *Peill*, 19 Ves. 615.

NEW TRIAL.

1. New trials granted in issues directed to try the right of the soil, though the judge certified in favor of the verdict, as there was no precedent of a decree, where the inheritance would be bound, being made upon one verdict only. *Earl of Darlington, Earl of* v. *Bowes*, 1 Eden, 270.

See *Robinson* v. *Lord Byron*, 2 Cox, 5.

2. The improper rejection of written evidence is no ground for a new trial of an issue, when the court is satisfied that, if such evidence had been received, it ought not to have produced a different verdict. *Hampson* v. *Hampson*, 3 V. & B. 41.

3. No new trial upon the improper rejection of evidence, if the court, judging upon the whole record, is satisfied that the verdict is right. *Bootle* v. *Blundell*, 19 Ves. 503.

4. Where, at the trial of an issue *devisavit vel non*, the heir consented that a verdict should go against him without examining all the three witnesses, the court refused to grant a new trial on the ground of their not being examined. *Ibid*, 19 Ves. 494. Coop. 136.

5. In an issue and an action directed by the court the practice varies. In the first, the motion for a new trial must be made to the court directing it, in the second to that in which it is tried; nor is the rule affected by any special provisions by which the direction of the action is accompanied. *Carstairs* v. *Stein*, 2 Rose, 178.

Ex parte Kensington, Coop. 96.

6. On the trial of an issue directed to ascertain whether a modus was payable in respect of a certain part of a farm, the judge directed the jury to find specially, that the disputed district was an addition to the farm from the old common; if they were of that opinion, and they, by the general verdict, found it was an ancient part of the farm, there was no reason to be dissatisfied with their conclusion, there being only one witness strongly against that conclusion, whose evidence was obscure, and opposed by other evidence; and it was to be presumed, in the absence of opposing testimony, that the inclosure had been lawfully made, and so as to give the land by way of substitution for the right of common; and though the verdict might be wrong in form, yet it was right in substance, and the court will not send it back for a matter of form. *White* v. *Lisle*, 4 Mad. 214.

7. In an action for not removing tithes, the court refused to grant a new trial, though damages amounted to £150 on a farm of less than 100 acres. *Baker* v. *Leathes*, Wigh. 113.

8. Where an occupier of lands is plaintiff, in an issue directed by the court of exchequer to try a modus, and proves on the trial that the defendant (the vicar) and his predecessors have not received tithe of hay within a certain township, either in kind or *sub modo*, within living memory; and that the vicar and his predecessors have been in possession of a piece of meadow within the same township, said, in some of the terriers produced, to have been given in lieu of tithe hay: and no evidence is adduced to rebut such a case on the part of the defendant; if the jury find for the defendant under the direction of the judge "that they must be satisfied from the evidence that the defendant and his predecessors have held the meadow in lieu of tithes from before the commencement of legal memory," it is not ground for a new trial. *Adams* v. *Evans*, 4 Price, 14.

9. It is in the discretion of a court of equity to grant or refuse a new trial of an issue directed to be tried at law; for the

issue having been originally directed merely to satisfy the conscience of the court, on facts material to the equity of the case, it may order evidence to be received, although not strictly admissible on other trials at law; and it will send the issue down as often as the result is not satisfactory; or if satisfied that the finding of the jury is agreeable to the equity of the case, it will not order a new trial on the ground that inadmissible evidence, (strictly so called) had been received below.—Wood, Baron, *dissentiente*. *Bullen* v. *Mitchel*, 2 Price, 399.

10. If on the trial of an issue out of equity the verdict is right, though there may have been miscarriage in the conduct of the trial, that is no good reason for directing a new trial. *Ibid*, 4 Dow, 330.

11. Though on the trial of an issue out of equity, evidence has been rejected which ought to have been received, if the court is satisfied that the verdict is right, and that, though the rejected evidence had been admitted, it ought not to have produced a different verdict, the court will not grant a new trial merely because of the rejection of evidence, which ought to have been admitted. And, on the same principle, though evidence has been admitted which ought to have been rejected, if the verdict is good upon other evidence, the court will not grant a new trial, merely because some evidence had been admitted which ought to have been rejected. *Ibid*, 4 Dow, 332.

NUISANCE.

1. The manufacture of bricks, if for the purpose of making habitations, is not a public nuisance. *The Attorney General* v. *Cleaver*, 18 Ves. 229.

2. Nuisance at common law by using articles of recent discovery, as gunpowder or gas, so as to cause danger to the public. *Crowder* v. *Tinkler*, 19 Ves. 623.

3. Construction of the statute 12 Geo. 3, c. 61, not authorizing a powder mill, which would be a nuisance at common law, though, as working at the commencement of the act, not liable to the penalties imposed by it. *Ibid*.

OFFICER.

I. NAVAL OR MILITARY.

1. It has been decided, both at law and in equity, that the half-pay of an officer is not assignable, or attachable, on principles of public policy; but a distinction has been made between the half-pay of an officer and a pension to an individual. *M'Carthy* v. *Goold*, 1 B. & B. 380.

(*See also* Tit. PENSION, *post*.)

II. OF CHANCERY.

(a) *Clerk in Court*.

1. The lien of the clerk in court on the costs cannot affect any collateral application between the parties to the suit, for the court will not take notice of such lien, except on a direct application for that purpose. *Holworthy* v. *Mortlock*, 1 Cox, 202.

2. The privilege of clerks in court, which exempts them from personal arrest, is the privilege of the suitors of the court, given upon a presumption of their being always to be found at their seats; but where a clerk in court, who had been arrested in an action at common law, claimed his privilege of being sued in the petty bag only, and it appeared, by affidavit, that he had not for a considerable time attended at his seat, but had secreted himself to avoid his creditors, the court would not make any order for his discharge in a summary way, leaving him to sue out his writ of privilege, and to plead it to the action. *Ex parte Sheppard*, 2 Cox, 398.

(b) *Master*.

1. A Master Extraordinary must have the same oath administered to him as that administered to the ordinary Masters of the court, therefore the petition of a Re-

man Catholic attorney, praying to have the oath under statute 31 Geo. 3, c. 32, substituted for the oath of supremacy in a commission for swearing him a Master Extraordinary, was dismissed. *Ex parte Agar,* 3 V. & B. 169.

PARTITION.

I. Jurisdiction.

1. The court of Chancery issues a commission of partition, not under the authority of any act of Parliament, but on account of the difficulty attending partition at law, and by analogy to the equitable jurisdiction in the case of dower.
Agar v. *Fairfax,* } 17 Ves. 552.
Agar v. *Holdsworth,* }

2. Partition between tenants in common and joint tenants, by stat. 31 Hen. 8, was extended by stat. 32 Hen. 8, to limited interests, for life or years; and the same right is in equity by bill, as at law by writ. *Baring* v. *Nash,* 1 V. & B. 555.

II. Where granted.

1. There is a discretion in equity to refuse a partition upon a suspicious title, but if the title is clear, a partition is matter of right. *Baring* v. *Nash,* 1 V. & B. 556.

2. A partition among several proprietors cannot be resisted, upon the objections of covenants not to inclose without general consent, rights of common, and the inequality and uncertainty of interests, they being in proportion to the unascertained value of other estates; but the decree will direct an inquiry to ascertain the parties entitled, and their respective shares, previous to the issuing a commission.
Agar v. *Fairfax,* } 17 Ves. 533.
Agar v. *Holdsworth,* }

3. There is no objection to partition by a tenant in common, from the minuteness of the interest, the inconvenience, difficulty, or reluctance of the other tenants in common; and therefore, a lessee for years may have a partition. *Baring* v. *Nash,* 1 V. & B. 551.

4. Semble, a power to exchange does not warrant a partition. *Attorney-General* v. *Hamilton,* 1 Mad. 214.

III. Effect of.

1. A partition never affects the interests of third parties, as rights of common.
Agar v. *Fairfax,* } 17 Ves. 544.
Agar v. *Holdsworth,* }

IV. Commissioners.

(a) *Rights and Duties.*

1. In a suit for partition, the interests and proportions are to be ascertained by the court, and not by the commissioners.
Agar v. *Fairfax,* } 17 Ves. 543.
Agar v. *Holdsworth,* }

2. Commissioners under a commission of partition have no lien on the commission for their charges. *Young* v. *Sutton,* 2 V. & B. 365.

V. Pleading and Costs.

1. In cases of partition, where the parties are entitled unequally, if the plaintiff be entitled to the smaller share, the costs shall be borne equally: but if the plaintiff be entitled to very much the larger share, as 49-50ths—*Quære.* *Hyde* v. *Hindly,* 2 Cox, 408.

2. A tenant in common having leased his share, on a bill for partition the lessee is a necessary party, and his costs must be borne by the lessor. *Cornish* v. *Gest,* 2 Cox, 27.

3. The costs of issuing, executing and confirming the commission of partition, to be borne by the parties, in proportion to their respective interests; but no costs previous or subsequent to the commission.
Agar v. *Fairfax,* } 17 Ves. 533.
Agar v. *Holdsworth,* }

4. Under a bill for partition, no costs to the hearing, and the expense of the conveyance and partition is divided in proportion to the interests. *Baring* v. *Nash*, 1 V. & B. 554.

5. Bill for partition by lessee for years need not set forth that defendant "is seised in fee, or otherwise well entitled;" nor need the reversioner be made a party. *Ibid*, 1 V. & B. 551.

PARTNERSHIP.

(*See also* Tit. BANKRUPTCY, *ante.*)

I. WHAT CONSTITUTES.

1. A trader paying another person for his labor in the concern a sum of money, even in proportion to the profits, this will not make that other person a partner; but if he has a specific interest in the profits, as profits, he is a partner. *Ex parte Hamper*, 17 Ves. 403.

2. A person becomes a partner by having a share in the profits, without interest in the capital. *Ex parte Boylston*, 17 Ves. 406 (*n*). (*Cited*) 19 Ves. 457.

3. The general criterion of partnership is a participation in the profits, and it makes no difference where part of the contract is, to suffer no loss. *Ex parte Langdale*, 18 Ves. 301.

4. But a man may be a partner, though he takes no profit, if he holds himself out as such by lending his name. *Ibid.* *Ex parte Watson*, 19 Ves. 459.

5. Partner by a share in profits without interest in the capital. *Ex parte Hodgkinson*, 19 Ves. 291.

6. A society for relief in sickness, &c. by means of a fund raised by subscription of the members, can be considered only as a partnership, having no corporate character. *Beaumont* v. *Meredith*, 3 V. & B. 180.

7. A., induced by the fraudulent representations of B., as to the profits of his business, gives him a certain sum of money for a share of it; and upon the discovery of the fraud, files a bill in equity for an account, to have the partnership declared void, and for a receiver. Although A., as against B., might have an equity, to say he never was a partner, it would be difficult to say so as against third persons. *Ex parte Broome*, 1 Rose, 69.

8. Upon a dissolution of partnership between A. and B., it is agreed, that until A. be provided for, B. should allow him a third of the profits. B. afterwards forms a partnership with C., and carries into it the stock of A. and B. Under that agreement A. is a partner with B. as to a third of his interest, but is not a partner with B. and C. *Ex parte Barrow*, 2 Rose, 252.

9. A retiring partner assigns all his share in the concern to two of the continuing partners, upon trust for his infant children, in such shares as he should appoint; and, in default of appointment, upon trust for the children, to be divided amongst them when the youngest should attain twenty-one. Held, that the contingent interest the father had in the share so assigned, depending upon the death of any of the children under twenty-one, was such an interest reserved by him in the concern as, with reference to creditors, prevented the determination of the partnership. *Ex parte Wilson*, Buck, 48.

10. C., the testator, being in possession of mines and ironworks, held under leases of unequal duration, by his will bequeathed £25,000 to B., "as a capital

for him to become a partner with my executor of one-fourth share in the trade of all those works, so long as the lease endures," with a devise to H. and his wife of the residue of his estates, real and personal: by a codicil, the testator gave to W. C. three-eighths of the concern at the iron-works; "so the partnership will stand at my decease, W. C., three-eighths; H., three-eighths; B., two-eighths." After the testator's death, W. C., H., and B., carried on the works for two years, selling iron, manufactured not only from the produce of their mines, but from ore and old iron purchased for the purpose of manufacture and resale. B. having then assigned his share to C., the business was carried on in like manner by C. and H. till the death of the latter, no agreement having ever been entered into for the duration of the partnership. Held, that the codicil withdraws the trade from the operation of the residuary clause in the will, and vests three-eighths in H. to the exclusion of his wife; and that the concern is not a mere joint interest in land, but a partnership in trade. *Crawshay* v. *Maule*,
1 Swan. 495. 1 Wil. 181.

II. Articles, Construction of.

1. Under a bill by some partners in a joint concern, on behalf of themselves and the others, three hundred in number, for a dissolution, receiver, &c., and an account, alleging mismanagement by the managers, the court refused to interfere by injunction, and the appointment of a receiver, in the first instance, until they had tried the means of redress, provided by the articles. *Carlen* v. *Drury*,
1 V. & B. 154.

2. Although generally an agreement to refer disputes to arbitration is no objection to a suit in equity, yet, in the case of the Opera House, where the deed upon which the parties founded their title, contained an anxious provision for deciding the differences by arbitration, the court refused to interfere, by appointment of a manager or receiver, before the parties had taken that course. *Waters* v. *Taylor*,
15 Ves. 10.

3. Whether a provision in articles of partnership, that on the bankruptcy of a partner his share shall be taken by the solvent partners, at a sum to be fixed by valuation, and payable by instalments in a course of years, is not void by the statutes concerning bankrupts.—*Quære.* *Wilson* v. *Greenwood*, 1 Swan. 471.
1 Wil. 221.

4. Stipulations in articles of partnership, for an annual settlement of accounts, and for payment to the representatives of a deceased partner, of an allowance, in lieu of profits, since the last annual account, proportioned to the amount of his share of profits during two years preceding, are waved in equity by the omission through several years to settle annual accounts, and by engaging in business to which the stipulations cannot be applied without injustice: an injunction was therefore granted to restrain the representatives of the deceased partner from proceeding on a bond, given by the surviving partners, for repayment of his share, according to the articles, before the settlement of accounts of transactions pending at his decease, on which a loss was subsequently sustained. *Jackson* v. *Sedgwick*. 1 Wil. 297.
1 Swan. 460.

III. Partners.

(a) *Powers and Duties.*

1. In general, a partnership is bound by the acts of an individual partner, in those cases only, which in the usual course of dealing are referrible to the partnership concerns. *Ex parte Agace*.
2 Cox, 312.

2. There are implied obligations among partners so far as they are not regulated by express contract; as the obligation to use the joint property for the benefit of all the owners of that property. *Crawshay* v. *Collins*, 15 Ves. 218.

3. Partnership bound by the signature of one partner. *Ex parte Gardom*,
15 Ves. 286.

4. The assignment of joint property by one partner, to secure his separate debt, must be subject to the joint debts. *Young* v. *Keighley*, 15 Ves. 557.

5. Payment to one partner is good payment to the partnership. *Duff* v. *The East India Company*, 15 Ves. 213.

6. One partner cannot sue separately.
Ibid.

7. The consequences of the dissolution of partnership, where there are no articles prescribing the terms, is a general sale and account of the joint property. One or more partners therefore cannot insist

on taking the share of another at a valuation, or that he shall remove his proportion from the premises, thereby securing the goodwill. *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.

8. The authority given to an acting partner imposes an obligation to apply the property, as received, to partnership purposes, or to charge himself as debtor with it, in the partnership books. *Ex parte Yonge*, 3 V. & B. 36.

9. One partner may make a valid contract with another partner to retire, giving him a sum for his share of the concern, though they both know the partnership to be insolvent, provided no fraud on creditors is intended. *Ex parte Peake*, 1 Mad. 346.

(b) Rights and Interests.

1. Partnership of two without any stipulations as to the proportions: the partners are entitled in equal moieties. *Peacock* v. *Peacock*, 16 Ves. 49.

2. The equitable rights of partners, after satisfaction of joint debts, is as the result of the account between them. *Ex parte King*, 17 Ves. 115.
1 Rose, 212.

3. Lien of a retiring partner, under an agreement for dissolution, not against the creditors of the other claiming either under a title given to him, or in case of bankruptcy, upon property left in his order and disposition, within statute 21 Jac. 1. c. 19. s. 11. *Ex parte Rowlandson*, 2 V. & B. 173.
1 Rose, 416.

4. Where one party enters into partnership with another, already established as a surgeon and apothecary, paying a premium, and the articles of partnership define the interest the representatives of a deceased partner are to take, but there is no provision which gives them the benefit of the good will of the concern; upon the death of one partner, his representatives are not entitled to a return of any part of the premium, or any share of what the good will sold for. *Farr* v. *Pearce*, 3 Mad. 74.

5. In a case, where an attorney has prevailed on a young man, about to be admitted, to become his partner in business for a certain term, and to pay him, as a consideration, a considerable sum of money; a part to be paid on the execution of the articles, and the remainder by yearly instalments. If during the term the attorney sue out, in character of petitioning creditor, a commission of bankruptcy against the person so having become his partner, whereby, on his being declared bankrupt, the partnership is necessarily dissolved: the court will not only restrain him from suing for the instalments accruing due afterwards, but will order him to refund the money already received by him, in consideration of the partnership, except so far as shall be commensurate with the period of the actual duration of such partnership.

So, also, if the attorney has himself since become bankrupt, and assignees have been chosen. In such a case the Lord Chief Baron allowed the plaintiff costs, and refused them to all the parties actually defending the suit. *Hamil* v. *Stokes*, 4 Price, 161.
Dan. 20.

(c) Dormant Partner.

1. A dormant partner not being an ostensible contracting party, a creditor may, but is not bound to go against him. *Ex parte Hamper*, 17 Ves. 412.

2. A creditor without notice of a dormant partner has the option to consider himself a joint or separate creditor.
Ex parte Hodgkinson, 19 Ves. 291.
——— *Norfolk*, 19 Ves. 457.

3. There is a wide difference between a dormant and a nominal partner. The former is liable in respect of profits: but one receiving a salary, not charged upon profits, is not by that a partner. *Ex parte Watson*, 19 Ves. 461.

4. Where a person gives credit to a firm not knowing there is a dormant partner, he may bring an action against either of the apparent partners, and have execution against either of the apparent partners, or against the interest of that one in the joint effects; but there is no instance of an execution against the visible effects of the visible partners, under an action against the dormant partner. *Ex parte Hamper*, 17 Ves. 403.

IV. PROPERTY.

(a) Joint or separate.

1. A joint creditor if he does not take the remedy the law gives him, by action, and by proceeding to seise upon the joint effects, has no lien upon them; his equity

to have the joint effects applied to the joint debts is through the medium of the partner, and for the sake of the partner; except in case of bankruptcy or death; but if joint creditors do not interfere, and the partners make a fair contract *inter se* to dissolve the partnership, and perfect the dissolution by actual assignment of the property, delivery of possession, and separate enjoyment; the joint effects become the separate property of the party who bought them, as much as if he had acquired them in market overt of any stranger. *Ex parte Peake,* 1 Mad. 346.

2. Where a partnership is dissolved by bankruptcy of one partner, the assignees of that partner are entitled, beyond the account and distribution of stock, &c. to a participation of subsequent profits made by the other partners, with the capital as constituted at the time of the bankruptcy. *Crawshay* v. *Collins,* 15 Ves. 218.

3. But whether they are also entitled to profits made with that capital and other funds together—*Quære.* *Ibid.*

4. Where a lease of premises, in which a partnership trade is carried on, is renewed by one partner in his own name clandestinely, it will be a trust for the partnership to be accounted for as joint property. *Featherstonhaugh* v. *Fenwick,* 17 Ves. 298.

5. One partner, after dissolution of the partnership, continuing to trade with the joint property must account for the profits. *Ibid.*

6. Upon an exception to a master's report, stating the capital and stock in trade of a partnership to consist, at the time of the bankruptcy of one of the partners, of the estimated value of the dead stock employed in it, it was referred back to the master to state what was the amount of the capital, and also of the stock in trade at the time, in order to adjust the amount of subsequent profits, to which the assignees of the bankrupt partner were to be entitled as against the other partners, who had continued to trade with the partnership property after the bankruptcy. *Crawshay* v. *Collins,* 1 J. & W. 267.

7. Distinction between capital and stock in trade, with reference to the rights of retiring and continuing partners. *Ibid,* 1 J. & W. 278.

(*b*) *Survivorship.*

1. Partnership determined by death; the legal property survives not the beneficial interest, the right of the executor to the value of the testator's interest must be ascertained by sale and not by calculation. *Crawshay* v. *Collins,* 15 Ves. 218.

2. Whether upon the death of a partner, the good will survives—*Quære.* *Ibid,* 15 Ves. 227.

3. The common law only partially adopts the *lex mercatoria* in respect of partnership in trade; holding, that though partners are in the nature of joint tenants, there is no survivorship in point of interest between them; but that in respect of partnership contracts, the obligation is joint, and consequently attaches exclusively on the survivors. The relief given in equity on joint bonds is given on the ground of mistake. *Devaynes* v. *Noble,* 1 Mer. 564.

4. Semble, when a partnership is formed between professional persons, as surgeons, upon the determination of the partnership, unless there are stipulations to the contrary, each must be at liberty to continue his exertions; and when the determination is by the death of one, the right of the survivor is not affected; such partnerships being very different from commercial partnerships. *Farr* v. *Pearce,* 3 Mad. 74.

(*c*) *Liability to Creditors.*

1. Execution may be had by a separate creditor against joint property, subject to account, ascertaining the specific interest of that partner in the joint effects. *Ex parte Hamper,* 17 Ves. 407.

2. Upon an extent against one partner, the crown can only take the separate interest of the partner, and that subject to the partnership debts. *Rex* v. *Sanderson,* Wigh. 50.

See also *In the matter of Waitt,* 1 J. & W. 608.

3. Execution against joint property, though the foundation of the action had no relation to the joint concern. *Ex parte Hamper,* 17 Ves. 413.

4. Joint creditors have no lien on partnership effects, until execution; which may be joint or several: their equity after dissolution depends on the right of the

partners. *Ex parte Rowlandson*, 2 V. & B. 173.

See also *Ex parte Peake*, 1 Mad. 346.

5. One of the partners of a banking house died, the surviving partners carried on the business without changing the firm, and afterwards became bankrupts. The deceased partner's estate is not discharged with respect to those creditors who continued to deal with the surviving partners, and were in part paid by them, or those whose debts remained unaltered by receipt or payment, or those whose debts had been subsequently increased by payments to the surviving partners: and notice of the death of the deceased partner is not material. *Devaynes* v. *Noble*, *Sleech's case*, 1 Mer. 539.

6. But where creditors continued to deal with the surviving partners, by drawing out and paying in monies, having drawn sums out before they paid any in, and the balance varying from time to time, but upon the whole being increased by the subsequent dealings; the subsequent payments by the surviving partners must be taken in reduction of the balance due at the death of the partner, and his estate discharged *pro tanto*. *Ibid*, 1 Mer. 585.

7. The equity of a creditor against the estate of a deceased partner, will not be barred by eight months' non claim, and part payment by the surviving partner. *Ibid*, 1 Mer. 566.

8. No difference in principle between the case of a banking house and any other partnership, as to the equity of the creditor against the deceased partner's estate. Money paid into a banker's constitutes a debt, not a deposit. A creditor's leaving money in the hands of the surviving partners of a bank does not constitute a new contract, nor operate as a relinquishment of the old security. *Ibid*, 1 Mer. 568.

9. There is no rule of convenience which requires that the creditors of a banking house should make these demands on the surviving partners within a short time, or be held to have waved their equities against the estate of the deceased partner. *Ibid*, 1 Mer. 569.

10. There is no rule of convenience fixing any period within which, a creditor of a banking house, not making his demand on the surviving partners, is held to have waved his equity against the estate of the deceased partner. *Ibid*, 1 Mer. 569.

11. And where a creditor had deposited exchequer bills with the partnership, which were sold in the deceased partner's lifetime, without the knowledge or consent of the creditor, and the produce applied to the use of the partnership. This is a breach of trust only, but the money becomes a partnership debt from the moment of sale, whether all the partners are privy or not, and as such will attach to the deceased partner's estate, which will not be discharged by the creditor subsequently adopting the surviving partners as his debtors, while he was ignorant of the conversion; and if the creditor elects to consider it as a partnership debt from the time of the sale, he will be entitled to interest at 5 *per cent.* from that period. *Ibid*, *Clayton's case*, 1 Mer. 572.

12. False representation by bankers that they have laid out money in the funds is indictable as a conspiracy. *Auriol* v. *Smith*, 18 Ves. 203.

13. Notice to the surviving partners of a firm, given by a creditor of the partnership, as solicitor for the representatives of the deceased partner, that the estate of the deceased will not be liable for their future dealings, does not operate as discharging the estate from a debt previously incurred to that creditor, of which he was at the time ignorant; and payments subsequently made in respect of cash balances, are not to be taken as operating in extenuation of such a debt. *Devaynes* v. *Noble*, *Clayton's case*, 1 Mer. 579.

14. Where bills and India bonds were deposited with a banking house in the lifetime of D. (a partner since deceased,) which were sold by the partnership, part in D.'s lifetime, and part after his death. The estate of D. is answerable in respect of those only which were sold during his lifetime, though the party depositing had no notice of his death. *Ibid*, 1 Mer. 616.

15. Where the creditors of a partnership, after the death of one partner, continue to deal with the surviving partners, both by drawing out and paying in money, whereby their debts have been increased, but never at any time reduced. This is no discharge of the liability of the deceased partner's estate. *Ibid*, 1 Mer. [illegible]

16. In cases, as of a banking account, where there has been a continuation of

dealings, the appropriations (in the absence of express declaration) can only be made on the ground of presumption arising from the priority of receipts and payments. If any other appropriation is to be made, the creditor must declare such his intention at the time of payment. *Ibid*, 1 Mer. 608.

17. In this particular case, where the creditor drew his drafts, at a time when there was no fund to answer them, except the balance remaining in hand at the death of one of the partners; this must be taken as an express declaration of his intention that such fund should be applied in payment, not only of the drafts so drawn, but of the succeeding drafts, in the order in which they were presented. *Ibid*, 1 Mer. 610.

18. Creditors, in respect of stock standing in the names of the partners, which was sold in breach of trust, in the lifetime of the deceased partner, and the proceeds applied to the use of the partnership, are entitled, as against the estate of the deceased partner, either to consider such proceeds as a partnership debt, or to have the stock itself replaced, at their option. It makes no difference that the stock stood in the name of, and was sold by, one of the partners only, the proceeds having been applied to the use of the partnership. *Ibid*, 1 Mer. 611.

19. Also where such stock was transferred to the partnership as a security for advances, but under an agreement not to sell without notice, the deceased partner's estate will be liable for the whole of the stock sold contrary to such agreement, and not only to the extent of stock sold beyond the amount of the debt due to the partnership in respect of such advances. *Ibid*, 1 Mer. 624.

20. The death of a partner of itself works a dissolution of the partnership; and the mere want of notice does not, it seems, make the estate of the deceased partner liable for the debts of the continuing partners. If, however, a surviving partner deals with the customers in the character of executor as well as partner, that makes a different question, he having a right, as executor, to bind his testator's estate. *Vulliamy* v. *Noble*, 3 Mer. 614.

21. A separate creditor applying for satisfaction of his debt out of the partnership estate, by means of an equitable execution, must take it upon equitable terms, that is, subject to all partnership dealings. *In the matter of Wait*, 1 J. & W. 608.

V. Dissolution of.

1. If a partner is so far disordered in his mind as to be incapable of conducting the business, according to the terms of the articles of copartnership, a court of Equity will dissolve the partnership. In this case it was referred to the Master to ascertain whether the defendant was in such a state of mind as to be able to conduct the business according to the articles of copartnership; and the parties not agreeing on the report, an issue was directed. *Sayer* v. *Bennet*, 1 Cox, 107.

2. Where the partnership cannot be carried on according to the true intent and meaning of the articles of copartnership, the court will dissolve the partnership. *Baring* v. *Dix*, 1 Cox, 213.

3. Partnership, without any provision as to its duration, may be determined without previous notice, subject to the proper accounts. *Peacock* v. *Peacock*, 16 Ves. 49.

4. A partnership, without articles for an indefinite period, may be dissolved by any partner, at any time, and without previous notice, subject to the engagements of the partnership: and the existence of the engagements of the partners with third persons cannot prevent the right of dissolution as between themselves. *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.

5. Whether a partnership of sixteen hundred shares is illegal under the statute 6 Geo. 1, c. 18, s. 18; and, if illegal, whether a few can sue for a dissolution on behalf of the rest, without stating a positive necessity for the interference of a court of Equity, or offering a contribution to losses, &c.—*Quære*. *Carlen* v. *Drury*, 1 V. & B. 154.

6. Where the conduct of the partners makes it impossible to carry on the concern upon the terms stipulated, it will be considered as dissolved; upon this principle a decree was obtained for the sale of the Opera-house, and to restrain the managing partner from acting; with liberty to either party to lay proposals before the Master for management until the sale. *Waters* v. *Taylor*, 2 V. & B. 299.

7. The dissolution of a partnership on the lunacy of a partner, can only be ob-

mined by a decree of a court of Equity, and not by the act of the survivors, and it will not be considered as determined where the others had carried on the business with his capital. *Ibid.*

2 V. & B. 303.

8. How far the lunacy of a partner is a ground of dissolution of the partnership, depends on the degree and probable duration of the disorder, as it affects the capability of the party to fulfil the contract. *Ibid.* 2 V. & B. 303.

9. Where the contract neither expressly, nor by inference, limits the duration, the partnership may be terminated at a moment's notice by either party. *Crawshay* v. *Maule*, 1 Swan. 508.

1 Wil. 191.

10. A partnership for a term of years is dissolved by the death of a partner before the term has expired, unless there are express stipulations to the contrary. *Gillespie* v. *Hamilton*, 3 Mad. 251.

11. If a retiring partner assigns all his share in the concern to two of the continuing partners, upon trust, to pay him an annuity for his life, subject to abatement or enlargement, with the fluctuation of the profits of the trade, that will not, with reference to creditors, determine the partnership. *Ex parte Wilson*,

Buck, 48.

12. There is no general rule that partners purchasing a leasehold interest must be understood to have entered into a contract of partnership, commensurate with the duration of the lease. A lease is only part of the capital stock. *Crawshay* v. *Maule*, 1 Wil. 196. 1 Swan. 521.

VI. Pleading and Practice.

1. The defendants to a bill for a partnership account cannot move for a production of the accounts before answer; but they may move to stay proceedings against them for not putting in their answer until after inspection, where that is necessary. *Pickering* v. *Rigby*,

18 Ves. 484.

2. A bill for an account cannot be maintained by one partner against another, without praying a dissolution of the partnership. *Forman* v. *Homfray*,

2 V. & B. 329.

3. Under the usual decree for an account on a bill by creditors, the Master refused to go into a claim of the surviving partners of the testator, in respect of a balance of dealings between the partnership and the testator in his separate capacity: but the court held that the Master was bound to receive the claim, however it might stand at law; that it was the Master's duty to provide so that all the accounts, both legal and equitable, should be taken; and if in taking such accounts he finds difficulties arising from want of sufficient powers, he or the parties must apply to the court to supply the defect of his authority. *Paynter* v. *Houston*,

3 Mer. 297.

4. Where a suit is instituted for the dissolution of a partnership, and it is clear, on the bill and answer, that all, or some of the parties, have a right to a dissolution, a sale of the partnership property may be directed on motion: and where a partnership is actually dissolved by death, or otherwise, no person can make any use of the property inconsistent with the purpose of winding up the concern; and if any other use is made of the property, or there is any difference between those who are to deal with it, the court will appoint a manager, and direct inquiries in what manner the concern can be wound up most beneficially to those interested. *Crawshay* v. *Maule*,

1 Swan. 506.

1 Wil. 190.

5. One partner may file a bill against his copartner for an account, although he does not pray by his bill a dissolution of the partnership. *Harrison* v. *Armitage*,

4 Mad. 143.

6. The court will not treat a bill to restrain an acting partner from collecting or contracting debts, and appointing a receiver, as if it were in nature of a bill to restrain waste, whatever they might do where such partner shall be shewn to have been guilty of culpable conduct, or to be insolvent. *Lawson* v. *Morgan*,

1 Price, 303.

7. The court will not interfere to require the Bank to transfer money which they withhold, on having been served with process (while in force,) on a bill filed by representatives of deceased partners against the survivor of the firm, even for the purpose of paying the partnership debts. *Toulmin* v. *Copeland*,

6 Price, 405.

8. The court refused to order the Bank to remove a distringas from a partnership stock on the motion of defendant, the surviving partner, although his bill put in

his answer denying all the charges in the bill. *Ibid*, 7 Price, 631.

9. It is not a good plea to a bill filed by one residuary legatee (to whom, with others, the debts due from a concern in which the testator had been a partner with one of his legatees, had been bequeathed,) against the others for an account of monies due from the partnership to the testator, charging the defendant with owing the concern various sums of money, having possession of the partnership-books; that all the monies due from the partnership to the testator at the time of his death consisted wholly of money lent by him to the defendant; and that (as the fact was,) the testator had, by his will, forgiven and released the defendant from all monies lent and advanced by him during his lifetime; the release by the devisee being treated as referring to specific sums advanced independently of the partnership debts. *Hanson* v. *Hanson*, 4 Price, 168.

10. The court does not interfere for the management of a joint concern, except as incidental to the object of the suit, to wind up the concern, and divide the produce. *Waters* v. *Taylor*, 15 Ves. 13.

PATENT.

I. Granting.

1. A patent was granted upon petition (a caveat having been entered), for an improved steam engine, as not infringing upon an existing patent; but without costs, the caveat not being unreasonable. *Ex parte Fox*, 1 V. & B. 67.

2. If improvements upon steam engines could not be used without the engine for which a patent had been granted, the inventors must wait the expiration of that patent. *Ibid.*

II. Specification.

1. The specification of a patent must be in itself sufficient, though a picture or a model descriptive of it may be annexed. *Ex parte Fox*, 1 V. & B. 67.

2. To support a patent, the specification should be so clear, as to enable all the world to use the invention as soon as the term for which it was granted is expired. *Newbery* v. *James*, 2 Mer. 446.

3. To establish the validity of a patent, the invention must be both new and useful, and the specification must accurately describe it; also, if the specification seeks to cover more than is actually new and useful, it vitiates the patent, rendering it ineffectual, even to the extent to which it might otherwise have been supported; but whether or not the specification is defective is a question of law. *Hill* v. *Thompson*, 3 Mer. 629.

III. Repealing.

1. A *scire facias* to repeal a patent must be brought in the county where the record is, viz. in Middlesex; and the venue cannot be changed to any other county. *Rex* v. *Haine*, 2 Cox, 235.

PAUPER.

1. Improper and vexatious conduct in a former suit, or a subscription, though liable to be impeached as maintenance, is no ground for dispaupering. *Corbett* v. *Corbett*, 16 Ves. 407.

2. Where a pauper does not proceed to trial after giving notice, he is dispaupered, and not permitted to proceed. *Ibid*, 16 Ves. 408.

3. It is doubtful whether proceedings would be stayed in an action by a pauper, until payment of costs of a nonsuit in a former action for the same cause as a pauper or not. *Ibid*, 16 Ves. 410.

4. In the case of a pauper plaintiff, the costs of impertinence expunged from the answer were ordered to be taxed as dives costs, and to be paid into court. *Rattray* v. *George*, 16 Ves. 232.

5. Pauper pays costs for scandal. *Ibid*, 16 Ves. 234.

6. Notice of motion by a party *in formâ pauperis* must be signed by the clerk in court. *Gardiner* v. ——, 17 Ves. 337.

7. A party convicted of perjury is competent to make an affidavit to enable him to sue as a pauper. *Boyer* v. *M'Evoy*, 1 B. & B. 562.

8. Misconduct in a former cause is no ground for refusing a party liberty to sue as a pauper in another, for the subject before in dispute. *Ibid.*

9. The decree directs generally that the costs of all parties should be taxed and paid out of the estate. The costs of a pauper defendant shall be taxed as dives costs. *Wallop* v. *Warburton*, 2 Cox, 409.

10. But where a plaintiff applies to dismiss his own bill with costs against a pauper defendant, pauper costs only shall be taxed. *Denne* v. *Russel*, (Cited) 2 Cox, 410.

11. When a pauper plaintiff obtains a decree for payment of money, it is to be drawn up on stamps as in a dives suit. *Hansard* v. *Kemeys*, 1 J. & W. 189.

12. Party dispaupered upon affidavit that his earnings exceeded £70 annually. *Lovekin* v. *Edwards*, 1 Phil. 179.

PAYMENT OF MONEY.

See also Tit. Executor, (*ante*); Vendor & Purchaser, (*post*).

I. Into Court.

1. It is now the settled practice to move, on examination admitting money due, for payment into court, before the cause is set down for further directions. *Hatch* v. ——, 19 Ves. 117.

2. After the usual decree for an account, and a reference to the Master to take the amount of principal and interest, an order may be obtained, on motion, for the defendant to pay into court the amount of the principal sums, admitted to be due by examination upon interrogatories; but this will not be extended to interest, unless the defendant admits, by his answer, to have made greater interest than what he was directed to pay. *Wood* v. *Downes*, 1 V. & B. 49.

3. Motion to bring into court the shares of prize-money belonging to claimants abroad, who had not come in under the decree in the cause, was refused. *Good* v. *Blewitt*, 19 Ves. 336. Coop. 197.

4. The court refused to order the defendant to pay into court a balance appearing upon books of account deposited in the Master's office, although the books were ordered to be so deposited, and to be taken as part of the answer. *Roe* v. *Gudgeon*, Coop. 304.

5. The general rule as to payment of money into court, is, that the plaintiffs must be solely entitled to the fund, or have such an interest jointly with others, as to entitle them, on behalf of themselves and of those others, to have the fund secured in court. *Freeman* v *Fairlie*, 3 Mer. 29.

6. Bill against vendee, an auctioneer, praying a specific performance, and that the deposit might be paid into court; the auctioneer admitted the deposit to be in his hands, and stated his claims upon it. On motion, he was ordered to pay in the deposit, after deducting the amount of his claims, and without prejudice to any question as to the money so retained. *Yates* v. *Farebrother*. 4 Mad. 239.

7. The court cannot make a compulsory order upon any person not a party to the suit; but there can be no objection to an order that such person may be at liberty to pay money into court. *Francis* v. *Collier*, 5 Mad. 75.

8. A plaintiff having obtained an injunction to restrain proceedings at law, cannot be called on to pay into court the sum demanded at law, on an affidavit of equitable grounds by one of the defendants, the answer of the others not having come in. *Menzies* v. *Rodrigues*, 1 Price, 133.

9. The court will not order a plaintiff, who has obtained an injunction to stay proceedings at law on a bill filed for a discovery, by which he seeks to establish a case of goods being charged at a much greater price than that agreed on, to pay even the price acknowledged to be just, into court, to abide the result of the action. *Parnell* v. *Nesbitt*, 2 Price, 149.

10. Where the court order an injunction to be continued in a case doubtful on the merits, they will order the sum proceeded for to be paid into court. *Dally* v. *Catchlowe*, 4 Price, 147.

11. Where an attorney was concerned for both the mortgagor and mortgagee, and had been appointed receiver of the rents and profits of the mortgaged estate,

and on the order made for delivery of possession, there is found to be a balance remaining in his hands beyond what is sufficient to satisfy the mortgagees, he will be ordered to pay such balance into court, notwithstanding the general report have not yet been made, on which there may possibly be found to be a greater sum of money due to him than the balance in his hands. Wood, B. *dissentiente*.
Sir W. Lewes v. *Morgan*, 5 Price, 42.

12. Order for partner to pay into court partnership money received by him contrary to good faith; but in general a partner insisting that the balance of the account is in his favor, is not obliged to bring into court what is in his hands, unless the other partners do the same.
Foster v. *Donald*, 1 J. & W. 252.

II. Out of Court.

1. The court of Chancery has jurisdiction after the bill dismissed for payment of money out of court. *Wright* v. *Mitchell*, 18 Ves. 293.

2. A power of attorney, executed in Paris, in the presence of two witnesses, and authenticated by a notary public of Paris, and an affidavit here, stating the notary to be a notary public, and verifying his signature, was ordered to be acted upon by the accountant-general. *Lord Kinnaird* v. *Lady Saltoun*, 1 Mad. 227.

3. A motion that defendants, whose title to the trust funds was in question in the cause, might have advanced to them a sum of money, to answer the expense of executing a commission in America, was refused. *Tillotson* v. *Hargreaves*,
4 Mad. 172.

4. Where a gross sum is sought to be paid out of court, the order must be obtained on petition; but where only interest on a gross sum is applied for out of court, it may be obtained on motion. *Anon.* 4 Mad. 228.

5. Money ordered to be paid under a power of attorney, executed in North America, attested by a notary public, and verified by the secretary of state of that country. *Garvey* v. *Hibbert*,
1 J. & W. 180.

6. Semble, that a party who is entitled to the interest of a fund in court for life, with a general power of appointment of the principal, cannot receive the money out of court without an appointment to the use of themselves. *Van* v. *Barnett*,
19 Ves. 110.
But see *Irwin* v. *Farrer*, 19 Ves. 86.

PENSION.

1. The statute 5 Anne, c. 3, for perpetuating the memory of the great actions performed by the Duke of M., converted the duke into a tenant in tail of estates, of which he was then tenant in fee; and notwithstanding an express limitation, that the estates should "always go along and be enjoyed with the titles and dignities," and a proviso, restraining alienation, to the prejudice of the persons in remainder, the rents and profits may be effectually alienated by the person in possession, as against himself: but the pension, granted by statute 5 Anne, c. 4, "for the more honorable support of the dignities" of the Duke of M., and his posterity; payable out of the revenues of the Post Office, to such person severally and successively to whom the same should come by virtue of that Act, with a proviso, that the acquittance of every such person should be a sufficient discharge, is inalienable. The court, therefore, upon the motion of an annuitant, to secure whose annuity the duke had executed an indenture for conveying the estates and the pension to a trustee, granted an order for a receiver as to the estates, without prejudice to the rights of judgment creditors in possession, but refused it as to the pension. *Davies* v. *Duke of Marlborough*, 1 Swan. 74. 1 Wil. 130.

2. A pension for past services may be aliened: but a pension for supporting the grantee in the performance of future duties is inalienable. *Ibid*, 1 Swan. 79.
1 Wil. 141.

3. Where government grants a pension by warrant of the treasury, made payable to the grantee or his assigns by the treasurer of the Navy, during the grantee's life, whether such pension is assignable within the policy of the law—*Quære.* Whether the crown has a right to retain the pension in discharge of a debt due from the grantee in a different capacity from that in which it was granted him—*Quære*, *Priddy* v. *Rose*, 3 Mer. 86.

4. A pension to A. and his assigns is, when assigned, a grant, and not a chose in action. *M'Carthy* v. *Goold*,
1 B. & B. 389.

PERJURY.

1. Permission or refusal to file a supplemental answer ought to have no influence on a prosecution for perjury. *Strange* v. *Collins*, 2 V. & B. 163. *Edwards* v. *M'Leary*, 2 V. & B. 257.

2. The explanation by a second answer does not take away the opportunity of indicting upon the former answer. *Ibid*, 258.

3. False swearing, when it does not strictly amount to perjury, is an indictable offence as a misdemeanour. *Ex parte Overton*. 2 Rose, 257.

4. On an application to take an answer off the file, to ground a prosecution for perjury, the court has no jurisdiction to inquire whether there be probable grounds for the prosecution, or what may be the motives of the prosecutor, it being only interested to see that the record be not defaced. *Stratford* v. *Greene*, 1 B. & B. 294.

5. An application to take an answer off the file in order to prosecute the defendant for perjury, granted as a matter of right, being in furtherance of public justice. *Ibid*.

PERPETUATING TESTIMONY.

I. SUIT FOR.

1. A plaintiff in a suit to perpetuate testimony must have a present interest, however minute or distant from possession. A contingent interest, however near or valuable, with the exception of a wager, the expectation of issue in tail, heir apparent, or next of kin of an incurable lunatic, not sufficient. *Allan* v. *Allan*, 15 Ves. 130.

2. It is doubtful if such a bill could be maintained by trustees to preserve contingent remainders. *Ibid*.

3. Where a bill to perpetuate testimony is dismissed, it is not necessary to state in the decree that it is to be without prejudice to the perpetuating of the testimony. *Mackrell* v. *Hunt*, 2 Mad. 37 (*n*).

4. Distinction between examination *in perpetuam rei memoriam* and *de bene esse*. In a suit for the former purpose, after the examination there is an end of the cause. *Morrison* v. *Arnold*, 19 Ves. 671.

II. COSTS.

1. Defendant to a bill, to perpetuate testimony, is entitled to his costs immediately after the commission is executed, upon the allegation that he did not examine any witnesses. *Foulds* v. *Midgley*, 1 V. & B. 138.

2. When, on a bill to perpetuate testimony, the defendant does not examine witnesses, he is entitled to costs. *Earl Abergavenny* v. *Powell*, 1 Mer. 435.

3. A defendant to a bill to perpetuate testimony, there being no examination of witnesses, is entitled to the costs of answering. *Lecky* v. *Murray*, 1 B. & B. 391.

4. Costs of perpetuating the testimony of a will allowed to a purchaser. *Mackrell* v. *Hunt*, 2 Mad. 37 (*n*).

PETTY BAG.

1. An action having been commenced on the petty bag side of the court of Chancery, but tried in B. R. an application for a new trial must be made in B. R. and not in the Court of Chancery. *Ex parte Barker*, 1 Cox, 418.

2. After a verdict in an action in the petty bag, an application to discharge the defendant, he not having been charged in execution within two terms, must be made to the King's Bench, where the issue was tried, but the Court of Chancery, in this case, to remove any difficulty, made a collateral order. *Fraser* v. *Lloyd*, 19 Ves. 317. Coop. 187.

3. Order to set down demurrer in the petty bag for argument made upon motion in court. *The King* v. *Knox*, Coop. 98.

PLEADING.

I. ANSWER.

(a) *Sufficiency of.*

1. If a legatee's bill against the executor prays that the defendant may admit assets, or that an account may be taken of testator's personal estate, but does not require the defendant to set forth such account, he is not bound to do so; but a submission to account is sufficient. *Misenor* v. *Burfoot*, 1 Cox, 58.

2. It is not necessary to answer to every circumstance tending to the point upon which the defendant relies, and tenders an issue by his plea. *Drew* v. *Drew*, 2 V. & B. 162.

3. Particular charges must be answered particularly: a general denial is not sufficient. *Prout* v. *Underwood*, 2 Cox, 135.

4. Defendant, by his answer, insists that he is not bound to make a discovery of certain matters inquired after by the bill, as such discovery would subject him to certain forfeitures under an Act of Parliament. The plaintiff excepts to this

and several other parts of the answer. The defendant submits to the exceptions, and by his second answer answers the other points, but insists on the same thing as to the point above mentioned. At the time the first answer was put in, the forfeitures might have been sued for; but when the second came in, the time for suing for the forfeitures had elapsed, and they could not then be recovered against the defendant. Under these circumstances the defendant's answer is insufficient. *Williams* v. *Farrington*, 2 Cox, 202.

5. A defendant may, by his answer, object to making a discovery which would subject him to penalties under an Act of Parliament; and if the defendant omits so to protect himself, still, being a public Act of Parliament, the Master, upon a reference, is bound to take notice of it, and over-rule an exception for insufficiency. *Ibid.*

6. Defendant need not set forth an account of the transaction of a trade, in which the plaintiff pretends to have been a partner, if there is a clear denial of the partnership. *Jacobs* v. *Goodman*, 2 Cox, 282.

7. Answer reported insufficient. Defendant excepted to the report, assigning as a reason why he had not set out the account, that the stamps to the schedule would amount to £29,000. The court then ordered the books themselves to be deposited in the master's office, to be considered as part of the answer. *Roe* v. *Gudgeon*, Coop. 304.

8. On a bill, stating a partnership, and praying an account, the defendant by his answer denied the partnership, and refused to set forth the account; but held, if he answers, he must answer fully, and that he should have pleaded. ——— v. *Harrison*, 4 Mad. 252.

9. On an application for an injunction to restrain bankers from proceeding at law, to recover the amount of cheques paid by them on account of the plaintiff in equity, where the bill, which also prays a discovery, states that a partnership subsisted between the plaintiff and the deceased principal of the banking firm, in another concern, of which the plaintiff had the conduct and management, and that the cheques were drawn under special circumstances, founded on a mutual understanding between the plaintiff and the deceased, to which the defendants in equity (the surviving partners in the banking concern) were not privy, they denying positively by their answer, that they were in any manner engaged in the concern as partners or otherwise; it is not matter of material exception to the defendant's answer, that under such circumstances they do not set forth, as required, the language of the body of the cheques drawn by the plaintiff, as such managing partner; for, having denied that they were in any way concerned or interested in the business, it would be of no service to the plaintiff if it were so set forth, as that (if it were true) would avail him on the trial at law. *Askam* v. *Thompson*, 4 Price, 330.

10. Whether a defendant, answering at all, can refuse to give a full answer—*Quære.* *Rowe* v. *Teed*, 15 Ves. 372.

11. A defendant cannot answer part of a bill, and refuse to answer the other part; he cannot by answer object to answering, though by plea he may. *Mazarredo* v. *Maitland*, 3 Mad. 66. *Somerville* v. *Mackey*, 16 Ves. 382.

12. The mere denial of combination, or answering immaterial facts, does not comply with the terms of the order for time not demurring alone. *Wetherhead* v. *Blackburn*, 2 V. & B. 121.

13. An answer is to be looked at as more or less deserving of credit, according as it more or less fairly meets all the inquiries contained in the bill. *Freeman* v. *Fairlie*, 3 Mer. 42.

14. A defendant may by answer protect himself from answering interrogatories, tending to criminate him. *Curzon* v. *De la Zouch*, 1 Swan. 192.

15. Whether a partner who has retired from an active concern, can be compelled to look into the partnership accounts, to answer a suit in equity—*Quære.* *Seely* v. *Boehm*, 2 Mad. 176.

16. In general, a defendant is not bound to answer any interrogatories in an amended bill, which are the same as were used in the original bill, to which an answer, admitted to be sufficient, has been put in; but if the plaintiff, by his amendments, makes a new case, the defendant is bound to answer all the interrogatories, though some are merely repetitions of those in the original bill, which have before been answered, if such further answer is made material by the new case. *Mazarredo* v. *Maitland*, 3 Mad. 66.

17. A miller carrying on the trade of a mealman, is obliged to set out in his answer to a bill for the discovery of tithes, what quantity of meal, ground at his mill, he has sold, though not the prices for

which he has sold it. *Chapman* v. *Pilcher*, Wigh. 15.

18. In a valued policy, unless there is a particular charge in the bill, that the value of the cargo is below the amount insured, it is sufficient if the defendant swears to the value as stated in the invoice. *Aubert* v. *Jacobs*, Wigh. 118.

19. A general allegation in the answer, that defendants could not be affected by the notice in any way, is not a sufficient intimation to plaintiff that defendant intended to rely upon the insufficiency of the notice. *Bennett* v. *Neale*, Wigh. 324.

20. The true test, as to whether questions are to be answered or not, are, 1st, Whether the answers might lead to the crimination of the defendant; and 2ndly, Whether they are relevant, and may be material to the case of the plaintiff. *Maut* v. *Scott*, 3 Price, 477.

21. An answer, to a bill seeking an account, relying on a deed of compromise as a bar to rendering it, was on exceptions considered insufficient, as such defence is only available by way of plea, and not by way of answer. *Leonard* v. *Leonard*, 1 B. & B. 323.

22. In general, when a party pleads, he must also answer. *Ibid*, 1 B. & B. 324.

23. A defendant must, in all cases, put in a full answer, except to criminate himself, or when purchaser for valuable consideration without notice. *Ibid*, 1 B. & B. 325.

24. The plea of purchaser without notice, is a bar to the discovery as well as the relief; but if not insisted on by the defendant, he must answer and confess the notice, or the plaintiff may except to the answer; but if he does not except, the affirmative of proving notice will be on him. *Eyre* v. *Dolphin*, 2 B. & B. 203.

(*b*) *Supplemental.*

1. The answer to a bill for a specific performance, admitted the agreement and acceptance of title, and the cause was thereupon set down for hearing, after which the defendant discovered a will, made upwards of eighty years before, not set forth in the abstract, but supposed to affect the title: Whether the will can be set up as an objection to the title by a supplemental answer—*Quære. Const* v. *Barker*, 2 Mer. 57.

2. The court, for the purpose of amending a clerical error, will permit a supplemental answer to be put in.
Ridley v. *Obee*, Wigh. 32.
Taylor v. *Obee*, 3 Price, 83.

3. The court will, under circumstances, allow a defendant to put in an explanatory answer. *Robinson* v. *Scotney*, 19 Ves. 584.

4. Supplemental answer, substituted lately for liberty to amend an answer, permitted with great caution, only on some strong ground of justice, as fraud; not on negligence, unless the party was led into it; requiring a precise statement of what is to be put on the record. *Curling* v. *Marquis Townsend*, 19 Ves. 628.

5. The ground of the modern practice of allowing a supplemental answer is, that although the defendant be permitted to correct or vary his former answer, still it is more proper to keep the former answer upon the file, that justice may be done in every view of the case in which that answer was sworn. *Ibid*, 19 Ves. 631.

6. The defendant to a bill for specific performance, having sworn by his answer, that he took possession of the premises under the contract, moved for liberty to file a supplemental answer, stating by affidavit, that he had so taken possession of part of the premises only, being previously in possession of the other part as tenant; and that the mis-statement was merely from not conceiving it material. The court refused the motion without an affidavit, that he meant by the original answer, to swear to the fact, as he then represented it. *Livesey* v. *Wilson*, 1 V. & B. 149.

7. Supplemental answer was permitted to correct a mistake, but confined strictly to mistake clearly sworn to, and probable in itself; the solicitor, who put in the former answer, being dead, his letter, admitting the fact contrary to that answer, would not be evidence in a prosecution for perjury against the defendant. *Strange* v. *Collins*, 2 V. & B. 163.

8. Liberty was given to file a supplemental answer, relative to a fact, on defendant's affidavit that at the time of filing the answer he had no recollection of the fact, but had since discovered an

entry in the parish books concerning it. *Edwards* v. *M'Leay*, 2 V. & B. 256.

9. An additional answer is always admitted with difficulty, if prejudicial to the plaintiff; but otherwise, if for his benefit, subject, if no such objection, to the propriety of a prosecution for perjury. *Ibid*, 2 V. & B. 257.

10. Explanation by a second answer, does not take away the opportunity of inflicting upon the former answer. *Ibid*, 2 V. & B. 258.

11. Pending exceptions to an answer, a further answer cannot be filed in this court until those exceptions are argued and disposed of. *Edwards* v. *Johnson*, 1 Price 203.

12. A further or supplemental answer may be used to correct or explain an obvious mistake or ambiguity in the original answer, but not where the former is clear and intelligible without, or with a view to strengthen the defendant's case. *Kidson* v. *Dilworth*, 5 Price, 564.

13. An insufficient answer is considered as no answer, but when exceptions are answered, the whole is taken as one answer. *Edwards* v. *M'Leay*, 2 V. & B. 258.

14. In schedules annexed to an answer, there was a material error, which was only discovered on taking an account before the master; upon petition and affidavit the defendants were allowed to put in supplemental schedules. *French* v. *Myles*, 4 Mad. 404.

II. Bill.

(a) *Form of.*

1. Where the plaintiff claimed as heir at law, through a second son, but without alleging that the first son died without issue, a demurrer, for that the plaintiff had not by her bill sufficiently stated the pedigree by which she made title, was over-ruled. *Delorne* v. *Hollingsworth*, 1 Cox, 421.

2. The prayer of a bill is material in construing charges not direct. *Saxton* v. *Davis*, 18 Ves. 80.

3. Relief may be had under a general prayer in a bill for relief, without any particular prayer. *Wilkinson* v. *Beal*, 4 Mad. 408.

4. If a vicar, claiming an account of tithes through a whole parish by bill in equity, prove his right in part of the parish only, the objection that the claim is too largely laid, is not a ground for dismissing the bill. Wood, B. *dissentiente*. *Scott* v. *Lawson*, 7 Price, 267.

5. Where circumstances are alleged in a bill, which in legal construction amounts to fraud, the ground of fraud is sufficiently laid, although that term is not applied in the bill to such circumstances. *Knatchbull* v. *Kissane*, 5 Dow, 389, 409.

(b) *Amendment of.*

1. A plaintiff is not entitled, upon paying the common costs of amendment, to change entirely the nature of his bill, as by converting a prayer for an account against a bailiff into a bill to foreclose a mortgage, after an issue finding the plaintiff a mortgagee; but the defendant in that case is entitled to all the costs beyond what he would have sustained had the bill been originally a bill of foreclosure. *Smith* v. *Smith*, Coop. 141.

2. A bill was filed in 1814 to set aside a purchase made in 1799 for fraud, inferred from great undervalue; the defendant, by his answer, denied knowledge of the value at the time of making the purchase: after replication filed and subpœnas served, the plaintiff cannot, without consent, obtain leave to amend by stating matter tending to fix the defendant with knowledge of undervalue, such matter making a new case and requiring an answer. *Christchurch, Dean and Chapter of* v. *Simonds*, 2 Mer. 467.

3. Where the defendant states in his answer facts which occurred subsequently to the filing the bill, the plaintiff cannot go into evidence as to those facts, they not being in issue, but the plaintiff may introduce, by amendment, a statement which will put those facts in issue, and is not obliged to file a supplemental bill for that purpose. *Knight* v. *Matthews*, 1 Mad. 566.

And see 2 Mad. 385.

4. If an event by which a title arises happen subsequently to the filing of the bill, such event cannot be introduced by amending the original bill, in which the title was shown; and therefore, where, after answer put in to a bill for redemption, plaintiff purchased the equity of redemption, and introduced such purchase by amendment, a demurrer was allowed

with full costs, and such demurrer, mentioning the new matter in the bill, is nevertheless a general demurrer. *Pilkington* v. *Wignal*, 2 Mad. 240.

5. After a plaintiff has twice amended his bill, and filed a replication for cause against a second order *nisi* to dismiss, as against a defendant who has not caused delay, the court will not permit the replication to be withdrawn for the purpose of further amending the bill by striking out the name of such defendant and in other respects, for they will set bounds to dilatory proceedings. *Turner* v. *Calvert*, 3 Price, 161.

6. The court will not allow a plaintiff to amend his bill, where he has been dilatory, without reason, in his former proceedings; and refusing such an application they will do so with costs. *Milward* v. *Oldfield*, 4 Price, 325.

7. After answer to a bill for discovery, a motion to amend by adding a prayer for relief refused with costs. *Butterworth* v. *Bailey*, 15 Ves. 358.

8. Where defendants had put in their answer, motion by plaintiff to amend, by striking out the prayer for relief, refused. *Earl Cholmondley* v. *Clinton*, 2 V. & B. 113.

9. The court will not allow a bill for discovery merely to be amended, by adding parties as plaintiffs. *Ibid*, 2 Mer. 71.

(c) *Supplemental.*

1. A defendant having been convicted, on the evidence of plaintiff among other witnesses, of perjury in his answer, in denying a parol agreement, upon which the suit for a specific performance was dismissed; the plaintiff cannot obtain leave to file a supplemental bill, in the nature of a bill of review, stating this conviction, the record of the conviction not being evidence. *Bartlett* v. *Pickersgill*, 1 Eden, 515. 1 Cox, 16.

2. Bill by an administrator, *durante minoritate*. If the infant attains 21 before the hearing, a supplemental bill is necessary. *Stubbs* v. *Leigh*, 1 Cox, 133.

3. Demurrer allowed to a supplemental bill, as stating circumstances subsequent not only to the original bill but to publication: first, as not properly supplemental matter; secondly, as not material. If the matter is material, the benefit may be obtained by a special application for the opportunity of examining witnesses, or a bill of discovery or of relief as it might be required, and, in that case, that the answer or evidence may be read at the hearing of the original cause. *Milner* v. *Lord Harewood*, 17 Ves. 144.

4. Heir at law filing a bill to redeem a mortgage, having also bought in the claim of a third person to the heirship, if he himself is found upon an issue not heir, he cannot by supplemental bill have the benefit of the original suit as the purchaser of the heirship of such third person; a demurrer to such supplemental bill will be allowed. *Tonkin* v. *Lethbridge*, Coop. 43.

5. The circumstance of a relevant event happening subsequent to an original bill, is not sufficient to warrant a supplemental bill, unless such events be material, such as to occasion an alteration in the interest of the parties. So where a supplemental bill only stated facts which might be considered by the master under the decree made in the original suit, a demurrer was allowed. *Adams* v. *Dowding*, 2 Mad. 53.

6. A supplemental bill of discovery may be filed where the discovery sought is material, and cannot be obtained by an amendment of the original bill, and the court will look into the original bill and answer to ascertain the materiality of the discovery. *Usborne* v. *Baker*, 2 Mad. 379.

7. Upon a bill to perpetuate testimony, where the examination of witnesses has been completed, and the commission closed; a supplemental bill for the further examination of witnesses, upon the ground that new material facts have been discovered since the filing of the original bill, even if it can be sustained, must state what the new facts are, in order that the defendants may be prepared to meet the new case. The mere addition of a new plaintiff makes no difference. If new evidence, as to facts stated in the original bill, has been discovered since the commission closed, an application must be made to the court for permission to examine the new witnesses, and not to file a supplemental bill. *Knight* v. *Knight*, 4 Mad. 1.

8. After a great lapse of time, and the deaths of parties from the residence abroad of the defendant, and upon an affidavit by him and his solicitor that

they had not discovered deeds material for his defence until after issue joined, leave was given to file a supplemental bill to put them in issue, and they were admitted in evidence upon a re-hearing. *Barrington* v. *O'Brien*, 2 B. & B. 140.

9. In giving leave to file supplemental bill on the ground of evidence newly discovered, diligence to discover them forms an ingredient in the mind of the court. *Ibid*, 2 B & B. 142.

(*d*) *Of Discovery*.

1. After an order in bankruptcy for liberty to bring an action, with special directions for a production of papers, and the bankruptcy not to be set up, a bill of discovery cannot be filed. *Cook* v. *Marsh*, 18 Ves. 209.

2. A counsel or attorney cannot be called upon to reveal the advice given to the client; but where the representatives of an attorney commence a suit, a bill will lie for discovery of cases laid by him before counsel, and opinions thereon, if they contained facts material to the plaintiff's case. *Richards* v. *Jackson*, 18 Ves. 472.

3. On a bill for a discovery, and a commission abroad in aid of a defence to an action for a libel, a demurrer was overruled, with liberty to file another, the plaintiff being held entitled to a commission abroad, though not to a discovery from the defendant. *Thorpe* v. *Macauley*, 5 Mad. 218.

(*e*) *Of Review*.

1. A bill of review with matter come to the party's knowledge after the hearing, lies where the plaintiff in the bill has, since the hearing, discovered matter which would vary the decree; and where, if such matter was known to the other party, he was not bound in conscience to make it known to the court: but if the matter was known to the other party, and was such as he in conscience ought to have discovered, he obtains the decree by fraud, and it ought to be set aside by original bill. So, where it was discovered that the Master, by his report, had allowed a debt which had been obtained by fraud, it should be rectified by original bill; and such relief may be obtained under the prayer for general relief, without praying specifically that the decree or act of the court might be set aside. *Manaton* v. *Molesworth*, 1 Eden, 18.

2. It is in the discretion of the court to give leave to file a bill of review on the discovery of new evidence; and where the defendant's father had subjected his real estates to the payment of debts, and the decree was for the sale of an estate for that purpose; and a deed had been discovered in the hands of the defendant's attorney, by which it appeared that the father was only tenant in tail of the estate, the court refused the application for leave to file a bill of review, as it tended to deprive creditors of payment of their just debts. *Wilson* v. *Webb*, 2 Cox, 3.

3. A petition for leave to file a bill of review after a decree affirmed on rehearing, and pending an appeal to the House of Lords for the purpose of introducing evidence in answer to evidence admitted by surprise, and not in answer to an interrogatory, nor the subject directly in issue, the decree not being made upon that evidence, was refused with costs. *Willan* v. *Willan*, 16 Ves. 72.

4. It is not permitted to file a bill of review, or a supplemental bill in nature of a bill of review where the decree has not been enrolled, upon new evidence, discovered since publication, where it would introduce a new case, of which the party was sufficiently apprised, to be enabled, with reasonable diligence, to have put it on the record originally. *Young* v. *Keighley*, 16 Ves. 348.

5. The grounds of a bill of review are: error apparent on the decree, or new evidence of a material fact discovered since publication. *Ibid*, 16 Ves. 350.

6. A bill of review may be also a bill of revivor and supplement. *Perry* v. *Phelips*, 17 Ves. 173.

7. Error apparent to support a bill of review must be plain and obvious, as a decree against an infant, without a day to shew cause, not merely an erroneous judgment, which might be the subject of a rehearing. *Ibid*,

8. It seems doubtful whether a bill can be maintained, so as to be a bill of review or a bill of revivor and supplement according as the decree may or may not have been enrolled, with a prayer in the alternative to suit either case; or whether a bill, in the nature of a bill of review, may be filed upon error apparent or matter of law, to be collected from the plead-

ings and evidence, a supplemental bill being necessary only to introduce new facts, to come on with a rehearing of the original cause. *Ibid.*

9. For a bill of review or newly discovered facts, the leave of the court must be obtained. *Ibid,* 17 Ves. 177.

10. The difference between a bill of review and a supplemental bill in nature of it: if the decree is enrolled, it is strictly a bill of review, and prays that the decree may be reviewed and reversed; but if the decree is not enrolled, the prayer is that the cause may be reheard, and in either case, matter of supplement or revivor may be introduced with the proper prayer. *Ibid,* 17 Ves. 177.

11. To a bill of review and reversal for error apparent on the decree, a plea of the decree, and a demurrer against opening the enrolment allowed; the facts constituting the error, not forming part of the record of the decree, being neither proved nor relied on at the original hearing. *O'Brien* v. *Connor,* 2 B. & B. 146.

12. An erroneous result, in point of law, drawn by the court from facts apparent on the record, is the proper subject of a bill of review for error apparent on the decree. *Ibid,* 2 B. & B. 154.

13. A fact misunderstood by the court, and not introduced into the decree, may be ground for an appeal, but not for a bill of review. *Ibid.*

14. A. and B. claim, under separate wills, as devisees of C.; and upon suit, at the instance of A., the will in favor of B. set aside, and that in favor of A. established. B. then sets up a bond of the devisor for £40,000, being more than the value of the whole property, on which bond he brings action at law, and obtains judgment; whereupon A. amends his bill, and prays and obtains injunction to restrain execution. A., after the will in his favor had been established, and before action on bond, gives to D., his solicitor and attorney, a mortgage of the lands devised, as a security for past and future costs in the proceedings, and for money advanced by D. to A. D. does not make himself a party to the suit, but suffers it to proceed in the name of A. as the sole plaintiff. Decree, in 1800, for payment of the sum on the bond, with interest from the time of the devisor's death, instead of from its date, so that the bond was partly relieved against, and per Lord Redesdale, afterwards in Dom. Proc. the bill must be understood as having submitted to have the relief made effectual, according to the rights of the parties. A. then compromises the suit, and refuses to appeal, and the whole property sold and purchased in trust for B., for a less sum than that reported due to him. D. files his bill against A., B., and another, charging collusion and fraud, and praying that the decree of 1800 might be declared void as against him, and that he might be at liberty to appeal from it in the name of A., if that should appear to be for his advantage. Held below, that the mortgage was valid as between D. and A., and that D. had a right to appeal in A.'s name. Appeal accordingly by D. in A.'s name, in the cause of A. v. B., and appeal against the decree authorising that appeal. The House of Lords, without deciding whether D. had a right to appeal in this way, refer back D.'s cause to the court below for rehearing, that the court might decide whether D. might not impeach the decree in the cause A. v. B., to the extent of his claims by bill, in the nature of a bill of review or otherwise, though the same remained in force against A. *Daly* v. *Kelly,* 4 Dow, 417.

III. Bill, Parties to.

See also Tit. Baron & Feme, (*ante.*)

(*a*) *Interest of Plaintiff.*

1. Where the plaintiff has no right, the defendant may hold till a better right appears. *Burgess* v. *Wheate,* 1 Eden, 213.

2. Whether a plaintiff can claim by original bill, under a special assignment of a legacy, and by way of supplement, as a general creditor of the legatee, not proving his debt otherwise than by the admission, not the oath of the executor, and against a person accountable to the executor for assets—*Quære.* *Tulk* v. *Houlditch,* 1 V. & B. 248.

3. Whether a devisee and heir-at-law can join in a bill, claiming an equity of redemption upon the allegation, that, questions having arisen as to which of them was entitled to it, they had agreed to divide it between them. *Marquis Cholmondeley* v. *Clinton,* 2 J. & W. 135.

4. Parties having conflicting interests ought not to be joined as plaintiffs in a suit. *Tidwell* v. *Ariel,* 3 Mad. 407.

(*b*) *Interest of Defendant.*

1. The only case in which there can be a party to a bill, against whom no relief is prayed, is that of an agent of a corporation.
Le Texier v. *Margravine of Anspach*, 15 Ves. 159.
Gibbons v. *The Waterloo Bridge Company*, 5 Price, 493.

(*c*) *When numerous.*

1. The general rule that all persons materially interested, must be parties, is dispensed with where it is impracticable, or even very inconvenient: as in the case of a very numerous association in a joint concern, which is in effect a partnership; suits by or against tenants of a manor, as for suit to a mill; parishioners for tithes or a modus; societies for insuring each other, not within the statute 6 Geo. 1. c. 18. *Cockburn* v. *Thomson.* 16 Ves. 321.

2. In a suit against the trustees of a society for relief in sickness, by some members, for an account, alleging a dissolution contrary to the articles, all other members must be parties. *Beaumont* v. *Meredith*, 3 V. & B. 180.

3. Difficulty from the number of parties will not prevent the court's acting to enforce a legal right. *Adley* v. *The Whitstable Company*, 19 Ves 305. 1 Mer. 107.

4. A person having a common right against many other persons, may file a bill againt some of them; and if the right is fairly established, the court will carry the decree into execution against other persons not parties to the suit. *Weale* v. *The West Middlesex Water Company*, 1 J. & W. 369.
See also *Attorney-General* v. *Brown*, 1 Wil. 323. 1 Swan. 265.

5. One of several inhabitants of a district, who claim a right, under an act of Parliament, to be supplied with water from a public company, cannot file a bill on behalf of himself and others. *Weale* v. *The West Middlesex Water Company*, 1 J. & W. 370.

(*d*) *Assignee or Alienee.*

1. It seems, that where an estate in litigation in equity is aliened *pendente lite*, the alienee having the legal estate must be brought before the court in order to convey: but the court will restrain vexatious alienations made *lite pendente*. *Daly* v. *Kelly*, 4 Dow, 440.

2. A bankrupt may file a bill for an account and injunction, without making his assignees parties to the suit. *Lowndes* v. *Taylor*, 2 Rose, 365, 432. 1 Mad. 423.

3. Where the trustee of a term to secure payment of an annuity, assigns the term to another person, such person should be a party to a suit to have the securities delivered up as void. *Bromley* v. *Holland.* Coop. 18.

4. In a suit by one of several assignees of a bankrupt, it is not necessary that all the assignees should be plaintiffs; those who refuse to join may be made defendants. *Wilkins* v. *Fry*, 1 Mer. 244. 2 Rose, 371.

(*e*) *Attorney.*

1. It is unusual, and generally not necessary, to make an attorney a party to a suit, because he has title deeds in his possession, although it may become so in a special case where there is collusion between the attorney and his client. *Fenwick* v. *Reed*, 1 Mer. 114.

2. Where an attorney or agent is made a party as involved in the fraud charged by the bill, costs must be prayed against him where relief cannot, or demurrer will lie. *Le Texier* v. *Margravine of Anspach*, 15 Ves. 164.

(*f*) *Attorney General.*

1. Where a vicar and vestrymen, under a power of leasing, given by Act of Parliament, granted leases for 999 years and 1000 years: these not being charity estates, the Attorney General is not properly a party to a bill to set aside the leases on account of their unreasonable length. *Attorney General* v. *Moses*, 2 Mad. 294.

(*g*) *Bill of Exchange, Drawer of.*

1. It is not necessary to make the drawer of a lost bill of exchange a party to a suit in equity against the acceptor. *Davies* v. *Dodd*, 4 Price, 176.

(*h*) *Bond, Suit concerning.*

1. Plaintiff suing upon a joint and se-

veral bond, must bring forward all obligors, principal, and sureties, unless the surety is insolvent, or have not paid any thing, and it so appears. *Cockburn* v. *Thompson*, 16 Ves. 326.

2. One obligor, in a joint and several bond, may obtain an injunction to stay proceedings at law upon the bond, without making the co-obligor a party to the suit. *Chaplin* v. *Cooper*, 1 V. & B. 16.

3. Where, upon a treaty of marriage, A., the mother of the intended husband, represented to B., the father of the intended wife, that her son was not indebted; and that an estate, of which he was in possession, was his own; when, in fact, one-third belonged to A., and for the value of which she at that time held a bond; and by such representation B. was induced to give his consent to the marriage, and a portion to his daughter: held, that B. was not a necessary party to a suit to set aside the bond as a fraud upon the marriage, but that he was a competent witness to prove the fraud. *Scott* v. *Scott*, 1 Cox, 366.

(i) *Bankrupt.*

1. In a suit against assignees of a bankrupt to compel the performance of an agreement entered into previously to the bankruptcy, the bankrupt is not a necessary party, and may demur if relief be prayed against him; but if discovery only—*Quære*. It is otherwise in a case of fraud. *Whitworth* v *Davies*, 1 V. & B. 545.

2. Mortgage of a copyhold. The mortgagor became a bankrupt, but no bargain and sale was made to his assignee. The mortgagee files a bill of foreclosure against the bankrupt and his assignee. A demurrer of the bankrupt was allowed, he not being a necessary party to the suit. *Lloyd* v. *Lander*, 5 Mad. 282.

(k) *Commissioners.*

1. A demurrer to an information against the acting commissioners under a local Act of Parliament, was overruled, where the commissioners not made parties had not qualified. The court held, that the information might be sustained against the acting commissioners only, for the purpose of relief in respect of their past acts; that, for the purpose of prospective regulation, other commissioners might be made parties, as they qualified and assumed the functions under the provisions of the act; and that a clause in the act, directing suits to be prosecuted against the treasurer only, was not applicable to cases in which adequate relief could be obtained against the commissioners only. *Attorney General* v. *Brown*, 1 Wil. 323. 1 Swan. 265.

(l) *Different Characters, Parties sustaining.*

1. Where two different characters happen to unite in one person, (those standing in each of which characters, if held by distinct persons, would be necessary parties in a cause,) it is not sufficient that the person having this double character is before the court in one of them, he must be before the court in both.
Kellett v. *Kellett*, 3 Dow, 253.
Belchier v. *Butler*, 1 Eden, 526.

(m) *Executor.*

1. A suit in Equity cannot be sustained by creditors against the agent of executors, for an account and payment of a sum of money remitted to him from India, where the executors reside, if the will has not been proved within the jurisdiction of the court, the stat. 38 Geo. 3, c. 87, not applying to this case; a demurrer, therefore, that the personal representative was not a party, was allowed. *Lowe* v. *Farlie*, 2 Mad. 101.

(n) *Inheritance, Party representing.*

1. A decree of foreclosure was obtained against a tenant for life, where the tenant in tail was abroad and not a party to the suit. *Fishwick* v. *Lowe*. 1 Cox, 411.

2. It is an exception to the general rule, that all persons interested must be parties to a suit, when it is held sufficient to bring before the court the first person having an estate of inheritance. *Cockburn* v. *Thompson*, 16 Ves. 326.

3. To a bill for partition by one tenant in common of a lease for years against the other tenant in common, the owner of the inheritance is not a necessary party. *Baring* v. *Nash*, 1 V. & B. 551.

4. In a suit concerning the inheritance of a trust estate, settled on Baron C. for life, and, after remainders to his un-

born children, upon the person who should then be entitled to claim as Baron C., in tail; with an ultimate remainder to the present Baron C. in fee: the person presumptively entitled to the baronry, although no person entitled to a prior estate of inheritance is before the court, is not a necessary party. *Marquis Cholmondeley* v. *Lord Clinton,* 2 J. & W. 1.

(*o*) *Heir at law.*

1. Where, on the hearing of a cause in Dom. Proc. it was discovered that the heir at law of a deceased executor, who was a necessary party, was wanting, and that heir at law happened to be a surviving executor already before the court, but only in his capacity of executor, the cause stood over till he was also brought forward in his other character of heir at law of the deceased executor. *Kellett* v. *Kellett,* 3 Dow, 253.

(*p*) *Legatee or Devisee.*

1. Legatees out of the personal estate only, need not be parties to a bill to carry the trusts of a will into execution; but every person claiming an interest out of real estate must be before the court. *Morse* v. *Sadler,* 1 Cox, 352.

2. Generally, a residuary legatee must bring before the court all persons interested in the residue, subject to the exception as to impracticability and inconvenience. *Cockburn* v. *Thompson,* 16 Ves. 328.

3. Where testator in his lifetime had assigned stock upon trust, but the stock had not been transferred into the trustees' names at the testator's death, it is not necessary to make the residuary legatees parties to a suit against the executor to recover the stock. *Brown* v. *Dowthwaite,* 1 Mad. 446.

(*q*) *Lessee.*

1. One tenant in common having leased his share, on a bill for partition, the lessee is a necessary party. *Cornish* v. *Gest,* 2 Cox, 27.

2. The lessee of a leasehold interest that had been evicted for non-payment of rent is a necessary party to a bill by the mortgagee against the lessor, filed after the expiration of the six months allowed the tenant to redeem; and a demurrer for want of parties accordingly allowed. *Adams* v. *St Ledger,* 1 B. & B. 181.

(*r*) *Mortgagor and Mortgagee.*

1. A mortgagee must be before the court in his own right, and it is not sufficient that he is before the court as the executor of another party. *Belchier* v. *Butler,* 1 Eden, 526.

2. Where a party having mortgaged two estates to the same person, and sold the equity of redemption of one of them, to a suit by such purchaser against the mortgagee to redeem, the owner of the equity of redemption of the other estates is a necessary party. *Ireson* v. *Denn,* 2 Cox, 425.

3. In a bill by a second sequestrator against the first, for an account, prior incumbrancers not having obtained sequestration are not necessary parties. *Cuddington* v *Withy,* 2 Swan. 174.

4. Two estates being mortgaged together, on the death of the mortgagee, the equity of redemption of the one devolves on A., that of the other on B.; B. is a necessary party to a bill by A. for a redemption. *Marquis Cholmondeley* v. *Lord Clinton,* 2 J. & W. 1.

5. Where an estate is mortgaged by the purchaser, and the mortgagee is in possession of the title deeds, he is a necessary party to a bill to set aside the purchase. *Copis* v. *Middleton,* 2 Mad. 410.

(*s*) *Remaindermen.*

1. A party has no right, in order to clear his own title, to bring remaindermen before the court, upon a discussion whether a prior remainder-man has title or not; and, therefore, a bill as against them was dismissed. *Pelham* v. *Gregory,* 1 Eden, 518.

2. Where a lease made by tenant for life, with a power to lease, was invalid at law as against the remaindermen, as being a bad execution of the power, held that the remaindermen were not necessary parties to a bill by the tenant for life to set aside the lease for fraud. *Knatchbull* v. *Kissane,* 5 Dow, 391, 401.

(*t*) *Tithes, Suits concerning.*

1. The vicar is a necessary party to a bill for tithes by the impropriate rector against an occupier, when the defence made is, that the tithes in question are payable to him. *Dawe* v. *Benn,* 1 J. & W. 513.

2. A rector ought not to be made a defendant in a vicar's suit, for an account of small tithes charged to be withheld by occupiers on a claim by the rector. *Williams* v. *Price*, 4 Price, 156.

3. In a bill to establish a *modus* against a dean and chapter, as rector, the ordinary and patron are necessary parties. *De Whelpdale* v. *Milburn*, 5 Price, 485.

(*u*) *Trustee, or Cestui que Trust.*

1. If the trustees of a term, and all the *cestuis que* trust are before the court, an intermediate trustee of the equitable interest, need not be party to a bill filed to carry the trusts of the term into execution. *Head* v. *Lord Teynham*, 1 Cox, 57.

2. If there are *cestuis que* trust who ought in strict regularity to be made parties to a suit, and are not so brought before the court, their interests may be ascertained and protected (by indulgence of the court), by a petition to be presented by them for that purpose, to obviate further delay and expense. *Drew* v. *Harman*, 5 Price, 319.

3. When a party is entitled to a certain aliquot proportion of a certain ascertained sum, and to a suit to have such aliquot share transferred to him, he makes the persons entitled to other aliquot shares parties; they may demur as not having any interest in the suit, although it may occasion the trustees to be called upon to act in the execution of their trust by parts. *Smith* v. *Snow*, 3 Mad. 10.

4. Where the mortgage was made to a person in trust for the party who advanced the mortgage money, such trustee is a necessary party to a suit of foreclosure, for it is his legal estate, which is to be protected by the decree, and he is a necessary party to an immediate reconveyance if the defendant should redeem. *Wood* v. *Williams*, 4 Mad. 186.

(*x*) *Witness.*

1. It is a general rule, but with some exceptions, that a mere witness having no interest ought not to be a party to a suit in equity. *Whitworth* v. *Davies*, 1 V. & B. 550.

2. The clerk of a corporation, as the Waterloo Bridge Company, is without the general rule that a mere witness cannot be a party, and may be made a defendant to a bill by an annuitant for a discovery of funds unappropriated, although such clerk has no interest, and may be examined as a witness. *Gibbons* v. *The Waterloo Bridge Company*, 5 Price, 491.

3. But where an officer of the Bank of England was made a party to a bill, for the purpose of discovery, when stock, the subject of the suit, had been transferred, a demurrer was allowed on the ground of his being merely a witness. *How* v. *Best*, 5 Mad. 19.

IV. Demurrer.

(*a*) *To Bill, Form of.*

1. A demurrer to the whole bill, with an exception of a small part, is good in point of form. *Hicks* v. *Raincock*, 1 Cox, 40.

2. A demurrer is irregular, if it covers any part of the bill which is answered; so where after answering the original bill, the defendant filed a general demurrer to the amended bill, it was held irregular. *Atkinson* v. *Hanway*, 1 Cox, 360.

3. A defendant demurred to a part only of the bill, and answered other parts, to which the demurrer, if good, must extend: it was held no objection to the allowance of the demurrer, that it was equally applicable to the whole of the bill. *Mayor of Dartmouth* v. *Seale*, 1 Cox, 416.

4. Defect of parties may be taken advantage of by demurrer, if the defect appears upon the face of the bill; but if not, it must be shown by plea. *Cockburn* v. *Thompson*, 16 Ves. 321.

5. The general rule, that, where the plaintiff is entitled to discovery only, and not to the relief, a general demurrer lies, does not prevent a demurrer to the relief giving the discovery. *Todd* v. *Gee*, 17 Ves. 273.

6. Demurrer cannot be good in part and bad in part; and therefore where it goes to relief to which the plaintiff is entitled, it will be overruled generally. *Ibid*, 17 Ves. 273.

7. A demurrer going to the whole relief, but answering to what is connected with the relief, as a demurrer to all the discovery, except "touching the several title deeds creating the entail," &c. and "as to the residue of the same bill not demurred to," answering, will be overruled as covering too much. *Robinson* v. *Thompson*, 2 V. & B. 118.

8. A demurrer not going to the whole bill, is bad in form, where it does not clearly express the particular parts of the bill demurred to. *Ibid.* 2 V. & B. 118. *Wetherhead* v. *Blackburn*, 2 V. & B. 121.

9. Where a plaintiff, entitled to discovery only, prays for discovery and relief, a general demurrer lies. *Albretcht* v. *Sussman*, 2 V. & B. 328.

10. A demurrer to a bill for discovery and relief, if good as to the relief, is good as to the discovery also. *Williams* v. *Steward*, 3 Mer. 502.

11. A demurrer admits as true what is stated by the bill as matter of fact; not what the plaintiff considers as fact, but which is merely inference from matter of law. *Ibid*, 3 Mer. 503.

12. Though double pleas are not allowed in Equity, the defendant may, by demurrer, assign as many reasons as he pleases, why the plaintiff, on his own shewing, is not entitled to relief: but, if upon any part of the bill the plaintiff is entitled to relief, a general demurrer cannot be supported. *Jones* v. *Frost*, 2 Mad. 1.

13. If the plaintiff is entitled to any part of the relief sought, a demurrer to the whole relief must be overruled *Attorney General* v. *Brown*, 1 Wil. 381. 1 Swan. 304.
Vauxhall Bridge Company v. *Earl Spencer*, 3 Mad. 365.

14. A demurrer to an amended bill need not be entitled as a demurrer to the original and amended bill, but as a demurrer to the amended bill; the original bill having become nugatory by the amendment, the defendant is not bound to notice it in an answer or demurrer. *Smith* v *Bryon*, 3 Mad. 428.

15. A demurrer to a bill by an annuitant against an incorporated company and their clerk, for a discovery of funds not appropriated, overruled on the ground of the clerk joining in the demurrer, he having no right to demur. *Gibbons* v. *Waterloo Bridge Company*, 5 Price, 491.

16. A general demurrer to a part of a bill is bad pleading. *Metcalf* v. *Brown*, 5 Price, 560.

(*b*) *To Bill, where it lies or does not lie.*

1. Demurrer will not lie to a bill stating a sale of the office of secondary of Wood-street Compter, and praying an account of the profits of the office; because upon demurrer it does not sufficiently appear what is the nature of the office, nor consequently whether such a sale is illegal under stat. 5 & 6 Edward 6. *Blake* v. *Raincock*, 1 Cox, 40.

2. Bill by an heir against a claim under a devise, praying a discovery, and that the witnesses may be examined *de bene esse*, and their testimony recorded; if a general demurrer for want of equity is overruled, the defendant will not be permitted to demur *ore tenus* as to the examination of witnesses, that not being made the subject of demurrer on the record. *Pitts* v. *Short*, 17 Ves. 213.

3. Where the plaintiff, claiming under a settlement stated in the bill, alleged that he was unable to set it forth with certainty, it being in the defendant's possession, the court will not conclude the plaintiff by the statement of its contents in the bill, which he admits may be inaccurate; but the defendant must plead the settlement, if he calls upon the court to determine the construction of it: therefore, if the statement of the settlement in the bill does not show an equity, a demurrer will nevertheless be overruled. *Wright* v. *Plumptree*, 3 Mad. 481.

4. Where the object of a bill *quia timet* is to prevent the assignees of a bankrupt purchaser of an estate, from bringing an action to recover back that part of the consideration-money remaining due to the vendor, which had been paid to him subsequently to the act of bankruptcy, on the ground of his having waved his equitable lien by taking a bond for the purchase-money, if the bill charge, as a fact, that the bond was given as a further additional or collateral security, the question of law cannot be raised on a general demurrer, because that fact must necessarily be admitted. *Braband* v. *Hoskins*, 3 Price, 31.

5. Demurrer by a judgment creditor to a bill for an injunction, to restrain him from taking out execution on his judgment against an estate sold before he obtained judgment, and ineffectually conveyed to the purchaser (the plaintiff), whereby the legal estate descended, since the date of his judgment, to the heir at law—overruled. *Prior* v. *Penpraze*, 4 Price, 99.

6. General demurrer to a bill by widow and infant, customary heir of a copyhold, for discovery of title of defendants in possession, allowed for defect of sufficient case for the interference of the court. *Baker* v. *Booker*, 6 Price, 379.

7. Demurrer upon the statute of limitations to a bill for an account, stating that no demand was made for twelve years, allowed. *Foster* v. *Hodgson*, 19 Ves. 180.

8. Whether an allegation in the bill for an account, that the parties dealt as

merchants, implies, that the accounts which are the subject of the suit are merchants' accounts within the exception of the statute of limitations—*Quære*.
Ibid.

(c) *For Multifariousness.*

1. A bill which seeks to enforce different demands against persons liable respectively, but not as connected with each other, is clearly multifarious. *Saxton* v. *Davis*, 18 Ves. 80. 1 Rose, 82.

2. Information against a corporation stating that they were seized of real estates, partly for purposes of public utility, and partly in trust for private charity, and charging a general misapplication of the funds, and praying relief accordingly: this is multifarious, and a demurrer will lie. *Attorney General* v. *Corporation of Carmarthen*, Coop. 30.

3. Where an estate was vested in trustees in trust to sell, and was accordingly sold in six different lots to different purchasers; a bill against such several purchasers to compel them to complete their purchase, and the *cestui que* trust and incumbrancers to execute conveyances, was held multifarious, and a demurrer by one of the purchasers allowed. *Brooks* v. *Lord Whitworth*, 1 Mad. 86.

4. Where defendants have several and distinct rights, they cannot be joined in one suit: as where a vicar sought to set aside three distinct leases, granted at different times to different persons, the bill was held clearly multifarious. *Attorney General* v. *Moses*, 2 Mad. 294.

5. If a bill be multifarious it should be objected to by demurrer, it is too late to make that objection on the hearing of the cause. *Ward* v. *Cooke*, 5 Mad. 122.

6. In order to determine whether a suit is multifarious, the inquiry is, whether the bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the suit be single, but it happens that different persons have separate interests in distinct questions, which arise out of that single object, it necessarily follows, that such different persons must be brought before the court, in order that the suit may conclude the whole subject. *Salvidge* v. *Hyde*, 5 Mad. 146.

7. Bill by a creditor against executor and trustee, and mortgagees in possession, for an account, and also against one of several purchasers, in distinct lots, of an estate from the executor and trustee, impeaching such purchase, held not to be demurrable to by such purchaser for multifariousness. *Ibid*, 138.

8. A bill filed to restrain a plaintiff at law from proceeding on five different policies of insurance, effected on different ships between the same parties, at the same time, is not demurrable for multifariousness. *Kensington* v. *White*,
3 Price, 164.

(d) *To Interrogatories.*

1. A witness objecting to an interrogatory before the examiner, must demur. *Bowman* v. *Rodwell*,
1 Mad. 265.

2. A motion to overrule a demurrer to interrogatories by a witness, on the ground that he acquired the information inquired after, in his professional character of an attorney or solicitor, was refused; because not accompanied by an affidavit to satisfy the court that the interrogatories might be answered without the witness's disclosing his client's secrets: the court cannot decide upon the mere language of the interrogatories, and it is the court and not the master who is to decide whether the matter is confidential. *Parkhurst* v. *Lowten*, 3 Mad. 121.

3. Upon demurrer by an attorney to an interrogatory, upon the ground, that the answer would divulge the secrets of his client, the court held that such demurrer was in effect an answer upon oath, and upon which, if false, an indictment for perjury could be maintained, and that such oath is as conclusive as if, in an examination at law, the witness had sworn the question could not be answered without the disclosure of secrets professionally communicated by his client; but as a solicitor must, like any other witness, divulge all secrets of his client which he did not come to the knowledge of in his relation of solicitor to his client, the demurrer was overruled as too general, and leave was given to put in a written demurrer on a re-examination. *Morgan* v. *Shaw*, 4 Mad. 54.

V. Information.

1. The distinction between information and bill is, that the former is not necessary, where the subject is a public right, as the election of a minister by parishioners or a congregation, unless it is connected with the revenue. *Davis* v. *Jenkins*, 3 V. & B. 154.

2. Commissioners being empowered by act of parliament to levy a rate not exceeding a certain proportion of the poors' rate, on the occupiers of all houses, &c. in Brighton, for paving, lighting, and watching the town; and another rate, not exceeding a fixed sum, on every chaldron of coal landed on the beach, or otherwise brought into the town, for repairing or building works to protect the coast of Brighton, against the encroachment of the sea; the act reciting, that the inhabitants were unable to raise money sufficient for that purpose, without the aid of parliament, with power of distress for non-payment, and liberty to apply any surplus of the coal-rate, after payment of the debt contracted on the security of that rate, and the expenses of repairs, &c. in aid of the rate for paving, &c. To an information by the Attorney General, at the relation of an inhabitant, filed against forty-eight commissioners, (the whole number being a hundred), by the description of acting commissioners, stating that the commissioners had during several years levied the coal-duty at its maximum, and applied a large portion of the produce in aid of the town rate, for paving, &c. instead of the construction and repair of works for the protection of the coast, and the discharge of the debt contracted on the security of the coal-duty, and had distrained the goods of the relator for non-payment of the duty, and praying an account of the money levied and expended: an injunction against an undue levy, and a direction that the commissioners should replace any sums which they had applied to purposes not warranted by the act, a general demurrer for want of equity was overruled, the court holding the duty on coals to be a charitable use, and therefore a proper subject for an information. *Attorney-General* v. *Brown*, 1 Wil. 323.
1 Swan. 265.

3. Where the King is not interested as patron, but the suit is merely for the assertion of the private rights of the vicar, it is not a case for an information. *Attorney-General* v. *Moses*, 2 Mad. 294.

VI. Plea.

(a) Generally.

1. The office of a plea, generally, is not to deny the equity, but to bring forward a fact or series of circumstances, forming in their combined results some fact which displaces. *Rowe* v. *Teed*, 15 Ves. 372.

2. The denial of some fact alleged by the bill, in some instances, with certain averments, is considered a good plea in equity, though not at law. *Ibid.*

3. There is a distinction between partners and creditors, and between general and scheduled creditors, as a plea for want of parties, by analogy to a plea in abatement at law, must shew the proper party. *Cockburn* v. *Thompson*. 16 Ves. 325.

4. A reference whether two suits are for the same matter, may be obtained by plea in Chancery as in the Exchequer, but not by motion. *Murray* v. *Shadwell*, 17 Ves. 353.

5. In many cases a plea supported by answer, must also contain a denial generally by averment. *Morison* v. *Turnour*, 18 Ves. 182.

6. It is no objection to a plea, that it contains an exception, if such exception does not require a reference to the answer to make it intelligible; but a plea with exception of "matters after mentioned" is bad. *Howe* v. *Duppa*, 1 V. & B. 511.

7. Various facts cannot be joined in one plea, unless all conclusive to a single point of defence; as several deeds tending to establish the single point of title, so in the case of papacy. *Whitbread* v. *Brockhurst*, 2 V. & B. 153 (*n*).

8. But on a special application, the court, where circumstances require it, will give the defendants leave to file a double plea: as in the case of a bill by simple contract creditors against executors, alleging that the testator had rendered his real estates subject to the payment of all his debts; and also, that having been a trader at the time of his death, such estates were liable by the statute, and the bill not stating the will at length, but only the effect of it, the court could not see whether the real estates were in fact charged with the payment of debts, so as to determine whether a plea, that testator was not a trader, could answer the whole bill. *Gibson* v. *Whitehead*, 4 Mad. [illegible].

9. An averment to belief, as to the transactions or acts of another, is sufficient. *Drew* v. *Drew*, 2 V. & B. 159.

10. If a defendant answers to part of a bill, and pleads to the rest, when the

plea should have extended to the whole, it is bad in form, and will be overruled. *Noel* v. *Ward*, 1 Mad. 322.

11. If a bill be open to a demurrer, a plea cannot be resorted to; and a plea to be good must state some new matter, which is a bar to the suit. *Steff* v. *Andrews*, 2 Mad. 6.

12. Plea overruled, there being relief prayed, which the plea did not cover. *Barker* v. *Ray*, 5 Mad. 64.

13. Where a plaintiff in equity seeks to avoid a legal bar, upon equitable grounds, the defendant in equity pleading the legal bar, must of necessity accompany his plea with averments generally denying the equitable matter. But where the defendant in equity pleaded the legal bar, with an answer, and introduced averments in the plea to the effect of the answer, held to be a useless repetition of the same matter, and the plea was overruled, with liberty to put in another. *Cork* v. *Wilcock*, 5 Mad. 328.

(*b*) *Negative.*

1. The Lord Chancellor doubted if a plea, that plaintiff is not heir, is a good plea. It seems that if the plea goes on to state a pedigree, by way of shewing that the plaintiff is not heir, and adds at the end, that the plaintiff is not in manner aforesaid, or any other manner heir, this is a good plea in point of form, although the title of the plaintiff is not concluded by the pedigree as stated. *Gun* v. *Prior*, 1 Cox, 197.

2. A bill for an account of stone, taken from the plaintiff's quarry, under a promise to account; and also, stating assurances that accounts were kept; a negative plea, denying only the promise to account, but not that the accounts had been kept, was overruled. *Jones* v. *Davis*, 16 Ves. 262.

3. Plea of no partnership, though a negative plea, is good, because the claim as partner, like that of the claim as heir or executor, can be met by a negative plea only. *Drew* v. *Drew*, 2 V. & B. 159.

4. A negative plea, as no partnership, not going to collateral circumstances, charged as evidence of it, is insufficient. *Evans* v. *Harris*, 2 V. & B. 364.

5. A plea of the stat. 32 Hen. 8, c. 9, s. 3, against buying and selling pretended titles; and also, that there was not any mortgage as mentioned in the bill, (the bill praying that the defendant might redeem a mortgage upon a covenant, in a lease from the defendant to the plaintiff) held good, though a negative plea. *Hitchins* v. *Lander*, Coop. 34.

6. Plea, to an ejectment bill stating outstanding leases and praying relief, that there are no such leases, allowed. *Armitage* v. *Wadsworth*, 1 Mad. 189.

7. In a case where the bill alleged the suppression of a codicil, an assurance by the testator, that he had directed his executors and residuary legatees to pay an annuity to the plaintiff, and their promise to him accordingly, and which promise was admitted after his death, and acted upon by actual payment for several years, a plea merely denying the execution of any codicil and any such direction, was overruled. *Chamberlain* v. *Agar*, 2 V. & B. 259.

8. To a bill against an occupier for an account of tithes, arising from farms and lands, situate within the township of K., in the parish of L., a plea that the defendant did not occupy any farm or lands, within the parish of L., or the titheable places thereof, was allowed. *Warrington* v. *Mothersill*, 7 Price, 666.

(*c*) *Amendment of.*

1. Leave to amend a plea is not of course, and the amendments are to be stated. *Wood* v. *Strickland*, 2 V. & B. 150.

2. The court will not in any case give leave to amend a plea, which is supported by an answer. *Thompson* v. *Wild*, 5 Mad. 82.

(*d*) *Account stated and settled.*

1. Plea of account stated and settled to a bill for an account, must be supported by averments, shewing an actual (though not final) settlement, as from security being given for the balance, and that all vouchers have been delivered up. Nor is it sufficient, that the last fact is stated in a schedule of the statement of the account referred to by the answer, without a positive averment of it in the plea. *Hodder* v. *Watts*, 4 Price, 8.

(*e*) *Agreement.*

1. After a bill filed for an account, a plea of a subsequent agreement, arranging the matters in dispute, and declaring that all proceedings in law and equity should cease, pleaded in bar fourteen months af-

ter the execution of the agreement, and containing no other averment with respect to it, than that it had not been waved or determined, was overruled, under the circumstances of the case, and as not containing sufficient averments. *Rowe* v. *Wood*, 1 J. & W. 315.

2. Whether a plea of an executory agreement, in the nature of a plea, *puis darrein continuance* at law, can be allowed in equity—*Quære* Semble, that in equity the proper mode of obtaining the relief given at law, on a plea of that nature, is by a motion to stay proceedings, or to dismiss the bill. *Ibid.*

3. There is no precedent of a plea of an agreement after bill filed. it may keep from the court a knowledge of those circumstances which ought to regulate its decisions. *Ibid*, 1 J. & W. 338.

4. Plea of an executory agreement, which only avers that it has not been waved or determined is insufficient. *Ibid*, 1 J. & W. 344.

(*f*) *Alien Enemy.*

1. Plea of alien enemy will be allowed to a bill for relief, but whether it would be allowed to a bill for discovery merely, as a defence to an action at law—*Quære*. *Albretcht* v. *Sussman*, 2 V. & B. 323.

(*g*) *Award.*

1. In a suit to be relieved against an award, upon suggestion of misbehaviour, &c. the arbitrators will not be allowed to plead the submission and award, with an averment of impartiality, &c., but they must answer all material charges in the bill, and not attempt to cover themselves by their own act. *Rybott* v. *Barrell*, 2 Eden, 131.

2. To a bill charging corruption of arbitrators, a plea of the award merely, is not sufficient. *Evans* v. *Harris*, 2 V. & B. 364.

(*h*) *Bankruptcy.*

1. Plea of bankruptcy of the plaintiff is bad in point of form, where all the facts are not averred distinctly and in succession, and the averment that the plaintiff was duly found a bankrupt, will not supply the defect; as a man may be duly found a bankrupt without being one in fact, and as the assignees are obliged at law to submit the whole of the facts to the jury, who may decide he was not a bankrupt. *Carleton* v. *Leighton*, 3 Mer. 667.

2. To a bill by bankrupts seeking a discovery in aid of their defence to an action at law, and payment of the balance found due to them on the taking of the accounts, and an injunction in the mean time, a plea of bankruptcy of the plaintiff was overruled. *Lowndes* v. *Taylor*, 1 Mad. 423. 2 Rose, 365, 432.

3. Where the bankrupts were employed as brokers, and fraudulently pledged the goods of plaintiff to third persons, and plaintiff brought his suit alleging a fraudulent conspiracy of the bankrupts, and those third persons, to obtain possession of the property. held that an action at law might be maintained for the tort, to which the certificate would be no bar; but that the plaintiff might also proceed by assumpsit, to which the certificate would be a bar, and as a bill in the place of an action for a tort would be demurrable to, the present must be considered as brought in the place of an action of assumpsit, and the certificate was consequently a bar, and the plea of bankruptcy and certificate, according to the statute, 5 Geo 2, c. 30, was therefore allowed. *De Tastet* v. *Sharpe*, 3 Mad 51.

S. C. *De Tastet* v. *Walker*, Buck, 153.

(*i*) *Buildings destroyed by Fire.*

1. On a bill filed to stay proceedings in an action, brought by defendant for dilapidations (founded on the destruction of the buildings thereon), and for a discovery whether he has not, since the commencement of the suit at law, assigned his interest in the premises, the defendant cannot protect himself from the discovery, or discharge himself from answering, by a plea, that the buildings had been destroyed by fire at a time when defendant was entitled, and had ever since continued out of repair and waste. *Duke of Bedford* v. *Macnamara*, 1 Price, 208.

(*k*) *Conviction for Felony.*

1. Plea put in without oath, of plaintiff's conviction of felony, to a bill by the

residuary legatee for an account of the personal estate of a testatrix, who died after the conviction, but before sentence of transportation completed, was allowed; the conviction being proved by the record alone, nor is it necessary to state even the identity upon oath. —— v. *Davies*, 19 Ves. 81.

(*l*) *Insolvent Debtors Act.*

1. A bill for specific performance of an agreement, to grant a lease to plaintiff, and an injunction against an ejectment at law; plea that the plaintiff had since the bill filed taken the benefit of an insolvent debtor's act, was overruled. *De Minckwitz* v. *Udney*. 16 Ves. 466.

(*m*) *Outlawry.*

1. Plea of outlawry in a suit for the same duty or thing, for which relief is sought by the bill, is not available. *Philips* v. *Gibbons*. 1 V. & B. 184.

(*n*) *Plenarty.*

1. Whether a plea of plenarty will hold to a bill seeking possession of a donative living—*Quære*. *Mutter* v. *Chauvel*, 1 Mer. 475.

(*o*) *Purchase without Notice.*

1. Plea of purchase from one not in possession, as a reversioner, ought to state how such person became entitled. *Hughes* v. *Garth*, 2 Eden, 168.

2. There is no distinction between the cases where a discovery is sought for the title of a purchaser, and a discovery of the specific things in his possession; but a plea of purchase for a valuable consideration without notice is equally applicable to both. *Hoare* v. *Parker*, 1 Cox, 227.

3. Where the widow of a testator, having the use of certain articles of plate for life, pawned them and died; to a bill against the pawnbroker for discovery of such articles of plate to enable plaintiffs to recover at law, the defendant pleaded that certain articles of plate were deposited with him by the widow, as her own property, for certain sums of money *bona fide* lent and and advanced thereon; but not averring that he had no other articles of plate in his possession, the plea was held bad in point of form, and overruled: and where a plea to a bill of discovery is overruled, the defendant cannot insist on the same thing by answer. *Ibid*, 1 Cox, 224.

4. To sustain the plea of purchase for valuable consideration without notice, the defendant must aver, that the vendor was, or pretended to be seised, and was in possession; which would be satisfied by the possession of the tenant. *Daniels* v. *Davison*, 16 Ves. 252.

5. There is no instance of a plea of purchase for valuable consideration without notice, without an averment, that the party purchased from a person seised or pretending to be seised in fee. *Attorney General* v. *Backhouse*, 17 Ves. 290.

6. Whoever has the best right to call for the legal title can avail himself of the plea of purchase for valuable consideration without notice. *Medlicott* v. *O'Donel*, 1 B. & B. 171.

7. One may plead that he is a purchaser for valuable consideration without notice, supporting his plea by denying all the circumstances, from which notice may be implied; but if he does not plead it, it would be too much to say that he shall be deprived of the effect of it, if it turns out, in point of fact, that he is a purchaser for valuable consideration without notice. *Rancliffe* v. *Parkyns*, 6 Dow, 230.

(*p*) *Purchase with Notice.*

1. The effect of the maxim, "*pendente lite nihil innovetur*," is limited to the rights and parties in that suit, and does not make a conveyance, *pendente lite*, absolutely inoperative. Therefore a plea in bar, to a bill by a purchaser from the defendant, that he purchased with actual notice of a suit to charge the estate with a voluntary settlement was overruled. *Metcalfe* v. *Pulvertoft*. 2 V. & B. 200.

(*q*) *Simony.*

1. A plea of simony, setting forth several distinct simoniacal contracts, was to a bill for tithes ordered to stand for an answer, with liberty to except, as being multifarious. *Wood* v. *Strickland*, 2 V. & B. 150.

(*r*) *Statute of Frauds.*

1. A plea to the principal ground of relief, as the statute of frauds, with averment of no agreement in writing, not going to collateral circumstances charged as evidence of it, overruled. *Evans* v. *Harris*, 2 V. & B. 361.

2. Defendant to a bill for specific performance of a parol agreement, with part performance, may take advantage of the statute of frauds by his answer admitting the agreement. *Rowe* v. *Teed*, 15 Ves. 375.

(*s*) *Statute of Limitations.*

1. Plea founded on the stat. 32 H. 8, c. 2, to a bill of discovery, overruled; because, though good in substance it was bad in form, as it avoided answering specific parts in the bil' otherwise than by generally denying the inference drawn from those parts; but afterwards, on cross motions, the plaintiff was allowed to amend his bill on terms, and the defendant to make a new defence. *Crow* v. *Tyrell*, 2 Mad. 397.

2. To a bill of revivor after a decree to account, the statute of limitations cannot be pleaded in bar. *Earl Egremont* v. *Hamilton*, 1 B. & B. 531.

3. The statute of limitations cannot be pleaded by trustees, in answer to a charge of breach of trust, to defend them from the consequences of neglecting their duty, in having sold an estate charged with the payment of a sum of money without satisfying that demand. *Milnes* v. *Cowley*, 4 Price, 103.

(*t*) *Title.*

1. A bill to set aside a conveyance for fraud, &c. plea of title paramount, under a former conveyance of all the estate and interests, under which the plaintiff claimed, was allowed. *Howe* v. *Duppa*, 1 V. & B. 511.

2. Plea, to a bill to redeem a mortgage, of a conveyance by the mortgagor of the equity of redemption in trust to sell and pay the mortgage and a bond debt, from him and two other persons, and a conveyance from the trustee to the mortgagee, nobody offering at an auction so much as was due for the mortgage money, with interest and costs, ordered to stand for an answer, with liberty to except. *Stabback* v. *Leatt*, Coop. 46.

3. Plea of title to a bill of an impropriate rector for tithes, overruled. *Heathcote* v. *Aldridge*, 1 Mad. 236.

VII. Scandal and Impertinence.

1. Allegations material to the issue are not impertinent, and where they are relevant and pertinent, though they may be false, and of whatever nature, they are not scandalous. *Ex parte Simpson*, 15 Ves. 477.

2. Allegations reflecting upon moral character, and not relevant, will be expunged from the record, whether in a suit or bankruptcy, and even without an application. *Ibid.*

3. The bill required the defendant to set forth an account of all and every the quantities of metals and minerals dug, &c., distinguishing from which of the mines the same were respectively raised, &c., and when, &c., the full value thereof, and of every particular, and how he computes the same; and when, and to whom, and for what, he has sold and disposed of the same, or so much thereof, as, &c.; and where, and in whose custody or power, the residue thereof remaining unsold now is, and the costs and expenses of working the mines, and the clear profits made thereby, and how he computes the same. A schedule to the answer, containing a mere transcript of all the items in tradesmen's bills, &c., is impertinent, and the master is right in reporting the whole of the schedule impertinent, without distinction of the particular items. *Norway* v. *Rowe*, 1 Mer. 347.

4. An answer to a bill for an account, setting out every separate item, although in one sense it would be pertinent, yet, if manifestly not called for by the nature of the case, it would be held impertinent, as being vexatious and oppressive. *Ibid.* 1 Mer. 347.

5. In answer to the usual interrogatories in a bill against an executor, as to the particulars of personal estate, and for what it sold, it is necessary to state only the amount for which it sold, and therefore a schedule annexed to the answer, in which every particular article of personal estate was set forth, and what it sold for, was, on exceptions, held impertinent. *Beaumont* v. *Beaumont*, 5 Mad. 51.

6. An amendment to a bill, stating part of a joint and several answer to the original bill, by way of pretence and interrogating to it, such amendment is not impertinent. *Seeley* v. *Boehm*, 2 Mad. 176.

7. It is not considered impertinence that many witnesses are examined as to the same fact, provided that fact be material, but if it is admitted by the answer, and therefore not in issue in the cause, any depositions to this point would be deemed impertinent. *Vaughan* v. *Lloyd*, 1 Cox, 312.

8. To a bill by a testamentary guardian and her husband, against the trustee of the property, seeking maintenance for minors; an answer stating the husband of the guardian to be unfit to have the management of the minors, being a "man of small fortune, increasing family, and a sectary," deemed scandalous and impertinent. *Corbet* v. *Tottenham*, 1 B. & B. 59.

9. An instrument in possession of a defendant, which is material to both the plaintiff's and the defendant's case, and is inquired of in certain respects by the plaintiff's bill, filed to restrain proceedings at law on it, must not be set out more at length in the defendant's answer than is sufficient fairly to satisfy the plaintiff's interrogatory, or it will be subject to be referred for impertinence. *The King* v. *Teale*, 7 Price, 278.

10. Needless prolixity is in itself impertinence, although the matter be relevant. *Slack* v. *Evans*, 7 Price 278 (*n*).

11. An amended bill, repeating all the charges and allegations in the original bill is prolix. *Willis* v. *Evans*, 2 B. & B. 225.

12. The court is bound to see that the suitors are not put to unnecessary expense by the records being loaded with unnecessary matter. *Ibid*, 2 B. & B. 229.

PORTION.

I. Vested or Contingent.

1. Term limited by marriage settlement to commence after the father's death, to raise portions for younger children, in such shares and proportions as he should appoint; and for want of appointment, equally, to sons at twenty-one, to daughters at twenty-one or marriage, which should respectively happen after his decease, or if the daughters should attain twenty-one or marry in his lifetime, then to be paid immediately after the decease of the father, with survivorship in case of the death of a child before its portion should become "due and payable;" the father died without making any appointment. Held, the portions of the daughters vested at twenty-one or marriage during the father's lifetime. *Cholmondeley* v. *Meyrick*, 1 Eden, 77.

2. Sums of money appointed by deed and will to A. for life, and then for her daughters and younger sons, as she should appoint, &c., and in default of such appointment, in trust for such daughters and younger sons, in equal shares, to be paid at their respective ages of twenty-one years, and in case any of them die before his or her share became payable, such share to the survivors. Held, that the portions vested in the children at twenty-one, during the lifetime of A. *Earl of Salisbury* v. *Lambe*, 1 Eden, 465.

3. The court will, from the general frame of a settlement, collect the intent, even contrary to the express words of a particular clause; and therefore where part of the general estate, was, in default of issue male of the marriage, limited to the first and other daughters, and terms were created of the whole estate, to raise portions for daughters, payable at certain times, and in certain events, and in case there was no issue male of that marriage, such portions were to be augmented; with a proviso, that in case any daughter should be entitled to the estate so limited, before the portion appointed for her should be to be paid, then her portion should cease, and not be raised: there being an only daughter, and the father having died

without issue male after her portion was vested: held, that she ought to be considered as an eldest son, and that she was not entitled to the augmented portion, though the estate vested after it became payable. *Earl of Northumberland* v. *Earl of Egremont*, 1 Eden, 435.

4. Covenant in marriage articles, that in case the father should happen to die leaving issue male, and one or more younger sons or daughter, to raise portions; if but *one then living* £1000, if two £1200, if three £1500, to be paid at their respective ages of twenty-one, or marriage, in such proportions as the survivor of the father and mother should direct, in default of such direction, equally. Held, that the share of a son who attained twenty-one was vested, though he died in the father's lifetime. *Rooke* v. *Rooke*, 2 Eden, 8.

5. Where by marriage settlement a fund is directed to be raised, only on the contingency of one or more younger children surviving the surviving parent, "for the portion or portions" of such child or children, it is a contingent fund and cannot give vested interests in such children who die before the surviving parent, as, if all the children died before the surviving parent, no fund would be raised, and this being the clear intention must govern the construction. *Hotchkin* v. *Humfrey*, 2 Mad. 65.

6. An incorrect and ambiguous settlement, construed as vesting children's portions at the age of twenty-one, against words importing a condition of their surviving the parents; an intention, which if clearly expressed, must prevail; but is not to be inferred as not a rational construction of an ambiguous family settlement. *Howgrave* v *Cartier*, 3 V. & B. 79. Coop. 65.

7. A younger son, though particularly named to take part of a sum charged as portions for younger children, afterwards becoming the eldest, before the portions are raised, and as heir taking the estate charged, is not entitled to any part of the charge. *Savage* v. *Carroll*, 1 B. & B. 265.

II. Raising or Payment of.

1. Where portions were provided for daughters on failure of issue male, to be paid at twenty-one, or marriage, after the death of the survivor of the father or mother; the father having died, leaving an only daughter, who had attained twenty-one, it was held, from the clear indication of the intention to postpone the raising till after the death of the survivor, that the portion should not be raised during the lifetime of the mother. *Verney* v. *Earl Verney*, 2 Eden, 26.

2 Portions to be raised by a trust term in a marriage settlement, the real estate is the primary fund; and the covenant by the settlor to pay them is auxiliary only. *Lechmere* v. *Carleton*, 15 Ves. 193.

3. By settlement, estates were limited to A. for life, with remainder to trustees for a term of years for raising £4000 for the portions of his younger children, remainder to his first and other sons in tail male. There was one son B., and two daughters, C. and D. By act of Parliament, passed during the children's minority, the estates were vested in trustees in fee, discharged from the uses of the settlement, upon trust, to raise by mortgage or sale the expenses of the Act and of the trusts, and afterwards certain portions affecting the estate prior to the settlement, and private debts of A. to a large amount; and to convey the unsold estates, and the equity of redemption of those which should be mortgaged to the uses of the settlement. Under this act the estates were mortgaged in fee for £41,386 to E., who having died largely indebted to the Crown, and it appearing that the former act was obtained by false representations, it was provided by another act, that if, on payment of £25,000 into the Exchequer, the real and personal representatives of E. should convey the estates to some person to be approved by B, (who had then succeeded to the estate,) the estates should be vested in such person, discharged of all claims of E. and of the Crown, to the intent to secure the re-payment of the money so paid into the Exchequer, to the person advancing the same, and subject thereto in trust for securing such proportional provision for C. and D., as they should be entitled to in respect of the portions originally secured upon the settled estates, and subject thereto in trust for B. The money was paid into the Exchequer, and the estates conveyed accordingly. Held, that C. was entitled to a full half of the £4000, with interest from A.'s death; and was not bound to contribute towards

payment either of the £25,000, or the expenses incurred in obtaining or executing the acts of Parliament. *Hansard* v. *Kemeys*. 2 Wil. 106.

III. Double.

See also Tit. Satisfaction, (*post*.)

1. In cases of portions, courts of Equity lean against double provisions moving from the father to the same persons, and for the same purposes. *Savage* v. *Carroll*, 1 B. & B. 276.

2. A power upon marriage was reserved to the father to appoint £1000, charged on certain lands, amongst the younger children of the marriage: upon his second marriage, he charged other lands with £5000 for the younger children (naming them,) of the first marriage. These portions not cumulative; and the latter only to be raised. *Ibid*, 1 B. & B. 265.

3. Distinction between legitimate and illegitimate child as to the presumption against double portions favorable to the latter. *Wetherby* v. *Dixon*, 19 Ves. 412.

POSSESSIO FRATRIS.

1. A., having a son and a daughter by one *venter*, and a son by another, conveys land to B., his surety in a bond, as an indemnity, and dies. B. pays the bond, and mortgages the lands. The eldest son dies. The mortgagee having been in possession without account or acknowledgment, semble, there was no *possessio fratris* of the equity of redemption. *Penvill* v. *Luscombe*, 2 J. & W. 201.

POWER.

I. Illegal or Void.

1. A power by will to tenants for life successively, when in possession, to alter estates tail into tenancies for life, is void. *Heath* v. *Heath*, 2 Eden, 330.

2. By marriage settlement the estates were limited to husband and wife successively for life, with remainder to the first and other sons in tail, with a power for the husband, after the birth of a son, to [illegible] son to be tenant for life, remainder to such son's first and other sons in tail. Whether this power is illegal, as tending to a perpetuity. *Quære*. *Bland* v. *Bland*, 2 Cox, 349.

II. Construction of, or of Deeds creating them.

1. In the case of a joint power by marriage settlement, to husband and wife, of appointing a sum of money among the children of the marriage, and in default of a joint appointment, the power to go to the survivor: a partial execution of the original power by the husband and wife, will prevent the secondary power given to the survivor from taking place. *Simpson* v. *Paul*, 2 Eden, 34. See also *Brown* v. *Nisbett*, 1 Cox, 13.

2. A power to appoint an estate in land, includes a power to dispose of the estate and appoint the produce; and the same effect has been given in the more doubtful case of a power to charge an estate; and a power to appoint the money, produced by an estate directed to be sold, has been considered as a power to appoint the estate itself. *Bullock* v. *Fladgate*, 1 V. & B. 471.

3. The non-conformity of the nature of estates, raised by the execution of a power, to those in the instrument creating it, is not of itself sufficient to reduce the legal effect of the latter instrument by reference to the former. *Wykham* v. *Wykham*, 18 Ves. 416.

4. A power of appointment in a marriage settlement, held to comprehend, as to its objects, all the children of the marriage, and not to be confined to such of the children only as should be living at the death of the survivor of the parents. *Howgrave* v. *Cartier*, 3 V. & B. 79. Coop. 66.

5. Directions in a will to trustees to cut trees, in aid of testator's real and personal estate, held not a trust but a mere power upon the whole of the will. *Gower* v. *Eyre*, Coop. 156.

6. Direction for the the sale, in a given event, of an estate devis d by the will, without expressing by whom it was to be sold, does not give a power of sale to the executors by implication. *Patton* v. *Randall*, 1 J. & W. 189.

7. Semble, that a power of sale, in the event of two of testator's children disapproving of the manner o. managing his lands and houses, does not arise upon their notifying their opinion, that the executors are incompetent to the management. *Ibid.*

8. A power of sale, not expressly given to any one, is not to be implied to the executors, because the devisees of the estate are minors. *Ibid*, 1 J. & W. 196.

9. A trust term, created by a marriage settlement, to raise a sum of money, on the decease of the survivor of the husband and wife, in case there should be no issue of the marriage, living at her death, and to be paid as the wife at any time or times during her coverture, and notwithstanding the same, by any deed or writing &c. should appoint or devise. The power cannot be exercised during widowhood or a second marriage. *Horseman* v. *Abbey*, 1 J. & W. 381.

10. Power to a tenant for life, lord of a manor, to enfranchise, and for that purpose to convey the freehold to the customary or copyhold tenants, authorises a conveyance of the freehold to one who is equitably entitled, and has been erroneously admitted without a previous surrender by his trustee. *Wilson* v. *Allen*, 1 J. & W. 611.

11. A will, directing a settlement of estates, and that there should be inserted all proper powers for making leases, and otherwise, according to circumstances, for the tenants for life, to be exercised by them when qualified; and when not by the trustees, does not authorise the insertion of a power of sale and exchange to the trustees, to be exercised with the consent of the tenant for life. *Brewster* v. *Angell*, 1 J. & W. 625.

12. Whether the will authorises the introduction of a power of sale and exchange of any description—*Quære. Ibid.*

13. Power of appointment in a marriage settlement, among the children of the appointor, to be paid to sons at twenty-one, to daughters at twenty-one or marriage, if the appointor should be then deceased, or if living, three months after his death. Two of the children attained twenty-one and died before the appointor. Held that no interest vested in them so as to prevent an appointment of the whole sum to the survivors. *M'Ghie* v. *M'Ghie*. 2 Mad. 368.

III. Execution of.

(a) Valid or Void.

1. The husband having a power to make a jointure of any part of the estate, not exceeding £400, *per annum*, covenants on his marriage to settle lands of the yearly value of £400, clear of taxes and reprizes; he afterwards makes a settlement of lands, with a covenant, that if they should fall short of £400 *per annum*, he would make up the deficiency: held that the settlement was intended as an execution of the power, and the making the jointure clear of taxes and reprizes in the articles was a mistake. *Countess of Londonderry* v. *Wayne*, 2 Eden, 170.

2. A *cestui que* trust of a reversion in fee of lands, by articles, previous to her marriage, reserves to herself a power of disposing of all her estate to such uses as she should think proper; an appointment afterwards made by her will in favor of her husband and children is good, although no conveyance of the reversion was ever executed. *Wright* v. *Lord Cadogan*, 2 Eden, 239.

3. Power to a husband and wife to charge a term of years with such sum or sums of money, not exceeding £200, for their two daughters, as the husband and wife, or the survivor should appoint, with interest from the time the term should commence in possession, and not before; which was not until after the death of the survivor. Husband and wife, in execution of the power, direct the £200 to be equally divided between the two daughters, six months after the decease of the father and mother; and if either daughter died before payment, or the

money became due, the share of her so dying, to be laid out for the benefit of her executors: one daughter died after the appointment, and before the time of payment. This is a good appointment to the daughters themselves; but the appointment to executors is void; and as one of the appointees died before the time of payment, her share sinks into the inheritance. The joint appointment having appointed the whole, the share of the daughter who died, is not the subject of any further appointment. *Brown* v. *Nisbett*, 1 Cox, 13.

4. Lands were settled on marriage on the husband for life, remainder to the wife for her jointure, remainder to the first and other sons of the marriage in tail male, remainder over; with a proviso, "that if the husband, at any time after the birth of a son, should be minded to alter the uses of the premises thereby limited to the eldest son, so as to reduce such son to be tenant for life, remainder to trustees to preserve, remainder to his the said son's first and other sons in tail male; and signified such intention by deed or will as therein mentioned, then the estate before limited to such eldest son and heirs male of his body, should thenceforth cease, and in lieu thereof, the said indenture of settlement should be and enure to such son for life, with remainder," &c. The husband by will, reciting the power reserved to him by the settlement, "made and appointed his eldest son to be only tenant for life of the premises, with remainder to his heirs male." Whether the power in the settlement is illegal, as tending to a perpetuity—*Quære*.

But if not illegal, it is badly executed by the will, as such powers must be executed strictly according to the deed creating the power; and it is not sufficient for the settlor to declare his intention to alter the uses, for the other uses to take their rise from the settlement. *Bland* v. *Bland*, 2 Cox, 349.

5. A power of sale, with consent of parties, testified by any writing or writings, under their and his hands and seals, &c., attested by two or more witnesses, the attestation going only to sealing and delivery, held not to be sufficient, nor a subsequent attestation, that they also signed; but a case was directed. *Wright* v. *Wakeford*. 17 Ves. 454. See S. C. 4 Taun. 213.

6. The execution of a power is a limitation of a use, which must arise, if at all, at the time of execution, and arises also, as if expressed in the original settlement. *Ibid*, 17 Ves. 457.

7. A power to be executed by a deed, signed and sealed in the presence of witnesses, and the deed was expressed to be so executed, though the attestation appeared to be only to the sealing and delivery: in this case signature in the presence of the witnesses will be presumed. *Ibid*, 17 Ves. 458.

8. In the case of an execution, by will of a power in the ordinary words, by "his deed, sealed and delivered in the presence of two or more credible witnesses, or by his last will, attested, &c." the testator must execute in the presence of the witnesses, and they must attest that he has done so. *Ibid*.

9. The construction of an instrument intended to be an execution of a power, with reference to the instrument creating it, should be as operating to create an estate by way of use, to be put in its proper place, in remainder for instance, though the words import an immediate conveyance; but the excess at law, the legal effect of words in a deed, beyond the occasion and purpose, is not corrected. *Wykham* v. *Wykham*, 18 Ves 419.

10. The execution of a power is a limitation of a use, not requiring an immediately preceding estate of freehold. *Ibid*, 18 Ves. 418.

11. A power to appoint estates to be purchased with money, produced by the sale of other estates, is well executed by an appointment, operating directly upon the original estates. *Bullock* v. *Fladgate*, 1 V. & B. 471.

12. The renewal of a college lease by tenant for life, with a power of appointment, in her own name, and at her expense, has not the effect of an appointment in her own favor. *Brookman* v. *Hales*, 2 V. & B. 45.

13. The will of a person having a power to dispose of a fund, consisting partly of real estates, and partly of household furniture, linen, and plate, not referring to the power, but attested by three witnesses, and containing a gift of "all my estates and effects of whatsoever denomination," and of my "household furniture, with linen and plate," is not an execution of the power. *Jones* v. *Curry*, 1 Wil. 24. 1 Swan. 66.

14. A testator having a general power over a sum in the funds, limited, in de-

fault of appointment, to his children, and having other funded property, bequeaths all his personal estate, consisting of money invested in any of the public funds, household furniture, &c., this is not an execution of the power. *Webb* v. *Honnor*, 1 J. & W. 352.

15. The circumstance of his having no other funded property, is not to be adverted to on the question, whether he was or was not executing the power. *Ibid.*

16. To execute a power over personal estate, it is not necessary to refer to it; but there must be very clear, internal evidence of the intention. *Ibid*, 1 J & W. 357.

17. On the execution of a power it is not necessary to refer to it, a reference to the subject of it is sufficient *Dillon* v. *Dillon*, 1 B & B 92.

18. The recital of a power not necessary to the due execution of it. *Blake* v. *Marnell*, 2 B. & B 44.

19. A power is given to be executed by a will, "signed and published in the presence of, and attested by, two or more credible witnesses," a will signed by the testatrix, and attested, generally, "witness B. H. and J. H.' is not a good execution of the power. *Moodie* v. *Reid* 1 Mad 516 2 Mad. 156

20. A power of sale given to three trustees and their heirs, cannot be well executed by two surviving trustees *Townsend* v. *Wilson*, 3 Mad 261

21. A power given to testator's wife to dispose of a moiety of leasehold estate by a will "duly executed and attested," and in default of such appointment, the same to go "unto the executors or administrators of her my said wife, to and for his, her, or their own use and benefit or will, either signed, sealed, or attested, is not a due execution of the power. *Sanders* v. *Franks*, 2 Mad. 147.

22. A will referring to the estate, but not to the power, declared a good execution of it, to the extent of limiting estates to the objects of the power. *Dillon* v. *Dillon*, 1 B. & B. 77.

23. Tenant for life, with a power to raise a sum of money out of the settled [illegible] granted an annuity out of the [illegible] till a certain sum was paid off, [illegible] referring, in the annuity deed, [illegible]: this was held to be a due [illegible] though [illegible] [illegible] as well as power, there being no distinction between the case of a creditor and that of a volunteer, when an act done by a person, having a power and interest may refer to either. *Blake* v. *Marnell*, 2 B. & B. 35.

24. Upon appeal to the House of Lords this was held to be an informal execution of the power, though good under the circumstances, which were chiefly that the settlement gave no directions as to the mode of executing the power, and that it contained a prohibition against sale or mortgage; which, though it was only understood as a prohibition against sale or mortgage, so as to defeat the provisions of the settlement, might have led the tenant for life to execute in the mode of annuity. The judgment expressly guarded against being understood as a decision that in all cases the grant of an annuity, by tenant for life having a power, without referring to the power, would be a good execution. *Marnell* v. *Blake*, 4 Dow, 248, 267.

25. Under a general power to appoint to children, by deed or will, &c and in default of appointment, equally to them at twenty-one, an appointment to grandchildren is void, as exceeding the power. *Butcher* v. *Butcher*, 1 V. & B 79.

26 Appointment to a deceased child or its representatives, under a power to appoint to children, is void. *Ibid*, 1 V. & B. 91.

27. Under a power to appoint among children, interests may be given to grandchildren by way of settlement, with the concurrence of their mother, an object of the power, and her husband. *White* v. *St. Barbe*, 1 V. & B. 399.

28 No appointment can be made in favor either of persons who by their death have ceased to be an object of the power, or to their representatives, this being an implied condition to which every power is subject; and there can be no vesting in shares, to be appointed, prior to the appointment; and the shares being directed by the power to be paid at twenty-one, if the appointor should be then dead, or if not, in three months after his death, will not make any difference. *M'Ghie* v. *M'Ghie*, 2 Mad. 368.

29. Testator directed his wife to dispose of a residue among his, the testator's, relations, in such manner as she should think fit; an appointment by the will of the wife, among testator's relations [illegible] next of kin, [illegible] and the [illegible] directed to go to the next of kin, to

the testator at the time of his death. *Pope* v. *Whitcombe*, 3 Mer. 689.

30. Devise to testator's widow for life, to be by her divided amongst such of testator's children and their issue as should be surviving at her death. The power, well executed by a will, appointing a share to each of the surviving children of the testator, or in case of their deaths to their children respectively, and another share to the children of a deceased child. *Ex parte Williams*, 1 J. & W. 89.

31. The donee of a power cannot appoint to any persons not the objects of the power. *Palmer* v. *Wheeler*, 2 B. & B. 27.

32. A father having a power of appointing among his children, cannot from the execution of it derive to himself a benefit. *Ibid*, 2 B. & B. 29.

(*b*) *Fraudulent or illusory.*

1. Power of jointuring, in bar of dower, executed after marriage in favor of the wife, but with an agreement that she should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of her husband's debts, this is not a good execution of the power, as it should have been in bar of dower, which could only be by a settlement before marriage; and also, as it was not executed *bona fide* for the end designed by the power, it was held a fraud upon the power, and the execution was set aside, except so far as related to the annuity to the wife, the bill containing a submission to pay it, and only seeking relief against the other objects of the appointment. *Aleyn* v. *Belchier*, 1 Eden, 132.

2. Where a deed of appointment is obtained by a husband from his wife by undue influence, oppression, and cruelty, an issue will be directed to try the validity of the deed, and an injunction against proceeding under it in the mean time. *Peck* v. ———, 16 Ves. 157.

3. The jurisdiction of courts of equity, upon cases of illusory appointments, is discretionary according to the circumstances of the case. *Bax* v. *Whitbread*, 16 Ves. 15.

4. A power of appointment in a marriage settlement, of the property of the wife, to be exercised by the survivor of the husband and wife, the appointment to be among children and grandchildren; the wife survived and gave £100 to one who at the time was an uncertificated bankrupt, and took other interests to himself and family, under the instruments creating and executing the power, and the residue of the fund, £2400, to another. This is not an illusory execution of the power. *Ibid.*

5. An appointment of £200 stock, though a very unequal proportion of the fund, was held, under the circumstances of the case and the nature of the trust, not to be illusory. *Butcher* v. *Butcher*, 1 V. & B. 79.

6. The question, whether an appointment is or is not illusory, must be determined upon the circumstances of each case, according to a sound discretion; the power, however lay the terms, being in some degree coupled with a trust; but an equal distribution is not required, nor any reason for appointing unequal shares, unless the smaller share is clearly unsubstantial. *Ibid.*

7. A father, under covenant for an equal division at his death of all the property he should die seised or possessed of, between his two daughters or their families, though he retains the power of free disposition by act in his lifetime, cannot defeat the covenant by a disposition in effect testamentary, as by reserving to himself an interest for life. *Fortescue* v. *Hennah*, 19 Ves. 67.

8. An appointment to one child, under a power of appointment to one or more, is good, if fairly made, but, if fraudulent, it has no consideration to support it. *Daubeny* v. *Cockburn*, 1 Mer. 644.

9. Voluntary settlement of personal property, in trust for such one or more of his children as the settler should appoint. An appointment to one child exclusively, upon a secret understanding that that child should re-assign a part of that fund to, or in favor of, a stranger, is a fraud upon the settlement, and void not only to the extent of the sum assigned back, but *in toto*, and the settlement being voluntary makes no difference. A suit therefore by a purchaser for valuable consideration, without notice, under this appointment, was dismissed, [illegible] the person entitled under the [illegible] in default of [illegible]

also the legal estate in the fund, the subject of the appointment. *Ibid*,
1 Mer. 626.

10. Father, tenant for life, with remainder in fee to his sons in such shares as he should by deed or will appoint: upon the coming of age of his eldest son, the father appoints the fee to him, and by a second deed dated two days after, the son is made to join the father in a mortgage to secure a debt due by the father; and by a third deed dated the next day, the son is made tenant for life of the equity of redemption, with remainder to his issue in tail male, reversion in fee to the father, and an additional charge for the younger children of the father is created. Held that the mortgage was a fraud upon the power, the father deriving a benefit to himself, and declared void, the mortgagee having notice of it. *Palmer* v. *Wheeler*, 2 B. & B. 18.

See also *Davis* v. *Uphill*,
1 Swan. 129.

(c) *Defective, where aided in Equity.*

1. Equity will not aid a defective execution of a power in favor of a natural son against persons claiming under a subsequent valid execution of it. *Bramhall* v. *Hall*, 2 Eden, 220.

2. Testator devised part of his legal and part of his equitable estate to trustees and their heirs, in aid of the personal estate, for payment of debts and legacies; and after such trusts should be performed, he devised all his real estates to sons and a daughter, and their respective issue male, in strict settlement, &c. with power to the sons respectively, when in possession, to convey or appoint all, or any part, to trustees on trust, by the rents and profits to raise a rent charge as and for a jointure for any wife or wives, for each such wife's natural life only; and also to charge portions by deed, and to lease for twenty-one years. The power was executed by a conveyance to trustees and their heirs on trust, by the rents and profits to raise and pay a jointure during the wife's natural life only, and charging portions with covenant for title and quiet enjoyment by the trustees during the natural life only of the wife. The court of King's Bench certified, that the trustees took an estate in fee; and the court of Common Pleas that they took no estate whatsoever. A recovery by the tenant in tail, the tenants for life being dead, the mortgages outstanding, the debts unpaid, and the trustees for the jointure not parties, is valid as an equitable recovery, if those trustees took a fee. As to the equitable estates, viz. subject to the debts and mortgages, if an estate for life; and as to the legal estates, if a limitation in a deed can be reduced by implication, the circumstances that the purpose did not require a fee, that it might disturb subsequent estates in the instrument creating the power, and the restraint of the covenant for quiet enjoyment to the wife's life, could not prevail against the legal effect of the limitation to the trustees and their heirs. The proper mode of executing such a power, is limiting a rent charge to the wife by way of jointure, secured, if not by the ordinary power of entry and distress, by a trust term for ninety-nine years, with a proviso for cesser on payment of the jointure during her life, and all arrears at her death. *Wykham* v. *Wykham*, 18 Ves. 395.

3. There is a distinction as to the execution of a power in law and in equity: a strict, literal, or due execution, is the same in both; but, though void at law, the substantial intention upon meritorious consideration will be enforced in equity.
Ibid.

4. Estates were sold under a power in a marriage settlement, to sell and invest the money in other estates, to be settled to the same uses; estates purchased previously to such sale will not be considered as a substitution for the estates sold, where there is no original trust, subsequent agreement, or representation, so to settle them; but an account will be decreed of the money produced by the sale, and not of their present value. *Denton* v. *Davies*,
18 Ves. 499.

5. The payment of a valuable consideration by a person, not having the legal estate, and not being an object of the power, cannot set up an invalid appointment in his favor: but it is different where the power is unlimited as to its objects, and the appointment impeachable on the ground only of its being voluntary.
Daubeny v. *Cockburn*, 1 Mer. 638.

6. M. M. gives to the defendant all her freehold and copyhold estates upon trust, to permit E. S. to receive the rents, &c. during her life; and after her

death to sell, and out of the produce to pay £100 to such person as she should by will appoint. E. S. by will, without reference to the power, gives £100, and the whole of her household furniture, to the plaintiff. It was charged by the bill, and not denied, that the testatrix had no personal property at the time of her death, except a few articles of household furniture. An inquiry as to the state of the property at the time of making the will, with the view of ascertaining that the testatrix must have intended the gift of £100, as in execution of her power, was refused, and the bill dismissed. *Jones* v. *Tucker*, 2 Mer. 533.

7. The Court has supplied a defective execution of a power in favor of a wife, a child, a purchaser, and creditors; but the relief does not extend to any other persons. The Court will not, therefore, on behalf of a husband, relieve against the defective execution of a power in his favor by his wife. *Moodie* v. *Reid*, 1 Mad. 516.

8. Excess in the execution of a power, if capable of separation, will be corrected. *Palmer* v. *Wheeler*, 2 B. & B. 28.

9. Where a will, in execution of a power, gave more to the objects of the power than was warranted by it, the excess was reformed to effectuate the general intention manifested in the articles creating the power. *Dillon* v. *Dillon*, 1 B. & B. 77.

10. Where the execution of a power is informal, but for valuable consideration, the instrument is to be reformed so as to be an execution in the mode in which the person having the power had a right to execute. *Marvel* v. *Blake*, 4 Dow, 264.

11. Father, tenant for life, with remainder in fee to his sons, in such shares as he should by deed or will appoint; upon the coming of age of his eldest son, the father appoints the fee to him; and, by a second deed, dated two days after, the son is made to join the father in a mortgage to secure a debt due by the father; and, by a third deed, dated the next day, the son is made tenant for life of the equity of redemption, with remainder to his issue in tail male, reversion in fee to the father; and an additional charge for the younger children of the father is created. On a bill by the son of the appointee to be relieved from the additional charge and mortgage, held, that the deed, so far as it charged the additional sums for younger children, was good; but the limitations were declared void, and the excess corrected. *Palmer* v. *Wheeler*, 2 B. & B. 18.

(d) Revocation and Re-appointment.

1. A., having a power of appointment by deed or will, with power of revocation and new appointment, executes the power by deed, but without reserving to herself any power of revocation; she retains the deed in her own possession, and afterwards revokes and re-executes it. The re-execution is void, and has no effect upon the original appointment. *Worrall* v. *Jacob*, 3 Mer. 256.

2. Where a power was given by deed to one to revoke uses, "from time to time, during his natural life," such revocation, and the re-appointment, to be "signed, sealed, and delivered, in the presence of, and attested by two or three credible witnesses." The Court thought there was ground to contend, that the power of revocation and new appointment was only to be exercised by deed, yet after the authority of *Roscommon* v. *Fowke*, would not decide that it could not be exercised by will, without first having the opinion of a court of law. *Edwards* v. *Edwards*, 3 Mad. 197.

PRACTICE.

I. ABATEMENT OF SUIT.

(*a*) *Bankruptcy*.

1. Bankruptcy is no abatement of a suit in equity. *Anon.* 1 Atk. 263.
Rutherford v. *Miller*, 2 Anst. 458.
Davison v. *Butler*, 2 Anst. 460(*n*).
And see Wheeler v. *Malins*, 4 Mad. 171.

2. But though not strictly an abatement, the suit becomes defective; so where the plaintiff becomes bankrupt, pending an account before the master, the Court will stop proceedings till the assignees make themselves parties to the suit. *Williams* v. *Kinder*, 4 Ves. 387.

3. And where after the usual decree for an account against executors, one became bankrupt, the Court refused to allow the assignees to go on with the account before the master, without making themselves parties by supplemental bill. *Russell* v. *Sharpe*, 1 V. & B. 500.
And see DIV. LXXXI. *post*.

4. Whether, at law, notwithstanding the bankruptcy of the plaintiff, the action may not proceed, the assignees giving security for the costs—*Quære*. *Williams* v. *Kinder*, 4 Ves. 387.

(*b*) *Marriage*.

1. A suit abates by the marriage of a female plaintiff, but not by the marriage of a female defendant. *Durbaine* v. *Knight*, 1 Vern. 318.

2. But in the latter case the husband must be named in the subsequent proceedings. *Wharam* v. *Broughton*, 1 Ves. 182.

3. Where two of the defendants intermarry, it is no abatement of the suit. *Jackson* v. *Smith*, Cary, 81.

4. Where the testator made his widow executrix jointly with J. S., but on condition she should not marry, and, pending a suit by them as executors general, the widow married; held by Bridgman, C. J. that the marriage abated the suit. *Hampden* v. *Brewer*, 1 C. C. 77.
But see Mitf. 45.

(*c*) *Infant coming of Age*.

1. Administrators, in nature of a guardian to an infant executor, file, on his behalf, a bill in Chancery; the infant, pending the suit, comes of age: this is no abatement. *Per Lord Egerton, C.* Cary, 31.

2. But in a subsequent case it was held that the suit was determined, and that the infant could not go on therewith, but must begin anew, unless he had so come of age, after a decree to account, in which case he could go on by bill brought for that purpose. *Jones* v. *Basset*, Pre. Ch. 1 4.

3. An infant suing by *prochien amie* comes of age, afterward publication passed, and the cause came on to be heard. It was objected that the suit was abated, but the Court overruled the objection, and proceeded to hear the cause; and in such cases the course is to proceed to hearing without any change in the proceedings. Cur. Can. 464.

4. Bill by administrator *durante minore ætate*, and immediately before the hearing the infant came of age; the Court thought there was no way of avoiding the necessity of a supplemental bill. *Stubbs* v. *Leigh*, 1 Cox, 133.

(*d*) *Death*.

1. Where joint tenants file a bill, and one dies, his interest survives to the other, and therefore there is no abatement. *Wright* v. *Dorset*, 3 C. R. 66.
Fallowes v. *Williamson*, 11 Ves. 309.
Boddy v. *Kent*, 1 Mer. 364.

2. But where tenants in common are plaintiffs, the death of one occasions an abatement of the suit. *Fallowes* v. *Williamson*, 11 Ves. 306.
But see Boddy v. *Kent*, 1 Mer. 164.

3. If two joint tenants are plaintiffs, and one releases, the cause is not thereby abated. *Anon.* 2 Free. 6.

4. A man and wife exhibit their bill for a promise made to both during coverture, the death of the wife does not make a bill of revivor necessary, the claim of the husband not being in right of the wife. *Thorne* v. *Brend*, Cary, 89.

5. If the bill be brought by husband

and wife, for a demand in her right, and the husband dies; it is in the nature of a chose in action, and survives, and the cause does not abate. *Pary* v. *Juxon*, 3 C. R. 40.

Anon. 3 Atk. 726.

6. But the plaintiff cannot proceed with the suit unless the widow elects to abide by the proceedings; and if she doth, the plaintiff may proceed, and the decree shall bind her. *Anon.* 3 Salk. 84.

7. Plaintiff gave a feme covert a promissory note, and the husband dying before answer to a bill brought for discovery of the consideration, the wife administered to him; and Lord Chancellor held, that as a wife can have no separate property, but whatever she gets during the coverture vests in the husband, the property of this note was wholly his, and that she had no interest in it but as representing her husband; and that, therefore, by his death the suit was abated. *Lightbourn* v. *Holyday*, 2 Eq. Ca. Ab. 1.

8. Where a man marries an administratrix, and, after a decree is obtained against husband and wife for payment out of the assets, the wife dies; the suit is thereby abated, and must be revived against the representatives of the wife. *Jackson* v. *Rawlins*, 2 Vern. 195.

9. Bill for a legacy against a married woman, as executrix, and her husband, and after publication passed, the husband dies; this is no abatement. *Shelberry* v. *Briggs*, 2 Vern. 249.

10. Where the suit is against a married woman, as administratrix, and her husband, and the feme dies, the suit abates entirely. *Brown* v. *Higden*, 1 Atk. 291.

11. Where, after hearing upon a bill of interpleader, a trial at law is directed between the defendants, there is an end of the suit as to the plaintiff, and therefore his death will not cause an abatement. *Anon.* 1 Vern. 351.

12. Though by 8. W. 3., a suit shall not abate by the death of one defendant, yet it must be taken with this restriction, that the subject matter of the suit is not hurt by the death of such defendant. *Brown* v. *Higden*, 1 Atk. 291.

13. Abatement by death of one of the defendants does not necessarily prevent judgment. *Davies* v. *Davies*, 9 Ves. 461.

14. Where creditors sue on behalf of themselves and the rest, the death of one does not cause an abatement. *Leigh* v. *Thomas*, 2 Ves. 313.

15. On bill by some creditors, in respect of their several demands, but not on behalf of all the creditors—whether the death of one of the plaintiffs causes an abatement—*Quære*. *Buddy* v. *Kent*, 1 Mer. 361.

16. The proceedings upon an information can abate by the death or determination of interest of the defendant only; and if there are several relators, the death of any, while there survives one, will not affect the suit; but if all the relators die, or there is but one, and he dies, the Court will not permit any further proceedings till the name of a new relator is inserted, which must be done by order of Court. Mitf. 79.

Attorney-General v. *Powel*, 1 Dick, 355.
Attorney-General v. *Heath*, Pre. Ch. 13.

17. An abatement by the death of a defendant suspends the effect of an order, that plaintiff should set down the cause to be heard within a limited time, or the bill be dismissed without further order. *Gregson* v. *Oswald*, 1 Cox, 343.

18. Abatement by death of the plaintiff will not prevent the Court making an order for the transfer, and payment of money out of Court, where the right is clear, and ascertained by the previous proceedings in the cause. *Roundell* v. *Currer*, 6 Ves. 250.

See further, Div. LXXII, *post.*

II. Account.

See also p. 1, *ante*, *and the references under* Tit. Account *in the Table of Titles prefixed.*

(*a*) *How Taken.*

1. A defendant, upon account before the Master, shall be discharged by his oath, of all sums under 40s. *Everard* v. *Warren*, 2 C. C. 249.

Marshfield v. *Weston*, 2 Vern. 176.
Morely v. *Bonge*, Mos. 252.

2. But he must swear positively to the fact; swearing to his belief only is not sufficient. *Robinson* v. *Cumming*, 2 Atk. 410.

3. And the defendant must swear when, and to whom, and for what, such sums were paid. *Anon.* 1 Vern. 283.

4. And provided also such sums do not in the whole exceed £100. *Whicherly* v. *Whicherly*, 1 Vern. 470.

5 But a party shall not charge another

upon his own oath. *Everard* v. *Warren*, 2 C. C. 249.

Plampin v. *Betts*, 1 Vern. 272.
Marshfield v. *Weston*, 2 Vern. 176.

6. Where the account was of twenty years standing, the defendant was allowed to prove his account upon his own oath, for what he could not prove by books or cancelled bonds. *Peyton* v. *Green*, 1 C. R. 146.

7. And where the account had been delivered fourteen years, and no objection taken, and defendant had lost his books by seizure in a foreign country; held, that defendant should not be charged beyond his own oath. *Holstcomb* v. *Rivers*, 1 C. C. 127.

8. The plaintiff was admitted to prove his debt before the Master. *Newman* v. *Norris*, 1 Dick. 259.

9. Plaintiff in his examination on interrogatories, charged and discharged himself in the same sentence, and held sufficient: but if they had been in different sentences, he must have proved the discharge. *Kirkpatrick* v. *Love*, Amb. 589.

Ridgeway v. *Darwin*, 7 Ves. 405.

10. A party may be discharged as well as charged by his own examination. *Blount* v. *Burrow*, 1 Ves. J. 547.

11. A charge by answer must be discharged by proof. *Partcriche* v. *Powlet*, 2 Atk. 383.

12. An executor charged by his answer, will not be permitted to discharge himself by his affidavit, of payments to the testator in his lifetime. *Ridgeway* v. *Darwin*, 7 Ves. 404.

13. A party charged by his answer or examination, cannot discharge himself by the same, unless the whole is stated as one transaction; as that on a particular day he received a sum and paid it over; not that upon a particular day he received a sum, and on a subsequent day he paid it over, for then it is a different transaction. *Thompson* v. *Lambe*, 7 Ves. 587.

14. Where, in taking an account of testator's estate, under a decree, the defendant, in establishing a claim against the estate, was guilty of suppression and embezzlement of papers relative to the claim, and the same was reported by the Master, the whole claim was for that reason disallowed. *Wardour* v. *Berisford*, 1 Vern. 452.

15. In decrees against a mortgagee on a bill for redemption, or against an executor to account, it is the course of the Court to direct it without future words, and yet if the person decreed to account, receive any sums subsequently to the decree, they must bring such sums into the account before the Master. *Bulstrode* v. *Bradley*, 3 Atk. 582.

16. An acting executor, to whom the produce of an estate in the West Indies, the property of an infant, was consigned, was directed to account annually upon affidavit. *Brooks* v. *Oliver*, Amb. 406.

17. In an account against an executrix, the Master was directed to allow items, the vouchers for which should be proved by affidavit to be impounded in the Ecclesiastical Court. *Nielson* v. *Cordell*, 8 Ves. 146.

18. Executor directed not to derive any advantage in keeping money in his hands, without accounting for legal interest, and to accumulate for the *cestui que trust*, directing a computation of interest at 5 *per cent.* on all sums received by him while in his hands; and that the Master do, in such computation, make half-yearly rests. The object of such direction is to charge compound interest, and the decree, though perhaps going further than usual, was held, under the circumstances, properly executed, by a computation of interest upon each receipt, from the day it was received; the balance of receipts, with the interest so calculated, and payments being struck at the end of the half-year; and that balance so composed of principal and interest, being carried forward as an item in the account producing interest. *Raphael* v. *Boehm*, 11 Ves. 92.

19. A confidential agent is bound to keep regular accounts; and where he neglected so to do, and to preserve vouchers against himself, though he had preserved those in his own favour, he was, on the ground of gross neglect of duty, not allowed a charge in respect of bills of costs for business done as a solicitor. *White* v. *Lady Lincoln*, 8 Ves. 363.

20. Where a mortgagee enters upon the estate, though forced to do so, he subjects himself to an account; but it is not an invariable rule, that in taking such accounts the Master must make annual rests. *Gould* v. *Tancred*, 2 Atk. 534.

21. The Master, if he please, may proceed *de die in diem*, in taking an account without an order for that purpose, and he may adjourn at pleasure, and the parties

are bound to attend without being served with fresh warrants. Prac. Reg. 7. *Lingham* v. *Sturdy*, 5 Ves. 423.

21. In a subsequent case, it was held, that an order was necessary to enable a Master to proceed *de die in diem*, such having been the constant practice; and that the order, when obtained, was not imperative upon the Master, but subject to his discretion. *Purcell* v. *M'Namara*, 11 Ves. 362.

22. Where the party who might resist a claim before the Master, does not attend, the Master ought to take the account as carefully as if he did attend. [illegible] *Johnston*, 2 S. & L. [illegible]

23. The words "all just allowances" in a decree for an account do not empower the Master to allow for improvements, unless the decree particularly mentions them, which is never the case, without the party making proof of there being some. *Knowles* v. *Spence*, Mos. 225.

24. The House of Lords in matters of account which are intricate, refer it to two merchants, named by the parties, to consider the case, and report their opinion upon it. *Ogle* v. *Wilcox*, 2 Atk. [illegible]

25. The court [illegible] make an allowance to one partner for the expense of entertaining the customers. The accounts having been annually balanced without such an item is conclusive. *Thornton* v. *Proctor*, 1 Anstr. 94.

(b) Settled Account, where binding.

1. Where there are only mistakes and omissions in a stated account, the party objecting shall be allowed no more than to surcharge and falsify, but if there is fraud and imposition, the whole shall be opened, though of twenty-three years' standing. *Vernon* v. *Vawdry*, 2 Atk. 119.

2. An account taken by tenant for life shall be binding upon a remainder-man, whose title afterwards vests, and he shall only be allowed to surcharge and falsify, unless fraud or errors are shewn therein; so in accounts upon mortgages, to which all who could claim the equity of redemption were parties, unless reasonable cause be shewn to open them. *Aucn* v. *Papworth*, 1 Ves. 163.

3. Account settled for ten years, though containing gross charges, shall not be opened, but plaintiff will be permitted to surcharge and falsify. *Brownell* v. *Brownell*, 2 Bro. C. C. 62.

4. If a merchant send an account current to another in a different country, on which a balance is made due to himself, and the other keeps the account without objection for two years, the rule is to consider it a stated account. *Tickel* v. *Short*, 2 Ves. 239.

5. Where there are settled accounts, the plaintiff must shew strong ground to open them. *Chambers* v. *Goldwin*, 5 Ves. 837. 9 Ves. 265.

6. Where the answer to a bill for an account, alleges a settled account which is not proved, the plaintiff will have liberty given to surcharge and falsify, if the Master should find any settled account. *Kinsman* v. *Barker*, 14 Ves. 579.

7. For the purpose of surcharging and falsifying settled accounts, specific errors must be charged. *Chambers* v. *Goldwin*, 5 Ves. 837. 9 Ves. 266. *Kinsman* v. *Barker*, 14 Ves. 579.

8. The *onus probandi* is always on the party having liberty to surcharge and falsify. The court takes it as a stated account, and establishes it, but if any of the parties can shew an omission, for which credit ought to be given, that is a surcharge, or if any thing is inserted which is a wrong charge, he is at liberty to shew it, which is a falsification, but it must be by proof upon his side. *Pit* v. *Cholmondeley*, 2 Ves. 565.

9. Where the decree gives a party liberty to surcharge and falsify, he is not confined to errors in facts, but may take advantage of errors in law. *Roberts* v. *Kuffin*, 2 Atk. 112.

III. Affidavit.

(*See Tit.* Bankruptcy, *p.* 114, *ante.*)

(a) How drawn.

1. An affidavit should not be too prolix, as by inserting the whole of a petition in an affidavit of service. *Ex parte Smith*, 1 Atk. 139.

2. It is a proper caution in an affidavit, as to words spoken, to add "or to that effect." *Ayliffe* v. *Murray*, 2 Atk. 60.

3. Where an order made upon the statute of 5 Geo. 2, shall be said to be obtained by contrivance, it is not sufficient to be sworn by the affidavit, that the par-

ty making it was informed and believes, that the defendants withdrew themselves, in order to avoid being served with the process of this court; it must be set forth, by whom the parties received such information. *Burton* v. *Maloon*, Barn. 401.

4. Semble an affidavit of notice of motion must state positively that the person served acts as clerk in court: information or belief is not sufficient. *Macauley* v. *Collier*, 1 Ves. 141.

5. Where an affidavit was made in order to obtain an injunction to restrain waste, the court thought the affidavit certain enough, by reason of the reference it had to the bill. *Bradly* v. *Stratc..y*, Barn. 399.

6. Affidavit, to a bill of interpleader, need not state that it is at the plaintiff's own expense. *Metcalf* v. *Hervey*, 1 Ves. 248.

7. In the case of waste, it is not sufficient to swear to information of the intention. The affidavit must go either to an act of, or threats to commit, waste. *Hannay* v. *M'Entire*, 11 Ves. 54.

(*See further* WITNESS III. *p.* 482, *post.*)

(*b*) *Before whom Sworn.*

1. Affidavits taken in London, or within twenty miles thereof, must be sworn before a Master; and, if taken in the country, more than 20 miles from London, before a Master Extraordinary, who must state the town and county where he takes them. Prac. Reg. 7.

2. Affidavit sworn before a Master Extraordinary in Ireland, was allowed to be read in the Court of Chancery here; but affidavits made in the Plantations cannot be read, unless they are under the seal of the Island. *Annesley* v. *Earl of Anglesey*, 1 Dick. 90.

3. Affidavit of the execution of an instrument, made before the mayor of a foreign town, not received without evidence of his holding that situation. *Garvey* v. *Hibbert*, 1 J. & W. 180.

4. Order that an affidavit should be sworn before a notary public at Amsterdam, with the intervention of a proper magistrate, if necessary by the law of Holland to the administration of the oath. *Chicot* v. *Lequesne*, 1 Dick. 150.

5. Affidavits sworn before one of the barons of Exchequer in England, may be read in the Court of Exchequer in Ireland. *Benson* v. *Vernon*, 3 Br. P. C. 626.

6. Affidavits sworn before a baron of the Exchequer in Scotland, may be read in a court of equity in England. *Braham* v. *Bowes*, 1 J. & W. 296.

7. No instance of the court of Chancery taking notice of an affidavit before a Justice of Peace in Scotland, though the courts, of late, have acted upon affidavits sworn before Judges of the superior courts there. *Hyde* v. *Whitfield*, 19 Ves. 344.

8. Affidavits taken before a person who was a solicitor in the cause cannot be read. *In the matter of Hogan*, 3 Atk. 813.

9. Where such affidavits were read in support of a petition of the solicitor, without communicating the fact to the court, the petition was dismissed with costs, to be paid by the solicitor who took the affidavits. *Ibid.*

10. The court of Exchequer refused to order an affidavit to be taken off the file for irregularity, on the objection of its having been sworn before the attorney for the party in the cause, where no circumstances of suspicion appeared, because it has hitherto not been contrary to the practice on the equity side of the court: But in consideration of the propriety of such a rule being established, the court would not order the party to pay the costs of his application. *Smith* v. *Woodroffe*, 6 Price, 230.

11. The court directed that in future, affidavits were not to be sworn before the attornies in the cause. *Ibid.*

12. Affidavits of a peer must be upon oath. *Meers* v. *Lord Stourton*, 1 P. W. 147.

13. But a peeress was ordered to produce deeds confessed in her answer, upon honour only, and not upon oath, it being supplemental to her answer. *Duke of Hamilton* v. *Lady Gerrard*, Pre. Ch. 92.

(*c*) *Time of Filing.*

1. If affidavits, on which an attachment is founded, be filed before the return of the attachment, it is sufficient. *Read* v. *Ward*, 1 Dick, 76.

2. This, though contrary to the general orders of the court, has been the constant practice; and in a late case, after much discussion, the court hesitated to decide upon the point of practice, but ordered that in future no process should issue, without an affidavit previously filed. *Broomhead* v. *Smith*, 8 Ves. 357.

3. The rule of courts of law is, that all affidavits shall be filed a certain time before discussion; the practice in Chancery is otherwise, and is to be preferred notwithstanding the inconvenience. *Ex parte Leicester,* 6 Ves. 432.

4. No objection to a motion, that the affidavit was filed only the day before; if it be an affidavit, which cannot be answered, as that the plaintiff cannot go to trial with safety till the answer comes in. *Jones* v. ———. 8 Ves. 46.

5. Where the court directs that affidavits shall be filed on both sides by a certain day, and some of the affidavits on one side happen not to be filed on that day, it is the established rule of the court, not to enlarge the order farther, that the other side may be required to give an answer to those affidavits. *Burton* v. *Maloon,* Barn. 401.

6. The affidavit of the personal service of a petition, must be filed before it can be read. *Ex parte North,* 4 Mad. 395.

See also BANKRUPTCY, XXI *c.* p. 114, *ante.* INJUNCTION, XXIII. *b.* p. 248.

(*d*) *Where or where not read.*

1. Affidavits made subsequently to a Master's report, cannot be read upon exceptions to the report. *Davis* v. *Davis,* 2 Atk. 21.
Dick v. *Milligan,* 2 Ves. J. 28.

2. An affidavit taken in one cause cannot be read as a ground for an order in another cause, although between the same parties: There must be an affidavit in the cause in which the order is made. *Lumbrozo* v. *White,* 1 Dick, 150.

3. In the case of an original and cross cause in Ireland, and process of contempt to a sequestration against the plaintiff in the original cause, for want of an answer to the cross bill, and the original bill dismissed for want of prosecution, and a decree *pro confesso* obtained in the cross cause: affidavits of illness and consequent incapacity to answer are admissible, upon a motion to set aside the process of contempt and the decree. *Benson* v. *Vernon,* 3 Br. P. C. 626.

4. Upon a motion for an injunction, affidavits cannot be read against the answer. *Sommerville* v. *Buckler,* 3 Anstr. 658.

5. Except in cases of waste. *Potter* v. *Chapman,* Amb. 99.
Robinson v. *Lord Byron,* 1 Br. C. C. 388.

6. Or of mischief analogous to waste. *Gibbs* v. *Coles,* 3 P. W. 255.
Peacock v. *Peacock,* 16 Ves. 153.
And see further, p. 248. (*ante*).

7. In the case of a verdict obtained by gross fraud and collusion, the court, on an application for an injunction to restrain execution, allowed affidavits to be read against the answer. *Isaac* v. *Humpage,* 1 Br. C. C. 462. 2 Ves. J. 427.

8. But the authority of this case is extremely questionable.
Hanson v. *Gardiner,* 7 Ves. 308.
Berkely v. *Brymer,* 9 Ves. 356.
Smythe v. *Smythe,* 1 Swan. 254 (*n*).

9. In support of motion for injunction on interpleading bill, affidavits of the facts may be read; it being exactly upon the footing of an injunction to stay waste. *Langston* v. *Boylston,* 2 Ves. J. 102.

10. Collusion is not to be presumed against the affidavit of the plaintiff in interpleading bill, nor can counter affidavits prevail. *Ibid.*
See further, Tit. INTERPLEADER II. p. 254 (*ante*).

12. Affidavits cannot be read against the answer in support of an injunction to restrain the negociating a bill of exchange. *Berkely* v. *Brymer,* 9 Ves. 355.

13. The reason of the practice in the Master's office of receiving the party's affidavit, in support of his claim as a creditor, is, that he must give that assurance that the debt is due; but if it is contested, no attention is given to the affidavit. *Fladong* v. *Winter,* 19 Ves. 196.

14. It is the practice of the court of Common Pleas to examine the affidavit to hold to bail, reducing the bail accordingly; and it has been lately adopted by the court of King's Bench. *Dick* v. *Swinton,* 1 V. & B. 373.
See also 11 Ves. 55.

15. If there is not time for the plaintiff to make a motion on the day for which notice is given, or if such motion stands over at the defendant's request, and afterwards, but before the motion is actually made, the answer is filed, the practice is to allow the affidavit in support of the motion to be read, and to consider the answer as a counter affidavit. *Goodman* v. *Whitcomb,* 1 J. & W. 589.

IV. Answer.

(a) Where and how a defendant is to answer—Generally.

1. A defendant in all cases, by the course of the court, has eight days, exclusive of the day of appearance, to answer the plaintiff's bill. Hinde 225.

2. The defendant answered voluntarily. *Gargrave* v. *Gargrave*, Toth. 11.

3 The defendant must answer the bill, though excommunicated. *Tichborne* v. *Edmonds*, Toth. 11.

4. A defendant incapable of managing his own affairs, may, on motion, obtain an order to answer by guardian, but the guardian must be named upon the motion. *Brassington* v. *Brassington*, 2 Anstr. 369.

5. Where a bill is brought for discovery of concealments of a bankrupt's estate, the court will not allow the defendants to look into their depositions taken by the commissioners, before they put in their answers. *Boden* v. *Dellow*, 1 Atk. 291.

6. Order for amendment of bill without costs, requiring no further answer; the amendment was by praying an injunction: held the defendant might answer *gratis*. *Savory* v. *Dyer*, Ambl. 70.

7. A defendant was permitted to answer, after decree *pro confesso* upon a sequestration, upon accounting for the delay and payment of the costs of the contempt. *Benson* v. *Vernon*, 3 Br. P. C. 626.

(b) ——— Defendant an Infant.

1. An infant, though a feme covert, may be compelled to answer. *Moore* v. *Greenvile*, Toth. 95.

2. A copyholder in fee by will charges his lands with payment of his debts, the lands being in England, the heir an infant in Scotland: the creditors bring their bill to have their debts paid out of the copyhold premises; the heir appears, and there is an attachment for want of an answer; but the heir being an infant, the body must be brought up to answer, which in this case could not be. The court ordered the infant to answer by a certain time, or shew cause why a receiver should not be appointed. *Leg* v. *Turnbull*, 2 P. W. 409.

3. Lord Hardwicke, Ch. doubted whether an infant could, before he came of age, put in a new answer, so as to hear the cause over again; for if there should be a decree against him on the second hearing, he may, with as much reason, put in a third answer, which would occasion infinite vexation. *Bennet* v. *Lee*, Dec. 1742. 2 Atk. 487.

And see also Div. XXI, *(post).*

4. An infant was ordered to put in his answer to a supplemental bill by guardian, and without oath. In the assignment of the guardian and the answer, his christian name was spelt *Seagrave*, instead of *Segrave*. On motion, the six clerk was ordered to file the answer, notwithstanding the variance in the name. *Faircloth* v. *Webb*, 5 Mad. 73.

(And see Tit. Infant VIII. *(b) ante.)*

(c) ——— Defendant Feme Covert.

1. A wife to answer without her husband, he being beyond sea. *Portman* v. *Popham*, Toth. 13.
Bell v. *Hyde*, Pre. C. 328.

2. And where a feme covert defendant lived apart from her husband, and the court thought the husband not chargeable for the matter in question: she was ordered to answer separately. *Plomer* v. *Plomer*, 1 C. R. 68.

3 And where a feme covert, her husband being out of the jurisdiction, appeared and obtained an order to answer separately, she was held bound to answer.
Dubois v. *Hole*, 2 Vern. 613.
Travers v. *Bulkeley*, 1 Ves. 384.
1 Dick, 138.

4. A husband bringing a bill against his wife, is admitting her to be a feme sole, and she must put in her answer as such, and no order is necessary. *Ex parte Strangeways*, 3 Atk. 478.

5. And where no answer had been put in on behalf of a married woman, so made defendant, instead of issuing an attachment, an order was made that she should put in her answer. *Ainslie* v. *Medlicott*, 13 Ves. 266.

6. In a similar case, upon a motion for commitment of a feme covert defendant, for not answering interrogatories, an order was made for her to put in her answer. *Brooks* v. *Brooks*, Pre. Ch. 24.

7. Where the husband will answer to the prejudice of the wife, a court of equity, upon motion, will give leave for her to answer separately. *Anon.* 2 Eq. Ca. Ab. 66.

8. Baron and feme, defendants to a bill, the feme must answer, although the answer cannot be read against the husband, and it may be doubtful whether it can be

read against her if she survive. *Wrottesley* v. *Bendish*, 3 P. W. 238.

9. But the feme is not bound to answer the bill subjecting her to a forfeiture, though the husband had submitted to answer. *Ibid.*

10. A wife, whose conscience is hurt by the answer drawn up by the husband, will be allowed to answer distinct from him. *Ex parte Halsam*, 2 Atk. 50.

11. Where a husband by menaces, prevails on his wife to put in an answer, he may be punished for a contempt *Ibid.*

12. Motion by plaintiff for a separate answer by a feme covert, upon the ground that her husband was a prisoner in the King's Bench, refused. *Anon*, 2 Ves. J. 332.

13. Where the wife lived in adultery with the plaintiff, the husband was allowed to answer separately from her. *Chambers* v. *Bull*, 1 Anst. 269.

See also Tit. BARON & FEME VII. *p.* 125.

(*d*) ———*Defendant a Foreigner.*

1. A foreigner unacquainted with English, may obtain an order to answer in his native language. 2 Turn. Prac. 314.

2. Where a foreigner puts in an answer in his own language, a sworn translation must be filed with it. *Simmonds* v. *Countess du Barre*, 3 Br. C. C. 263.

(*e*) *Orders for Time.*

1. A defendant is entitled, as of course, to three orders for time to answer. Prac. Reg. 15.

2. By general order, 23d Jan. 1794, the defendant, upon obtaining a third order for time to answer, must enter an appearance with the register, consenting that a serjeant at arms shall go against him, as upon a commission of rebellion returned *non est inventus*, in case of a non-compliance with the order: and on the second application for time to answer an amended bill, or after exceptions allowed, defendant must consent to the same terms; but this order not to exclude an application to the court, under special circumstances. 4 Br.C.C. 544.

3. Where a peer is defendant, in the cases specified in the general order, upon application for time to answer, the defendant shall enter his appearance: and undertake, that if the answer is not put in, a sequestration absolute shall go.

Gregor v. *Lord Arundel.* }
Plowden v. *Lord Arundel,* } 8 Ves. 87.

4. The defendant, after the three usual orders for time to answer, put in an insufficient answer; and, having submitted to answer exceptions, obtained an order for six weeks' time, to put in a further answer: the court would not discharge the order for irregularity, but thought it should be peremptory. *Hinckley* v. *Tomkinson*, 1 Cox, 177.

5. Defendant submitting to exceptions is not entitled to further time under the general order, 23d Jan. 1794, having previously had three orders for time, and consented to a serjeant at arms, as required by that order. *Portier* v. *De la Cour*, 8 Ves. 601.

6. Defendant pleaded and plaintiff amended his bill, paying costs. Such amended bill is not within the general order, 23d Jan. 1794, and the defendant therefore is entitled to the same orders for time to answer as upon an original bill. *Spencer* v. *Bryan*, 9 Ves. 231.

7. A defendant, after exceptions allowed, and not having previously come under terms, is entitled, of course, to one order for time; the general order of 23d January 1794, not attaching before the second application for time to answer an amended bill, or after exceptions allowed. *Wells* v. *Powell*, 17 Ves. 113.

8. Where the court refused to vacate the enrolment of a decree by default, dismissing the bill with costs, and a new bill was filed for that purpose, the court granted a motion for time to answer till a month after payment of the costs of the first cause, adopting the practice at law. *Pickett* v. *Loggon*, 5 Ves. 702.

And see Princess of Wales v. *The Earl of Liverpool*, 1 Wil. 113. 1 Swan. 114.

9. After two answers reported insufficient, the defendant is not entitled to six weeks' time to answer, and an order, obtained for that purpose, was discharged with costs. *Gregor* v. *Lord Arundel*, 6 Ves. 144.

10. Where more than the usual time for answering is necessary, the proper course is to apply by affidavit, and not to put in a short evasive answer for the purpose of gaining time. *Tomkin* v. *Lethbridge*, 9 Ves. 179.

11. Order for time to plead, answer, or demur, must be on condition of not demurring alone; and the mere denial of combination is not an answer within that condition. *Taylor* v. *Milan*, 10 Ves. 444.

12. The Court condemned the practice of allowing as much time of course after an insufficient answer as on the original answer. *Anon.* 2 Ves. J. 270.

13. At the Rolls, after insufficient answer, an order for time is obtained on petition, and defendant never gets as much as for the original answer. *Ibid.*

14. In the case of an original bill, and bill of revivor, whether the original defendant, having had orders for time to answer the original bill, can begin again with the usual course of orders for time to answer in the revived cause—*Quære.* *Fallowes* v. *Williamson*, 11 Ves. 306.

15. Where there were considerable amendments to the bill, and the defendants were assignees of a bankrupt who was out of the kingdom, the court granted a special order for time to answer, although the usual orders for time had not been obtained. *Norris* v. *Kennedy*, 12 Ves. 66.

16. Illness is an exception to the general rule, that an application for time to answer on special grounds must be made in the first instance before the usual orders are obtained. ——— v. *Riddle*, 19 Ves. 112.

17. Order for time to answer cannot be corrected by extending it to the usual order for time to plead, answer, or demur, not demurring alone. *Philips* v. *Gibbons*, 1 V. & B. 184.

18. In a case of doubtful practice, further time to answer was allowed, on terms. *Boehm* v. *De Tastet*, 1 V. & B. 324.

19. A defendant, who instituted the suit as the plaintiff's solicitor, after several years not having put in an answer, was ordered to answer within a week. *Mootham* v. *Hale*, 3 V. & B. 92.

20. The plaintiff, by an amended bill, required the defendant to answer as to certain facts, upon the inspection of papers stated to be left by the plaintiff in the hands of his clerk in court; the defendant, having obtained one order for time, was allowed, on affidavit that the papers were not left for inspection till some time after that order was obtained, so much time in addition, and that without prejudice to the usual order on a second application, after that additional time was expired. *Farnsworth* v. *Yeomans*, 2 Mer. 142.

21. After demurrer overruled, the order for a month's time to plead or answer, is of course. *Griffiths* v. *Wood*, 1 V. & B. 541.

22. But in a subsequent case it was held, that, after a demurrer overruled, time to answer can be obtained only on a special application. *Jones* v. *Saxby*, 1 Swan. 194. (*n*).

23. A motion for time to put in an answer, made on the same day an attachment is sealed, is irregular; the attachment being considered as sealed, the first moment of the day on which it issues. *Stephens* v. *Neale*, 1 Mad. 550.

24. Where a defendant obtains an order for a month's time, after cross bill answered, to answer original bill; after the cross bill is answered, he is not entitled, as of course, to any further order for time. *Noel* v. *King*, 3 Mad. 183.

25. A subpœna being served on the defendant, by leaving it at a house in London, though he resided in the country, after an attachment issued for want of an appearance, he appeared: held, that it must be considered as a town cause; and an order, obtained for six weeks' time to answer, was discharged, with costs, as being irregular. *Bound* v. *Wells*, 3 Mad. 434.

26. The time allowed to put in an answer to an amended bill is eight days, but a defendant may within that period apply for further time. *Church* v. *Legeyt*, 2 Price, 45.

27. But where the amendment is merely by adding a defendant, the original defendant is not entitled to answer the amendment, and therefore cannot have any order for time. *Gill* v. *Mathews*, 3 Anstr. 879.

28. After exceptions are allowed, the defendant has eight days to answer, and may then have an order for three weeks to commence from the expiration of the eight days. *Cowan* v. *Phillips*, 3 Anstr. 937.

(*f*) *Signature of Counsel.*

1. The signature of counsel is necessary to an answer, although there is no order of the court requiring it. The antient and uniform practice of the court being binding, as the law of the court, without positive order. The old practice on country commissions was equivalent to signature of counsel. *Brown* v. *Bruce*, 2 Mer. 1.

And see Wall v. *Stubbs*, 2 V. & B. 358.

2. Signature of counsel to answer not appearing on the record, the defendant must apply for leave to amend. *Harrison* v. *Delmont*, 1 Price, 108.

(g) Oath and Signature of Defendant.

1. Members of a corporation, charged as private persons, answered upon oath. *Warr* v. *The Company of Felt-Makers,* Toth. 7.

2. A Bishop to answer upon oath. *Mayor of Sarum* v. *Epis. Sarum,* Toth. 12.

3. The Mayor, or other individual member of a corporation, trustee of a rent charge out of the estate of such member for a charitable use, must answer, not only with the rest under their common seal, but also individually, a charge of having destroyed or cancelled the deed. *Dummer* v. *Chippenham Corp.* 14 Ves. 254.

And see Anon. 1 Vern. 117.

4. Answer and plea, returned as an answer only, rejected, the plea not being upon oath, but without costs, because the commissioner's fault, and not the defendant's. *Jefferson* v. *Dawson,* 2 C. C. 208.

5. A quaker was allowed to put in his answer without oath or affirmation, where the bill appeared frivolous, and the defendant had been committed. *Wood* v. *Story,* 1 P. W. 781.

6. Where an answer was put in on affirmation, the court refused to take it off the file, upon the ground of the party, whose answer it was, not being a quaker, as by the answer he undertakes that he is a quaker, at the hazard of an indictment for perjury. *Marsh* v. *Robinson,* 2 Anstr. 479.

7. A jew was ordered to be sworn to his answer upon the Pentateuch, and the Plaintiff's clerk to be present. *Anon,* 1 Vern. 263.

8. Where A. being beyond sea, sues B. at law, and B. brings a bill against A., the court will not allow the attorney of A. to answer for him without oath. *Anon,* 1 P. W. 523.

9. The court refused to order an answer prepared for five defendants, to be sworn to as the answer of three of them only. *Harris* v. *James,* 3 Br. C. C. 399.

And see also *Cooke* v. *Westal,* 1 Mad. 265.

Cope v. *Parry,* 1 Mad. 83.

10. A joint and several answer, including in the title persons who declined joining in it, was on motion ordered to be received as the answer of those who swore it, without striking out the names of those who declined. *Done* v. *Read,* 2 V. & B. 310.

11. Under special circumstances, and by consent, the six clerk was directed to receive the answer to a bill of foreclosure, though not signed by the defendant. ——— v. *Lake,* 6 Ves. 171.

12. Ordered, that the six clerk may receive the answer without signature, the defendant having gone abroad, and forgotten to sign it: the motion was consented to. ——— v. *Guillim,* 6 Ves. 285.

13. Order to take the answer of two defendants out of the jurisdiction, without oath and signature, upon affidavit of their father, that he had authority to act for them. *Harding* v. *Harding,* 12 Ves. 159.

14. Answer of a defendant abroad (not required to be on oath) ordered to be put in by a person having a general power of attorney to defend suits, &c. without signature. *Bayley* v. *De Walkiers,* 10 Ves. 441.

15. Motion by the plaintiff, that the answer of defendant, a mere trustee, without interest, in a state of incapacity, should be taken without oath or signature, refused, as it would not, in fact, be the answer of such defendant. The proper course is to have a guardian appointed. *Wilson* v. *Grace,* 14 Ves. 172.

16. Order, on plaintiff's motion, that defendant shall be at liberty to put in his answer without oath or signature, is of course, if defendant is in this country, but if abroad his consent is required. *Codner* v *Hersey,* 18 Ves. 468.

17. If a defendant have only signed one (the first) skin of his answer, which is an irregularity, the court will not order it to be taken off the file, but will permit the defendant to sign the others. And if he reside in the country, they will give him an opportunity of coming to town for that purpose. *Clarke* v. *Mansfield,* 3 Price, 605.

18 Where an answer is amended, though but in the title, it must be resworn, or if put in by a peer, it must be again attested upon his honor. *Peacock* v. *The Duke of Bedford,* 1 V. & B. 186.

(*See also as to the Answer of a Peer,* Div. LX., *post.*)

(h) Where and in what manner taken by Commission.

1. A defendant may have a commission to take his answer without motion or

order; but a commission to take his plea, answer, or demurrer, is a special commission, and can only be obtained on motion, and is never granted after a contempt. *Broughton* v. *Jones*,
3 Mad. 42.

2. After the defendant is in custody upon an attachment for want of an answer, he may obtain a commission to take his answer, on motion, and without consent. *Mainwaring* v. *Wilding*,
3 Mad. 41.

3. *Executio istius brevis, &c.* omitted in the return of a commission to take an answer, supplied by other words in the return. *Penn* v. *Chetle*, 1 Vern. 41.

4. The Court directed a commission to the East Indies, to take the answer of the defendant to the cross bill, who was of the Gentoo religion, and empowered two or three of the commissioners to administer such oath, in the most solemn manner, as in their discretion should seem meet: and if they administered any other oath than the christian, to certify to the Court what was done by them. *Ramkissenseat* v. *Barker*, 1 Atk. 19.

5. By general order 27th April, 1748, all answers or pleas taken by commission, must be signed by the parties swearing them, in the presence of the commissioners. 2 Atk. 289.

6. Commission to take an answer of a person residing in an enemy's country, must be executed in that country.
—— v. *Romney*. Ambl. 62.

7. Where a commission is executed abroad, the sending it out and the receiving it back again, must be proved by affidavit. *Bourdillon* v. *Alleyne*,
4 Br. C. C. 100.

8. An answer taken by commission abroad, was ordered to be filed without the usual oath of the messenger, under the circumstances, it having been opened by the defendant's solicitor by accident, and afterwards read in the presence of the plaintiff by agreement, with a view of having it filed by consent, and the answer being identified, and its being opened accounted for by the affidavits of the messenger, &c. and the further irregularity being cured by the consent. *Cox* v. *Newman*, 2 V. & B. 168.

9. Where a commission issues to take the answer of a foreigner, a power to take it through an interpreter, when necessary, is virtually implied. *Loughman* v. *Nicolls*,
6 Price, 108.

10. If the commissioners certify that the defendant was duly sworn to such answers in presence of the commissioners, and it appears by the affidavit of a commissioner, that the interpreter was duly sworn, and that he believes the defendant understood the contents of the answer, it is sufficiently verified. *Ibid.*

(i) *Amendment of.*

1. The court permitted a defendant to amend her answer before replication, upon affidavit that the matter mistaken was added in the margin of the draft, after she had perused it. *Chute* v. *Lady Dacres*,
1 C. C. 29. 2 Freem. 173.

2. Defendant by answer consented that an award made by her father might be confirmed; an application to amend her answer, upon affidavit, that she had never read the award and that her answer was prepared by her father, who had wronged her in the award, was refused. *Harcourt* v. *Sherrard*, 2 Vern. 434.

3. Answer not permitted to be amended by striking out the admission of a fact, but otherwise of a matter of law. *Pearce* v. *Grove*, Amb. 65. 3 Atk. 522.

4. Where the executor, in his answer to a bill by the next of kin, waved the benefit of the surplus by mistake of the law in that point, the court refused leave to amend his answer, though he proved the testator intended he should have the surplus. *Rawlins* v. *Powel*,
1 P. W. 298.

5. Liberty given to take an answer off the file, and to put in a new answer, upon a discovery, that the defendant at the time was ignorant of his interest. *Alpha* v. *Payman*, 1 Dick, 33.

6. Where the defendant, upon the advice of her counsel and solicitor, admitted assets, upon an idea that the account when taken would be found in her favor, and the Master reported her indebted in a sum twice as much as her whole property, the court, upon the affidavits of herself, her counsel, and solicitor, allowed her to amend, by qualifying the admission of assets in her answer. *Dagly* v. *Crump*,
1 Dick, 35.

7. Where an executor in his answer admits assets sufficient to pay debts and legacies, it shall bind him even in a suit subsequently instituted. *Roberts* v. *Roberts*, 2 Dick, 573.

And see *Forster* v. *Forster*,
2 Br. C. C. 619.

8. There are no certain rules about amendments of answers, for the amendments are in the discretion of the court. *Woodgate* v. *Fuller*, Barn. 50.

9. An answer may be amended, even after a prosecution for perjury commenced against the defendant for what he has sworn in his answer, where it plainly appears to be a mere mistake. *Ibid.*

And see Vaux v. *Lord Waltham*, 1 Br. C. C. 419 (*n*).

10 After hearing and decree, an answer was allowed to be amended, on affidavit of the solicitor and his clerk that the mistake was in engrossing the answer from the draft, and the draft produced. *Countess of Gainsborough* v. *Gifford*, 2 P. W. 424.

11. The defendant in her answer referred to marriage articles executed in Spain, and so subjected herself to an order for their production. The custom of Spain is to deposit articles and deeds in places appointed for that purpose; leave was given to amend the answer by stating such custom, and that the articles referred to were so deposited. *Wharton* v. *Wharton*, 2 Atk. 294.

12. Where a defendant has mistaken a fact or a date, the court will give him leave to amend his answer *Ibid.*

13. Answer was allowed to be amended, by inserting and adding facts. *Bedford* v. *Wharton*, 1 Dick. 84

14. Defendant after putting in an answer discovers a new title; the court refused to allow the defendant to put in a new answer, but ordered the answer to be taken off the file, and the new matter added. *Patterson* v. *Slaughter*, Amb. 292. 1 Dick. 285.

But see Alpha v. *Payman*, 1 Dick. 33.

15. Liberty was given to the defendant to amend his answer, by striking out the admission of the plaintiff's pedigree, after publication *Kingscote* v. *Bainsly*, 2 Dick. 485.

And see Woodgate v. *Fuller*, Barn. 50.

16. The court refused to allow a schedule to be amended, where an indictment for perjury had been threatened, although it was clear the party did not intend to perjure himself, he having no interest in so doing. *Earl Verney* v. *Macnamara*, 1 Br. C. C. 419.

Vaux v. *Lord Waltham*, *Ibid.* (*n*).

And see Rowley v. *Ridley*, 2 Dick, 677. 1 Cox, 281.

17. In case of a mistake in an answer, it was not allowed to be taken off the file; but the defendant was permitted to file an additional answer, giving the explanation. *Jennings* v. *Merton College*, 8 Ves. 79.

18. Answer not taken off the file upon mistake, but a supplemental answer permitted. *Dolder* v. *The Bank of England*, 10 Ves. 284.

19. The practice formerly of permitting amendment of an answer in case of a mistake is altered: now, a supplemental answer must be put in. The affidavit in support of the motion must state, that the defendant, when he put in his answer, did not know the circumstances upon which he applies, or any other circumstances upon which he ought to have stated the fact otherwise. *Wells* v. *Wood*, 10 Ves. 401.

20. Leave to amend an answer is generally refused, the course being to permit an additional answer to be filed. *Edwards* v. *M'Leay*, 2 V. & B. 256.

21. There are many instances of permitting answers to be taken off the file and resworn, where there was a mere mistake in the name. *Griffiths* v. *Wood*, 11 Ves. 63.

22. An amendment allowed in the title of an answer, from being "the farther answer to the original amended bill," to "the farther answer to the original bill, &c. and the answer to the amended bill, &c." but the answer so amended must, in the case of a peer, be again attested upon honor; and in the case of a common defendant, it must be resworn. *Peacock* v *The Duke of Bedford*, 1 V. & B. 186.

23 Motion by defendant to take answer, defective in the title, off the file, and to amend and reswear it, undertaking to reswear the same answer, allowed, on payment of costs. *White* v. *Godbold*, 1 Mad. 269.

24. The court refused a motion to amend an answer to a suit for tithes, after replication, by stating a modus, upon affidavit that defendant had not inserted it in his answer, because he could not at that time state it with sufficient precision. *Tennant* v. *Wilsmore*, 2 Anst. 362.

But see Maggridge v. *Hodgson*, 2 Anst. 443.

25. The court never permits an answer to be amended by striking out a passage in it: the practice now is to file a supple-

mental answer. *Harris* v. *Daubeny*, 3 Anst. 717.

26. A defendant will not be allowed to take his answer off the file, for the purpose of correcting a mistake; the course is to file a supplemental answer. *Ridley* v. *Obee*, Wigh. 32.
Taylor v. *Obee*, 3 Price, 83.

(*k*) *Further or Supplemental.*

1. If a plea or demurrer be overruled, the defendant must answer the whole bill, and the ordinary process of contempt issues to compel an answer, as in other cases; but if an answer was filed with the plea or demurrer, the defendant, upon his plea or demurrer being overruled, need not put in another answer, till the plaintiff has taken exceptions. *Cotes* v. *Turner*, Bunb. 123.

2. A plea and three insufficient answers, whether the defendant is to be examined on interrogatories—*Quære*. *Clotworthy* v. *Mellish*, 1 C. C. 279.

3. If an answer be reported insufficient, and the plaintiff obtain an order to amend, and that the defendant may answer the amendments and exceptions at the same time; unless he serve the order before the defendant answers, the defendant may answer the exceptions only. *Bethuen* v. *Bateman*, 1 Dick. 296.

4. A defendant may put in a better answer the moment exceptions are taken, or at any time before an order to "amend and that the defendant should answer the amendments and exceptions together" is obtained. *Knox* v. *Symmonds*, 1 Ves. J. 88.

5. And where the exceptions were answered after the motion, but before the order was drawn up, it was held regular.
Bethuen v. *Bateman* 1 Dick. 296.
Partridge v. *Haycroft*, 11 Ves. 579.

6. In the Exchequer, a defendant must give notice that he submits to the exceptions, before he can file his amended answer. *Anon*, 1 Anst. 86.
And see Edwards v. *Johnson*, 1 Price, 203.

7. The original bill brought for discovery only, the amended bill prays relief: the answer to this is to be considered as a part of the answer to the original bill, as much as if engrossed in the same parchment and a part of the same record. *Hildyard* v, *Cressy*, 3 Atk. 303.

8. The Court, on a special application, will permit an answer to be filed to an amended bill, even after the plaintiff has replied, and called on the defendant to join in commission, on an undertaking by the defendant to do both immediately. *Church* v. *Legeyt*, 2 Price, 45.

9. Where the bill is amended after answer, by adding a defendant, the original defendant cannot answer the amended bill. *Gill* v. *Mathews*, 3 Anst. 879.

10. The Court will permit a supplemental answer after replication, upon discovery of new matter in an account.
Maggridge v. *Hodgson*, 2 Anst. 443.

(*l*) *Sufficiency of.*

(*See also Tit.* Pleading I. *a*. p. 335.)

1. When the first answer is reported insufficient, the defendant, if he answer again without excepting, is to answer all the points excepted, though the same exceed the bill. *Crispe* v. *Neville*, 1 C. C. 60.

2. S. gave a bond to pay £800 a-year to H. during S.'s enjoying the office of ———, or whilst any body held it in trust for him; H. puts the bond in suit. S. brings a bill for injunction, and a cross bill is brought by H. to discover whether F. held the office in trust for S.; S. insisted in his answer he was not obliged to discover what would subject him to the incapacities of the several acts to vacate a seat in parliament on a member's accepting a place: he is not obliged to make the discovery, and he did right in answering, for he could not have demurred to this matter, because then he would have admitted the facts to be true. *Honeywood* v. *Selwin*, 3 Atk. 276.

3. A defendant is not bound to answer what tends to accuse him of maintenance, or of buying pretended rights within the statute of 32 H. 8. *Sharpe* v. *Carter*, 3 P. W. 375.

4. No person compelled to answer what has any tendency to criminate him. *Ex parte Symes*, 11 Ves. 525.

5. Where there is a dispute as to boundaries or unity of possession, a defendant must set forth how he is entitled. *Champenoon* v. *Borough of Totness*, 2 Atk. 112.

6. Defendant is not compellable to discover any thing which is wholly immaterial to the relief prayed. *Agar* v. *The Regent's Canal Company*, Coop. 212.

7. Where sums are specifically charged

in the bill to have been received by the defendant, he must answer specifically to them; and it is not sufficient to refer to a schedule of all sums received. *Hepburn* v. *Durand*, 1 Br. C. C. 503.

8. Defendant stating by answer a purchase for valuable consideration, without notice, shall not be compelled to answer further. *Jerrard* v. *Saunders*, 2 Ves. J. 454.

9. Where a discovery is sought of a correspondence, if the defendant set forth extracts of letters, and swear that those are the only parts of the correspondence upon the subject, it is sufficient. *Campbell* v. *French*, 1 Anst. 58.

And see Moodalay v. *Morton*, 1 Br. C. C. 471.

10. It is no answer on exceptions, that the defendant is a mere witness, and ought not to have been made a party: for, having submitted to answer, he must answer fully. *Cookson* v. *Ellison*, 2 Br. C. C. 252.

11. Though a defendant might have objected to answer, yet, if he answers at all, he must answer fully. *Taylor* v. *Milner*, 11 Ves. 41.

See also later cases establishing this point, Tit. PLEADING, *p.* 336, *ante.*

12. A demurrer, together with a mere denial of combination by answer, does not satisfy the undertaking not to demur alone. *Lee* v. *Pascoe*, 1 Br. C. C. 78.
Stephenson v. *Gardner*, 2 P. W. 286.
Lansdown v. *Elderton*, 8 Ves. 526.
Taylor v. *Milner*, 10 Ves. 447.

13. But an answer, though very insufficient, is a satisfaction of the condition in the order not to demur alone. *Tomkin* v. *Lethbridge*, 9 Ves. 179.
Baker v. *Mellish*, 11 Ves. 73.

(*m*) *Where binding, and against whom read.*

(*And see* (*i*) p. 376.)

1. The defendant by answer accuses himself and his co-defendant, and is believed against himself, but not against his fellow. *Michell* v. *Webb*, Toth. 10.

2. A co-defendant's admission, to the advantage of the plaintiff, will not make his case better. *Lockwood* v. *Ewer*, 2 Atk. 303.

3. No defendant by his answer can affect the rights of other parties. *Southcot* v. *Watson*, 3 Atk. 232.

4. The answer of one defendant is not evidence against another. As to the answer of a mere trustee, against whom the plaintiff does not desire a personal decree— *Quære.* *Morse* v. *Royal*, 12 Ves. 355.

5. Where a defendant by his answer alleged that he was in years, and could not remember the subject matter of the bill, but that another defendant as his attorney, transacted the matter charged; the Court thought, this referring to the co-defendant's answer was sufficient to allow of its being read against the first defendant. *Anon*, 1 P. W. 300.

6. Where a defendant disclaims all right, you cannot read his evidence as a proof of your own right, to the prejudice of another defendant. *Hill* v. *Adams*, 2 Atk. 39.

7. The answer of a superannuated person put in by guardian, shall be read against him as an answer of one of full age; *secus* of an infant who is to have a day to shew cause. *Sir Richard Leving* v. *Lady Caverly*, Pre. Ch. 229.

8. An infant's answer cannot be given in evidence against him, because it is not the infant's answer, but the guardian's, and the guardian is sworn and not the infant. *Wrottesley* v. *Bendish*, 3 P. W. 237.

9. An answer, purporting to be the answer of a minor, by his mother and guardian, may be read against the mother in another cause, where she is defendant in her own right. *Beasley* v. *Magrath*, 2 S. & L. 34.

10. A suit against a feme covert as executrix and her husband, and after publication passes the husband dies, the wife shall be bound by her answer; though it might be otherwise in case the wife's inheritance was in question. *Shelberry* v. *Briggs*, 2 Vern. 249.

11. Semble, the separate answer of a *feme covert* may be read against her. *Le Neve* v. *Le Neve*, 3 Atk. 648.

And see Wrottesley v. *Bendish*, 3 P. W. 238.

12. But not against her husband, co-defendant. *Anon*, 2 C. C. 39.
Ward v. *Ward*, 2 C. C. 173.
Wrottesley v. *Bendish*, 3 P. W. 238.

13. Where a witness was examined, and his evidence read at the hearing; and, during an appeal from the decree, in answer to a bill exhibited against him, he had discovered his interest; the answer was allowed to be read upon the appeal. *Needham* v. *Smith*, 2 Vern. 463.

14. Defendant insisting upon the statute of frauds, admissions by the answer are immaterial. *Blagden* v. *Bradbear*, 12 Ves. 466.

15. An admission of assets by an executor, is waved by the plaintiffs going into an account of assets. *Wall* v. *Bushby*, 1 Br. C. C. 484.

And see p. 376, *ante*

16. Where the answer to a bill for discovery only, is used as evidence, the whole must be read; and where relief is prayed by the bill, and the answer replied to, the plaintiff, reading admissions from the answer, must proceed to the completion of the immediate subject to which the defendant is answering, according to the course of evidence at law; but this does not apply to distinct matter. *Lady Ormond* v. *Hutchinson*, 13 Ves. 47.

17. Where an injunction is obtained in the absence of one of the defendants abroad, on a motion to discharge that order the answer of the other defendant cannot be read. *St. John* v. *Carroll*, [illegible] Anst. [illegible]

(*And see further* p. 108, *ante.*)

(*n*) *Where taken off the File.*

1. The omission of the general traverse at the end of an answer is not irregularity sufficient to have it taken off the file. *Anon.*, [illegible] P. W. [illegible]

2. Regularly the answer of *feme covert*, co-defendant with her husband, [illegible] separate, ought to have an order [illegible] rant it, but if the *feme covert's* [illegible] answer be put in without such order, and the same be a fair and honest answer, and deliberately put in with the consent of the husband, and the plaintiff accepts of it, and replies to it, the Court will not at the motion of the wife or her executors set it aside. *Duke of Chandos* v. *Tallet*, 2 P. W. 371.

3. The Attorney General may have liberty to withdraw his general answer, and put in another, insisting on the particular right of the crown. *Ilmington* v. *The Attorney General*, Lun. 305.

4. An answer respecting the bartering for boroughs taken off the file. *Warburton* v. *Hankey*, 1 Dick. 221.

5. Where the Counsel's name to an answer has been forged, the Court will not take the answer off the file, if an innocent plaintiff is likely to suffer by it. *Bull* v. *Griffith*, 2 Anst. 303.

6. Where an answer is actually filed by a defendant in contempt, without payment or tender of costs of the contempt, it may be taken off the file for irregularity, but where the plaintiff had taken an office copy of the answer, he was held to be precluded from treating it as a nullity, and the Court refused to make the order. *Sedgier* v. *Tyte*, 11 Ves. 202.

7. The Court will sometimes permit an answer to be taken off the file and resworn, where there is a mere mistake in the name, but where in the title of the answer, the plaintiff was misnamed, and the defendant wished to take advantage of the mistake to correct the statement of a fact in it, the Court held that he was not bound by the answer so put in, and on the motion of the defendant, it was taken off the file by the description of a paper writing purporting to be an answer. *Griffith* v. *Wood*, 11 Ves. 62.

8. Wherever it can be shewn that the answer is a mere delusion, it shall be understood to be the practice to take it off the file. *Tomkins* v. *Lethbridge*, 9 Ves. 178.

9. An answer merely evasive, is to be considered as no answer, and taken off the file. *Smith* v. *Serle*, 14 Ves. 415.

10. A motion cannot be made to take an answer off the file, because it is delusive, as answering only a few facts stated in the bill; exceptions must be taken. *Marsh* v. *Hunter*, 3 Mad. 437.

11. Admission of a single fact, besides the denial of combination, is a compliance with the terms not to demur alone. *Baker* v. *Mellish*, 11 Ves. 73.

and see Tomkins v. *Lethbridge*, 9 Ves. 178.

12. Where a defendant, having had an order for [illegible] month's time to plead, answer, or demur, not demurring alone, and a subsequent, peremptory order for three weeks further time to answer, files a demurrer and answer, it will, on motion of the plaintiff, be taken off the file. *Mann* v. *King*, 18 Ves. 297.

13. Where a defendant, attached for want of an answer, after orders for time to plead, answer, or demur, not demurring alone, put in a demurrer and answer, they were ordered to be taken off the file. *Curzon* v. *De la Zouch*, 1 Wil. 468. 1 Swan. 185.

14. An answer, purporting to be an answer to the bill of five complainants only, where there were six, was ordered to be taken off the file, though a year had elapsed before the objection was taken. *Cope* v. *Parry*, 1 Mad. 83.

15. Answer taken off the file, where the words "to the bill of complaint of" were omitted in the title. *Peters* v. *Thompson*, Coop. 249.

16. An answer, stated to be the joint

and several answers of two, but sworn only by one, ordered to be taken off the file, with costs. *Cooke* v. *Westall*; 1 Mad. 265.

But see Done v. *Read*, 2 V. & B. 310.

V. Appeal.

(*a*) *From or to what Court it lies.*

1. No appeal lay to the House of Lords in Ireland, from the judgment or decree of any Court in that kingdom. *Vernon* v. *Vernon*, 1 Br. P. C. 440.
Governor of Ulster v. *Bishop of Derry*, Show. P. C. 78.
Annesley v. *Sherlock*, 8 Br. P. C. 319.

2. Notwithstanding the King's grant of the Isle of *Man*, an appeal lies from a decree there to the King in Council; for the subject cannot be deprived of his right to appeal by the King's grant, although it may contain words expressly to that effect. *Christian* v. *Corren*, 1 P. W. 330

3. The Court of Great Sessions in Wales, is an independent tribunal, from which no appeal lies to the high Court of Chancery. *Per Lord Kenyon.*
Galbraith v. *Neville*, Doug. 5. (*n*).

4. No appeal lies to the high Court of Chancery, from a decree in a County Palatine. *Portington* v. *Tarbock*, 1 Vern. 178, 184.
Jennet v. *Bishopp*, 1 Vern. 181.
But see Addison v. *Hindmarsh*, 1 Vern. 443.

5. From the Court of Equity, at Lancaster, an appeal lies, by act of parliament, to the duchy court. *Addison* v. *Hindmarsh*, 1 Vern. 443.

6. No appeal lies to the House of Lords, from a sentence by the delegates, nor from a decree upon the statute of charitable uses. *Saul* v. *Wilson*, 2 Vern. 118.
See contra as to a decree of charitable uses, 3 Bl. Com. 428.
Warren v. *North*, Show. P. C. 110.

7. No appeal lies to the House of Lords against an order, awarding a commission of idiocy, or lunacy, by the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal; nor against any proceedings, touching the awarding or refusing of such commission. *Rochfort* v. *The Earl of Ely*, 1 Br. P. C. 450.

8. An appeal lies from ecclesiastical censure in Scotland, to the House of Lords. *Greenshield* v. *Magistrates of Edinburgh*, 8 Br. P. C. 349.

9. An appeal lies from a decree made in the plantations, to the King in council only. *Fryer* v. *Barnard*, 2 P. W. 262.

(*b*) *In what cases it lies, or does not lie.*

1. Upon an appeal from a sentence of the admiralty of the Cinque Ports, the Lord-Warden granted a commission of delegates: and upon a demurrer to a bill, for that the plaintiff did not set forth that the Lord-Warden had authority to grant such commission; the court made no order as to that matter, but could not relieve the plaintiff, because the appeal was not made till fifteen days after the sentence. *Denew* v. *Stock*, Rep. temp. Finch, 437.

2. By an order of the House of Lords, the 24th of March, 1725, the time for receiving appeals is limited to five years from the signing and enrolling of the decree; and therefore, upon an appeal brought from two decrees, of the 15th July 1728, and the 5th February 1731, which were enrolled in March 1764, the House declared, that the appeal ought not to have been received, and accordingly it was dismissed. In making this order, the House is said to have considered the enrolment of any decree pronounced by the Court of Chancery, as being, by legal relation, the act of the same day on which the decree was pronounced. *Smythe* v. *Clay*, 1 Br. P. C. 453.

3. The general order of the Court of Chancery, 1725, limiting the time for appeal to one month, cannot prevail against the practice contrary to it. *Wood* v. *Griffith*, 19 Ves. 550.

4. Such defects in a decree, as the Court will rectify upon motion, are not sufficient grounds for an appeal. *Bunbury* v. *Bolton*, 1 Br. P. C. 434.

5. No appeal lies from an order of a court of equity to shew cause, before such order be made absolute. *Nagle* v. *Foote*, 1 Br. P. C. 439.

6. Where a party to a suit sells and conveys all his right and interest under the decree to another, for a valuable consideration, such sale and conveyance is an absolute bar to an appeal from that decree. *Cusack* v. *Gilbert*, 5 Br. P. C. 465.

7. Matters of account omitted before the master, shall never be brought before the House of Lords, upon alteration of circumstances, or any other pretence; for their determination is the dernier resort

and the only security to a title, so that there can be no rehearing before them. *Countess Radnor* v. *Child*, 8 Br. P. C. 348.

8. It is not a ground of appeal that an account was not directed, which was not prayed by the bill, nor asked for at the hearing below. *Chamley* v. *Lord Dunsany*, 2 S. & L. 690.

9. Generally, there can be no appeal for costs only. *Wirdman* v. *Kent*, 2 Dick. 594. 1 Br. C. C. 140. *Eyre* v. *Parnell*, 8 Br. P. C. 349.

10. But this rule is not to be strictly adhered to, where the appeal for costs affects the merits of the case, and a sound distinction can be made; as where a fair encumbrancer, having a lien for his costs as well as his demand, is decreed his demand only. *Owen* v. *Griffith*, 1 Ves. 249. Amb. 520.

11. And where the costs which ought to have come out of the trust fund, were given by the decree out of the general personal estate, according to the specific prayer of the bill, the decree upon appeal, though affirmed in other respects, was corrected in that particular, being considered as relief specifically prayed, and therefore not within the rule against appealing for costs only. *Jenour* v. *Jenour*, 10 Ves. 562.

For other Exceptions, see also Tit. APPEAL, *p.* 29, *ante, and Pitt* v. *Page*, 1 Br. P. C. 1.

12. It is a known and established rule, that an appeal does not lie against an order made by the consent of parties. *Toder* v. *Sansam*, 1 Br. P. C. 468.

13. An appeal does not lie from a decree by consent; and although the party did not actually give his consent: his remedy in such case is against his Counsel, &c. *Bradish* v. *Gee*, Amb 229. *Downing* v. *Cage*, 1 Eq. Ca. Ab. 165.

14. An appeal is not barred by consent to an order under the decree, but the order ought to be inserted in the petition of appeal. *Wood* v. *Griffith*, 19 Ves. 550.

15. Where a defendant appealed from a decree obtained against him upon default of appearance at the hearing, the House of Lords dismissed the appeal without going into the merits, being in the nature of an original hearing. *Dean* v. *Abel*, 1 Dick. 287. *But see Cunyngham* v. *Cunyngham*, Amb. 91.

16. From a decree at the Rolls, affirmed there on a re-hearing, an appeal lies to the Lord Chancellor. *Parker* v. *Dee*, 2. C. C. 260. *Falkland* v. *Cheney*, 5 Br. P. C. 478. *Brown* v. *Higgs*, 8 Ves. 561.

17. An appeal lies to the Chancellor of the Duchy of Lancaster from a decree of the Vice-chancellor, dismissing the bill, although such decree has been affirmed on a rehearing. *Omerod* v. *Hardman*, 5 Ves. 722.

18. An appeal from the Rolls to the House of Lords will not lie until the decree is signed and enrolled. *Cunyngham* v. *Cunyngham*, Amb. 91. *Morse* v. *Dubois*, 8 Br. P. C. 349.

19. Semble, there is no standing order of the House of Lords that they will not hear an appeal, unless the cause has been argued before the Lord Chancellor. *Brown* v. *Higgs*, 8 Ves. 565.

20. Wherever there is a caveat entered to prevent a decree being enrolled, there ought to be a rehearing before an appeal. *Clerke* v. *Moor*, 8 Br. P. C. 349.

21. Where it was agreed by both parties, that the hearing and determining the demurrer to a bill of review in this cause, would take the whole term; and each side was determined to appeal to the House of Lords, the Lords Commissioners allowed the demurrer, without giving the least scintilla of opinion. *Whittington* v. *The Attorney-General*, 2 Dick. 616.

(*And see further Tit.* APPEAL, p. 29.)

(c) *For whom it lies or does not lie.*

1. Where a bill is filed to set aside a conveyance for fraud, imposition, and want of consideration, and for other relief; and the court dismisses the bill so far as relates to the conveyance, but gives the plaintiff liberty to proceed at law as to the other matters, and in the mean time retains the bill as to those matters; if the plaintiff neglects to proceed at law within a reasonable time, and suffers his bill to be absolutely dismissed for such neglect, he cannot afterwards complain of the decree, by way of appeal. *Rotheram* v. *Browne*, 8 Br. P. C. 297.

2. Persons who were not parties are not entitled to an appeal. *Williams* v. *Lane*, 8 Br. P. C. 349.

3. Under very special circumstances an appeal was allowed from an old decree, by a person who was neither party nor privy to the suit in which the decree was made. *Vernon* v. *Vernon*, 1 Br. P. C. 440.

4. Where the plaintiff, tenant in tail, dies after a decree of dismissal, his issue may appeal. *Osborne* v. *Usher*, 6 Br. P. C. 26.

5. An appeal lies at the suit of a tenant in tail in remainder, against a decree affecting his rights, had against a prior tenant in tail: and such remainder man may file a supplemental bill to make himself party to the former suit, for the purpose of appeal. *Giffard* v. *Hort*, 1 S. & L. 386. 411.

6. Even creditors, not parties to the suit, but who come in under the decree, may appeal, or have the cause reheard. *Ibid*, 1 S. & L. 409.

(*And see further*, p. 30, *ante*.)

(*d*) *Evidence admissible on.*

1. On the hearing of all appeals this principle prevails, that no evidence can be received which was not laid before the court below; nor can any evidence which was received below be objected to above, unless the admission of improper evidence be among the points of appeal. *Eden* v. *Earl of Bute*, 1 Br. P. C. 465. *Baesh* v. *Moore*, 3 Br. P. C. 546.

2. Upon a bill of appeal from an inferior court of equity to the high Court of Chancery, you need not assign particular errors, as you must do upon a bill of review; but you cannot examine *de novo* upon either of those bills; though in the Spiritual Court they examine over and over again upon new allegations. *Addison* v. *Hindmarsh*, 1 Vern. 442.

3. On appeal from the Rolls to the Lord Chancellor the cause is open, and the party is at liberty to read new proof, and offer what he can against the decree. *Needham* v. *Smith*, 2 Vern. 463 *Wright* v. *Pilling*, Pre. Ch. 496. Gilb. Eq. Rep. 151.

4. New evidence may be read upon an appeal from the Rolls, it being in truth but a rehearing. *Buckmaster* v. *Warrop*, 13 Ves. 456.

5. On an appeal from the Rolls, the appellant may be let into new evidence which was not read there, provided he will give up his deposit. *Hedges* v. *Cardonnel*, 1 Atk. 408.

6. Upon an appeal from the Rolls to the Chancellor, or from the Chancellor to the House of Lords, no new matter, not in issue in the cause below, can be insisted on. *Thompson* v. *Walter*, Pre. Ch. 295.

7. No point ought to be insisted on upon appeal, that was not mentioned below. *Chamley* v. *Lord Dunsany*, 2 S. & L. 690.

8. And where the petition of appeal introduced a variety of representation not made in the court below, it was ordered to be taken off the file with costs. *Wood* v. *Griffith*, 19 Ves. 550.

(*e*) *Staying Proceedings during.*

1. The Parliament being prorogued, you may proceed in the account in this court, notwithstanding the appeal. *Popham* v. *Bampfield*, 1 Vern. 344.

2. An appeal to the House of Lords does not stay proceedings in the court below. *Warden and Minor Canons of St. Paul's* v. *Morris*, 9 Ves. 316.

3. General rule, that an appeal does not stay proceedings without a special ground. *Gwynn* v. *Lethbridge*, 14 Ves. 585.

4. Few cases of staying proceedings under a decree pending an appeal, unless upon irreparable mischief. *Wood* v. *Griffiths*, 19 Ves. 550.

(*See further Tit.* Appeal, p. 30, *ante*.)

(*f*) *Withdrawing.*

1. Order on motion and consent that a petition of appeal from the Rolls might be withdrawn. *Thomson* v. *Thomson*, 10 Ves. 30.

VI. Appearance.

(*See also* Stat. 5 Geo. 2, c. 25.)

1. An appearance is necessary to a bill of revivor. *Anon*, 3 Atk. 690. *Henderson* v. *Meggs*, 2 Br. C. C. 127.

2. If both husband and wife are served with a subpœna, or the husband only, but with notice that his wife is a defendant, he must appear for both, else an attachment may issue; in the first case against both, and in the latter against the husband. Prac. Reg. 37.

3. The husband and wife are defendants; he only appears, and demurs: attachment against both. *Spicer* v. *Pakine*, Cary, 55.

4. Where the husband is beyond sea, and not amenable to the process of the court, the wife, in respect of her separate

estate, must appear and answer. *Bell* v. *Hyde*, Pre. Ch. 328. Gilb. Eq. Rep. 83. *Dubois* v. *Hole*, 2 Vern. 613.

5. Husband and wife served with subpœna abroad, wife comes to England, and being taken on process of contempt, puts in an appearance for herself only, and obtains an order to answer separately; held that she thereby had cleared her contempt, but the court would not discharge her appearance. *Travers* v. *Bulkeley*, 1 Ves. 384. 1 Dick, 138.

6. Appearance by the wife without the husband may be good, both at law and in equity, *Ibid.*

7. Where the plaintiff showed the defendant the subpœna, but delivered no note of the day of appearance, and the same did not appear by the label or otherwise, and the defendant appeared and found no bill filed, he was allowed his costs and attachment against the plaintiff. *Brightman* v. *Powtrell*, Cary, 83.

8. An irregularity in process may be cured by the defendant's appearance. *Floyd* v. *Nangle*, 3 Atk. 569.

9. But not if the appearance is entered just before the long vacation, for the purpose merely of avoiding an attachment. *Anon*, 3 Atk. 567.

10. Appearance salves no error in the original writ, but error in mesne process only. *Travers* v. *Bulkeley*, 1 Ves. 384.

11. But where an order which occasions the appearance is obtained by malpractice, the appearance will not salve error in the process. *Burton* v. *Maloon*, Barn. 401.

12. An order was obtained by contrivance upon the statute of 5 Geo. 2, and the defendant appeared to the bill; the Court, on application, set aside the order; the appearance to the bill must be set aside likewise. *Ibid.*

13. An order for appearing gratis, implies the words "that the defendant shall pray no day over." *Jervoise* v. *O'Carrol*, 2 P. W. 368.

14. Where a defendant is out of the jurisdiction and cannot be made to appear, it amounts to the same thing as if process had been taken out for want of an appearance, and carried on to a sequestration. *Darwent* v. *Walton*, 2 Atk. 510.

15. Order for defendant to appear to a bill, under special circumstances, enlarged for three months. *Wilkinson* v. *Coker*, 1 Dick. 74.

16 The Attorney-General *qua* such is always supposed to be in Court, and if he will not appear, it must be considered as a *nil dicit*. The Court therefore refused to order the Attorney-General to appear to a bill. *Barclay* v. *Russell*, 2 Dick. 729.

17 A defendant to a bill, though not served with process, may appear gratis, and refer it for impertinence. *Fell* v. *Christ's College, Cambridge*, 2 Br. C. C. 279.

18 A party by appearing gratis does not lose his right to costs. *Bowtee* v. *Grills*, 1 Dick. 38.

19. An infant plaintiff, a ward of the court, having married, proceedings were staid till the husband should appear. *Brummele* v. *M'Pherson*, 7 Ves. 237.

20. An attorney having entered an appearance for a party, not entitled to strike it out but on application to the Court for leave. *Menzies* v. *Rodrigues*, 1 Price, 92.

21. Where a Member of Parliament refuses to enter an appearance, the Court may appoint a clerk in court to enter an appearance for him, under stat. 45 G. 3, c. 124, s. 3. *Read* v. *Philips*, 16 Ves. 436.

And see as to entering an appearance for other defendants, stat. 5 Geo. 2. c. 25, s. 2, 3.

22. Ordered on motion, that the appearance of a defendant, brought to the bar of the Court by *habeas corpus*, directed to the Sheriff of Dorsetshire, might be entered, and that he be committed to the Fleet, charged with his contempt, and with the several causes mentioned in the Sheriff's return. *Batson* v. *Maybey*, 1 Price, 63 (*n*).

VII. Arbitration and Award.

(a) *Submission to arbitrate.*

1. By statute 9 & 10 Will. 3, c. 15. merchants, traders, and others, may make their submissions to arbitration a rule of any of the King's Courts of record.

2. Submission bond under 9 & 10 Will. 3. cannot be made an order of court after the award is made. *Spettigue* v. *Carpenter*, 1 Dick. 66. 3 P. W. 361.

3. But in a later case the court seemed to think a submission under the statute might be made a rule of court after the award made; and certainly a submission

after the award made, may be made a rule of court by consent: to be enforced, not perhaps by the process under the statute, but by the common process of the court. *Pownall* v. *King*, 6 Ves. 10.

4. An award in a cause depending, is not within the stat. 9 & 10 Will. 3. *Lord Lonsdale* v. *Littledale*, 2 Ves. J. 451.

5. Attachment against a party revoking a submission to an award by order by consent. *Hide* v. *Petit*, 1 C. C. 185.

6. Application to remedy a mistake in making a bond of submission an order of court after the award under it was made. *Ex parte Ross*, 1 Dick. 133.

7. General reference to arbitration by parties to a suit in equity was made an order of a court of law. Whether it is an order within the stat. 9 & 10 Will. 3. c. 15, so as to exclude the equitable jurisdiction to affect the award for mistake of the law apparent, and to restrain an application to the court of law to enforce it—*Quære*. *Nichols* v. *Chalie*, 14 Ves. 265

(*b*) *Award, impeaching or setting aside.*

1. If a submission is to three or any two of them, and two by fraud or force exclude the other, that alone is sufficient to vitiate the award. *Burton* v. *Knight*, 2 Vern. 515.

And see Chicot v. *Lequesne*, 2 Ves. 315.

2. A party submitting to an award desired the arbitrator to defer making his award until he should satisfy him as to some things which the arbitrator took to be against him; though this was within two or three days before the time for making the award was out, yet the request not being complied with, the award was held ill. *Pettigue* v. *Carpenter*, 3 P. W. 362.

3. If arbitrators delegate their power, the award is void for the whole; but merely referring costs to be taxed is not such a delegation as will vitiate the award. *Lingard* v. *Eade*, 1 Atk. 504.

4. Nor where the arbitrators award releases, and leave it to the court to settle the form of them. *Ibid*, 1 Atk. 506.

5. Where arbitrators are deceived, or where they make their award clandestinely, without hearing each party, a court of justice will interpose and avoid such award. *Medcalfe* v. *Ives*, 1 Atk. 64.

6. An award made upon reference, under an order of Court, is held by the Court as a decree, and even stronger, since it supersedes all errors but corruption or partiality. *Travers* v. *Lord Stafford*, 2 Ves. 19.

7. If arbitrators are mistaken in a plain point of law, it is a ground to set aside the award; otherwise, if it had been a doubtful point. *Corneforth* v. *Geer*, 2 Vern. 705.

Ridout v. *Pain*, 3 Atk. 494.

8. An award, upon a general reference, cannot be impeached for erroneous judgment upon facts, but may for corruption, misbehaviour, excess of power, and mistake admitted by the arbitrators; in the first three cases there must be satisfactory evidence against them, for the court favors awards. *Morgan* v. *Mather*, 2 Ves. J. 15.

9. Award contrary to law, made under a general reference, may be impeached, for that is excess of power. *Morgan* v. *Mather*, 2 Ves. J. 15.

Young v. *Walter*, 9 Ves. 364.

And see Nichols v. *Chalie*, 14 Ves. 265.

10. But if a question of law is referred to an arbitrator, he must decide it, and though he decides wrong, the award cannot therefore be impeached. *Ching* v. *Ching*, 6 Ves. 282.

Young v. *Walter*, 9 Ves. 364.

11. Evidence received by the arbitrator, after notice that he would receive no more, is sufficient to set aside the award. *Walker* v. *Forbisher*, 6 Ves. 70.

12. It is no objection to an award that it was prepared by the solicitor of one of the parties, or that the reference was not made a rule of court till after the award was made. *Featherstone* v. *Cooper*, 9 Ves. 67.

13. Upon an award made a rule of court of law, one term being that no bill in equity shall be filed, the court of law has a discretion to enforce that term or not. *Lord Lonsdale* v. *Littledale*, 2 Ves. J. 453.

14. An award made a rule of court, under stat. 9 & 10 Will. 3, c. 15, may be impeached for fraud. *Ibid.*

15. A party cannot move to set aside an award, without its being made a rule of court. *Chicot* v. *Lequesne*, 2 Ves. 316.

16. There is no way of impeaching an award in the Court of Chancery, but by bill. *Sumpter* v. *Life*, 2 Dick. 474.

17. Semble, exceptions may be taken to an award made on a reference by consent. *Squib* v. *Bradshaw*, 1 C. C. 186.

18. An award made pursuant to an order of court, must be confirmed, as is done upon a Master's report, and either side has a liberty to except to it. *Cresly* v. *Carrington*, 1 Vern. 469.
Vernon v. *Wells*, 2 Dick. 452.

19. And although by the terms of the submission the award is to be confirmed by decree "without appeal or exception." *Hide* v. *Cooth*, 2 Vern. 109.

20. Exceptions to an award under an order of reference to an arbitrator *Vernon* v. *Wells*, 2 Dick. 452.
But see Cressy v. *Carrington*, 2 Vern. 79.

21. If a matter be referred to arbitrators by decree or order, merely *ad computandum*, an exception will lie to the award, as to a Master's report, the referee being substituted for a master; but if the reference is of all matters in difference, an exception will not lie. *Woodbridge* v. *Hilton*, 2 Dick. 610.
1 Br. C. C. 398.

22. An award on general reference cannot be impeached by exceptions, but by cross motions to set aside or confirm it. *Knox* v. *Simmonds*, 3 Br. C. C. 358.
1 Ves. J. 369.
Price v. *Williams*, 1 Br. C. C. 103.
1 Ves. J. 365
Morgan v. *Mather*, 2 Ves. J. 15.

23. Upon a reference of "all dealings and transactions in like manner as if the same were referred to a Master" exception may be taken, with leave of the court, and if such exceptions are allowed, the court will refer it to a master, but will not refer it back to the arbitrator without consent. *Dick* v. *Milligan*, 1 Ves. J. 369 (*n*).

24. Matter of exceptions to an award must be confined to what arises upon the face of it, compared with proceedings in the cause, and cannot extend to matter of fact, of which the arbitrators are the proper judges. *Dick* v. *Milligan*, 2 Ves. J. 23. 4 Br. C. C. 117.

25. But as affidavits cannot be read upon exceptions, if the party proceed upon charges to be proved by evidence, it can only be, by motion to set aside the award. *Ibid.*

(*See further*, p. 33. *ante*.)

(c) *Non-performance.*

1. A party to an award made on a submission in court, pursuant to the stat. dies before the money is paid, but after an attachment issued: held, that the award is not in the nature of a judgment or decree, and the non-performance is in the nature of a contempt, which dies with the person, and so no *scire facias* would go against the heir or executor. *Webster* v. *Bishop*, 2 Vern. 444. Pre. Ch. 223.

2. Where a submission to an award has been made a rule of court, it is a contempt of that court to dispute the order, unless they can shew partiality, corruption, or misbehaviour in the arbitrators. *Lingood* v. *Croucher*, 2 Atk. 396.

3. Where there is non-performance of an award, the proper motion is, that the party may stand committed; not for an attachment; and notice of the motion must be served personally. *Knox* v. *Simmons*, 3 Br. C. C. 358.

(d) *Arbitrators.*

1. The Court of King's Bench is the proper court to examine into the partiality of the arbitrators, where the award is made a rule of that court. *Kampshire* v. *Young*, 2 Atk. 155.
And see Gwinett v. *Bannister*, 14 Ves. 530.

2. An arbitrator is not to consider himself agent for the person who appoints him, as the bond says he is an indifferent person. *Calcraft* v. *Roebuck*, 1 Ves. J. 226.

3. An arbitrator has power to proceed *ex parte*; if one of the parties, being duly summoned, will not attend, the arbitrator is to exercise his discretion. *Wood* v. *Leake*, 12 Ves. 412.

4. An arbitrator is not bound to discover upon what ground he made his award. *Anon*, 3 Atk. 644.

(*See further*, p. 32. *ante*.)

VIII. Attachment.

(*And see* Div. XVII. *post*.)

(a) *Where granted or refused.*

1. Attachment issued against the wife alone, and not the husband, for that she would not answer the bill. *Keits* v. *Mácher*, Toth. 15.

2. Attachment, upon the defendant's confession he had been served. *Waters* v. *Beid*, Cary, 104.

Stow v. *Maddock*, Cary, 115.

3. Attachment for putting in a demurrer, instead of an answer. *Farmer* v. *Fox*, Cary, 158. Tot. 15.

Paine v. *Carew*, Cary, 142.

4. Attachment, against husband and wife, for want of the wife's answer, stayed as to the husband, and leave given to attach the wife. *Leithly* v. *Taylor*, 1 Dick. 373.

And see Div. IV. (*c*) p. 372. *ante*.

5. An attachment for words against the court, uttered upon service of an order. *Witham* v. *Witham*, 3 C. R. 41.

6. The practice of issuing attachments without affidavit previously filed, is in opposition to the orders of the court, and to be corrected in future. *Broomhead* v. *Smith*, 8 Ves. 357.

7. The Warden of the Fleet attends the Courts of Chancery and Exchequer by two deputies; and therefore no attachment will lie against him, because he is supposed to be always personally in court. It is common to suspend clerks of court and the Warden of the Fleet, and in this case, upon a motion, the court granted an order for a sequestration, which is a kind of a suspension *nisi*. *Anon*, 1 Mos. 238.

8. An attachment for non-performance of an order against one in the Fleet, is directed to the Warden of the Fleet; and on his return, that he is his prisoner, the party may move for a sequestration. *Anon*, Mos. 301.

Strudwicke's Case, 3 P. W. 53.

9. An attachment may be granted against a solicitor for negligently managing his client's business. *Floyd* v. *Nangle*, 3 Atk. 468.

10. After service of an order upon a party in the cause for payment of money, the proper course is an attachment, and upon the return of the attachment, an order for commitment. *Bowes* v. *Lord Strathmore*, 12 Ves. 325.

11. Decree for debt and costs, an attachment for the debt alone, before taxation of costs, and another for the costs when taxed, were both held good. *Frazer* v. *Thabarn*, 2 Anst. 380, 413.

12. Where a solicitor's bill of costs is taxed, he may take out an attachment for them without previously taking out a subpœna, but he must first serve his client with the order for taxing his bill of costs, and with the Master's report of such costs. *Murphey* v. *Balderston*, Barn. 266.

phe 2 Atk. 114.

13. As to the regularity of issuing an attachment upon service of a subpœna in Scotland—*Quære*. *Bourke* v. *Lord Macdonald*, 2 Dick. 587.

14. The court, on motion, ordered an attachment, the subpœna having been served abroad. *Scott* v. *Hough*, 4 Br. C. C. 213.

15. Attachment with proclamations, ordered, on motion, upon service of subpœna in Scotland. *Shaw* v. *Lindsay*, 18 Ves. 496.

16. On a motion for an attachment for refusal of production and inspection of documents, pursuant to order, or for immediate inspection, the defendants objecting that the documents contained passages improper for inspection: the court refused the application for an attachment, but directed the defendants to pay the costs. *Jones* v. *Powell*, 1 Swan. 535 (*n*).

17. An attachment is considered as sealed the first moment of the day in which it issues; therefore, an order for time to answer, obtained on the same day an attachment issued, was discharged as irregular. *Stephens* v. *Neale*, 1 Mad. 550.

18. If an answer is put in the same day on which an attachment for want of an answer issues, the attachment has precedence. *Ibid.*

(*b*) *Execution and Return of.*

1. A defendant appearing gratis, an attachment being out, was committed. *Richers* v. *Stilman*, Cary, 57.

2. The sheriff amerced £5 for returning *non est inventus* upon an attachment, having been in the presence of the party. *Stradling* v. *The Earl of Pembrooke*, Cary, 62.

1 H. Blackst. 468.

3. On taking a party on attachment in execution, the sheriff may insist upon security proportionable to the duty, but in process the bond is only for £40. *Danby* v. *Lawson*, Pre. Ch. 110.

4. But the sheriff is not compellable to take bail. *Studd* v *Acton*, 1 H. Blackst. 468.

5. The sheriff cannot take a bail bond upon an attachment for non-payment of costs. In such case a messenger is to bring in the party. *Anon*,
Pre. Ch. 331.

6. Order upon the sheriff to pay to the party money, under an attachment for not paying costs. *Anon*,
11 Ves. 170.

7. Every attachment returned, on which an order for a serjeant at arms is grounded, must be entered in the register's office, else irregular. *James* v. *Philips*,
2 P. W. 657.

8. A contempt for non-performance of an order of court, is a breach of the peace, and a man may be taken on a Sunday upon an attachment for such contempt. *Ex parte Whitchurch*, 1 Atk. 58.

9. Where an attachment has issued against a person, and the sheriff takes a bail-bond for his appearance, and delivers it to the plaintiff, the court will discharge a rule made upon the sheriff to shew cause why he does not bring in the body; for the plaintiff is not without remedy, as he may move on a *cepi corpus* returned for a messenger to the county where the person lives. *Anon*, 2 Atk. 507.
And see Wilkinson v. *Belsher*,
2 Br. C. C. 181.
Holmes v. *Cardwell*, 3 Mad. 114.

10. An attachment against an infant, for not appearing to a bill against him, is issued merely to ground an order for a messenger to bring the infant into court, and therefore ought not to be executed. *Dove* v. *Dove*, 2 Dick. 618.
And see Eyles v. *Le Gros*, 9 Ves. 12.

11. So also an attachment issued for not obeying a writ of execution of an order, to deliver possession of land, is not to be executed, it being merely to ground an order for an injunction to deliver possession.
Dove v. *Dove*, 2 Dick. 618.

12. The sheriff of Chester, refusing to make any return to the mandate of the chamberlain of Chester, issued upon an attachment out of Chancery against the defendant to be executed, was ordered to do it by giving time. *Clough* v. *Cross*,
2 Dick. 555.

13. An attachment returnable within eight days after the purification. The eight days mean eight entire days. *Mootham* v. *Waskett*, 1 Mer. 243.

14. An attachment must be entered in the registrar's book before it is issued. *Smith* v. *Thompson*, 4 Mad. 179.

15. On motion for an attachment for not paying money under a previous order of the Court, against a party who has been called on by a former order, to shew cause why that money, and the costs of such application should not be paid, and against which order no cause has been shewn, the order for the attachment will be granted absolutely in the first instance. *King* v. *Price*, 1 Price, 341.

16. The order made on motion to pay money into court, that the defendant shall pay the costs, is imperative in that respect in the Court of Exchequer, and if not paid when taxed, the plaintiff may have an attachment against the defendant for non-payment, which process in the Exchequer is final, and in the nature of an execution, and therefore not bailable. *Plummer* v. *Savage*, 6 Price, 126.

17. An attachment sealed before, though not executed till after a party is in contempt, is irregular. *Frowd* v. *Lawrence*,
1 J. & W. 655.

(*c*) *Stayed or set aside.*

1. A witness served with subpœna to testify, being pressed for a soldier; attachment was stayed. *Humble* v. *Malbe*,
Cary, 58.

2. If the contempt be pardoned, the defendant is *rectus in curia*, and may proceed as if no process had issued. *Anon*,
1 C. C. 238.

3. The attachment may be superseded, or, if irregularly obtained, may be discharged, on motion.

4. Where, upon the marriage of a female plaintiff, the husband covenanted that the suit should be revived, and prosecuted for the benefit of himself, wife, and children, and the suit proceeded so far as to put a defendant into contempt for want of an answer; the husband cannot consent to a motion to stay an attachment, for want of an answer, that being in the face of his covenant. *Merryweather* v. *Mellish*, 13 Ves. 161.

5. The court refused to discharge an attachment, issued after an order for time had been obtained, where the service of the order had not been strictly regular. *Wallis* v. *Glyn*, Coop. 282.
19 Ves. 380.

6. Where the defendant obtains a third order for time, by petition at the Rolls, but before the order is drawn up, or any notice of the petition given to the plain-

tiff, an attachment issues, the court will refuse a motion, to set aside such attachment, with costs, as a copy of the petition ought to have been served on the plaintiff, *Newcombe* v. *Rawlings*, 3 Mad. 246.

IX. Bill.

(a) *Exhibiting.*

1. Bill dismissed, because the matter in question was under the value of 40*s.* *per ann.* *Reynolds* v. *Davy*, Toth. 80.

2. A bill will lie for recovering ancient quit rents, though very small, as two or three shillings *per ann.* *Cocks* v. *Foley*, 1 Vern. 359.

3 The court will not retain a suit by English bill, for a claim under £10 value, or under 40*s* *per ann.* in land, except in cases of charity. 1 q C. Ab 75.

4. Or where it is to establish a right, as to establish a right to 2*d* a head, as an Easter offering. *Laurence* v *Jones*, Barn 173

5. And a parson may sue for his tithes, be the amount ever so small, in this case but 9*s.* *Griffith* v. *Lewis*, 2 Br P C 408

6. Where a bill is exhibited merely for a discovery of a deed, no affidavit need be annexed, that such deed is not in plaintiff's possession, but if the bill pray relief, which might be had at law if the deed were in plaintiff's possession, such affidavit must be annexed to give the Court jurisdiction. *Anon*, 1 C C. 11.
——— 1 C. C. 231
——— Pre. Ch. 536.
——— Atk. 17.
Godfrey v. *Turner*, 1 Vern 247.
Dormer v. *Fortescue*, 3 Atk. 132.

7. And if a bill be exhibited for a discovery and delivering up of a deed, an affidavit that plaintiff hath not the deed is unnecessary, this being mere equitable relief. *Whitchurch* v. *Golding*, 2 P. W. 541.

8. So also if a bill be exhibited, to be relieved against the fraudulent cancellation of a deed, and praying to have another deed executed, no affidavit is necessary, as plaintiff could have no relief at law, if the deed were in his possession. *King* v. *King*, Mos. 192.

9. And where the bill prayed discovery of an agreement, and equitable relief, an affidavit was held unnecessary, although it was suggested that plaintiff himself had razed the written agreement, and so destroyed his remedy at law. *Nicholson* v. *Pattison*, 1 Vern. 310

10 After a decree in a cause, a new original bill cannot be brought between the same parties, and for the same matters. *Wortley* v. *Birkhead*, 2 Ves. 571. 3 Atk. 809.

11. But one, not a party to a bill dismissed, may file a new bill upon the same equity, because he cannot have a bill of review. *Doyly* v. *Smith*, 2 C C. 119.

12. So also where a bill is dismissed, upon defendant's proving himself a purchaser for valuable consideration, another may be exhibited, charging notice. *Williams* v. *Williams*, 1 C. C. 252.

13 A bill may be exhibited for mean profits, after a decree giving the possession. *Coventry* v *Hall*, 2 C R 259.

14. If two bills are exhibited by the same parties for the same matter, one will be dismissed with costs and where A., as sole executor to J S. exhibited his bill, and A and B. as joint executors of J. S exhibited another bill against the same defendants, for the same matter, one was ordered to be dismissed *Maunder* v. *Wright*, Cary, 125.

15. But Lord Hardwicke did not think it so unreasonable for two bills to be brought by different people for the same thing, as one in the name of a trustee, and another in that of the *cestui que trust*, and the same of an assignor and assignee, though if both bills are brought to a hearing, the court will dismiss that which was brought improperly, with costs *Gage* v *Bulkeley*, Amb 103.

16 There is no general rule that one bill only shall be depending, where a number of creditors are concerned, so where three creditors, who were within the terms of a trust created by a will for the payment of debts, brought a bill to carry the trusts of the will into execution, and the rest of the creditors brought a second bill for the same purpose, the court discharged an order, that both bills might be referred to a master, to certify which would be most for the creditors' benefit. *Anon*, 3 Atk. 602.

17. Bill by creditors in Exchequer and decree, bill by other creditors in Chancery, and account decreed. *Coysgarne* v. *Jones*, Amb. 613.
But see Anon, Mos. 261.

18. If there be a bill exhibited in one

Court of Equity, a bill in the nature of a cross bill may be filed in another; as if the mortgagor exhibit a bill to redeem in the Exchequer, the defendant may bring a bill in Chancery to foreclose. *Earl of Newberry* v. *Wren*, 1 Vern. 221.

19. Where an executor before probate files a bill, and afterwards proves the will, such subsequent probate makes the bill a good one. *Humphreys* v. *Humphreys*, 3 P. W. 351.

20. While a suit is depending in the Ecclesiastical Court for an administration, a bill may be brought here for an account of the personal estate: the reason why a bill may be brought before probate is, that the Ecclesiastical Court have no way of securing the effects in the mean time. *Phipps* v. *Steward*, 1 Atk. 285.

21. Any person may as *prochein amy*, exhibit a bill in the name of an infant, but none can bring a bill in the name of a feme covert, as her *prochein amy*, without her consent. *Andrews* v. *Cradock*, Pre. Ch. 376.

See also Tit. PLEADING III. p. 341. *ante, and* Div. LIII. *post.*

(*b*) *Signature of Counsel.*

1. Where the name of a counsel was put to a bill without his privity, it was dismissed. *Gristing* v. *Hore*, Cary, 117. *And see Bingham* v. *Warren*, Cary, 127.

2. The bill not being signed by counsel, the defendant obtained an order not to answer till counsel's hand were put to the bill, and to stay process of contempt in the mean time. *Farly* v. *Childe*, Cary, 160.

3. On certificate of the master, to whom it was referred, that the bill was not signed by counsel, it was ordered to be taken off the file with taxed costs. *Dillon* v. *Francis*, 1 Dick. 68.

4. And where, upon the hearing of a demurrer, the bill appeared not to be signed by counsel, it was ordered to be taken off the file with costs. *French* v. *Dear*, 5 Ves. 550.

5. The want of signature of counsel to a bill or answer, makes the record imperfect, and therefore is an objection which cannot be waved by taking a step in the cause. *Wall* v. *Stubbs*, 1 V. & B. 358.

(*c*) *When and in what Cases amended.*

1. Bill amended after plea set down, on payment of 20*l.* costs, and £5 for the plea. *Vernon* v. *Cue*, 1 Dick. 358. *Jennings* v. *Pearce*, 1 Ves. J. 447.

2. After [illegible] called on for argument, the plaintiff may amend, upon paying the costs of the plea. *Lopez* v. *De Tastet*, 3 Mad. 183.

3. Motion of course, after plea or demurrer, to amend the bill, on 20*s.* costs, but it is granted only upon stating that the plea or demurrer is not set down. *Jennings* v. *Pearce*, 1 Ves. J. 448.

4. By the allowance of a plea posterior to the amendment, the bill is out of court. *Jennings* v. *Pearce*, 1 Ves. J. 448

5. A bill may be amended by paying common costs, after a demurrer is put in; but after it is set down to be argued, it can be amended only upon paying the costs of the demurrer. *Anon*, Mos. 301. *Jennings* v. *Pearce*, 1 Ves. J. 447.

6. But a bill cannot be amended, after demurrer to the whole bill has been allowed; the bill being regularly out of court. *Smith* v. *Barnes*, 1 Dick. 67. *Watkins* v. *Bush*, 2 Dick. 701. —— v. *Baines*, 2 P. W. 300 (*n*).

7. Bill for a discovery and relief upon the arguing a demurrer, ordered to be amended, by waving all penalties and forfeitures. *Mason* v. *Lake*, 2 Br. P. C. 495.

8. The court has gone rather too far in allowing the amendment of bills, on answers being reported insufficient. *Anon*, 3 Atk. 512.

9. Amendment after answer, without prejudice to exceptions, by praying an injunction. *Jacob* v. *Hall*, 12 Ves. 458.

10. After defendant had put in his answer, plaintiff amended his bill, to which he also added a party, and filed a new engrossment without an order, and defendant appeared. Plaintiff was allowed to amend the last filed bill upon amending the new defendant's copy. *Parry* v. *Morgan*, 1 Dick. 234.

11. Liberty given after replication, to amend bill, without withdrawing replication, by charging one of the defendants as the administrator of J. S., which was in effect adding a party. *Andree* v. ——, 2 Dick. 768.

12. After publication plaintiff cannot amend his bill without withdrawing his replication. *Anon*, Barn. 222. *Anon*, 1 Atk. 51.

13. At the hearing, the cause stood over for want of parties, with liberty for the plaintiff to amend; he was ordered to do so by a given time, or the bill to be dismissed. *Yarroway* v. *Hand*,
2 Dick. 498.

14. When a cause stands over, with liberty to amend, paying the costs of the day, and the plaintiff does not amend within a reasonable time, a motion may be made that the plaintiff should amend within a limited time; and the plaintiff ought to pay the costs of such motion, it being made necessary by his default. *Cox* v. *Allingham*, 3 Mad. 393.

15. Where, after issue joined, an amendment of the bill became necessary, ordered, on motion by the defendant, that the plaintiff should amend within a fortnight, or that his bill should be dismissed. *Pratt* v. *Holebrook*, 5 Mad. 30.

16. Bill brought without the consent of one of the plaintiffs, upon an application to dismiss, his name was ordered to be struck out. *Creswell* v. *Ratcliffe*,
1 Dick. 32.

17. But in a similar case, where the cause was at issue, and the party complaining was the only plaintiff of ability to answer costs, and the defendants upon that ground opposed the motion, the court held the objection good, but ordered the notice to be saved till the hearing, that in case the plaintiff should be ordered to pay costs, the solicitor might be ordered to indemnify him. *Titterton* v. *Osborne*,
1 Dick. 350.

And see also, Tit. SOLICITOR & CLIENT, III. *a*. p. 416.

18. Motion to amend a bill by striking out a party, and making him a defendant, after bill dismissed: the court gave the plaintiff leave to amend, paying all costs, *Durand* v. *Hutchinson*. 2 Dick. 456.

19. Order that the name of an infant plaintiff might be struck out, that he may be made a defendant. *Tappen* v. *Norman*.
11 Ves. 563.

20. The evidence of a plaintiff being necessary, and the defendant refusing to consent to his examination, the bill was on motion amended by making him a defendant, and the replication withdrawn, on terms of costs, amending defendant's copy, and requiring no farther answer. *Motteux* v. *Mackreth*, 1 Ves. J. 142.

The report of this case in 2 Dick. 173. *is wrong, see* 6 Ves. 145.

21. Leave to amend by striking out the names of two of the plaintiffs, in order to obtain their evidence, was granted, and without consent, but upon giving security for costs. *Lloyd* v. *Mackeam*,
6 Ves. 145.

22. And even without giving security for costs, where the plaintiff to be struck out had become bankrupt. *Ewer* v. *Atkinson*, 2 Cox. 393.

23. The plaintiff in a revived suit, the representative of the plaintiff in the original suit, may amend the original bill, in the same manner as the original plaintiff might, had he been living. *Philips* v. *Derbie*, 1 Dick. 98.

24. Leave given at the hearing to amend the bill, the plaintiff paying the costs of the day. *Elliot* v. *Hele*,
2 C. C. 29.

25. The court at the hearing, refused leave to withdraw replication and amend, by adding parties, where the effect would be to suppress the depositions in the cause. *Anon*, Barn. 222.

26. After a cause is set down, the plaintiff can amend by making parties only, but cannot introduce new charges, or put a material fact in issue, which was not in issue in the cause before; the course is to file a supplemental bill. *Goodwin* v. *Goodwin*, 3 Atk. 370.

27. At the hearing, leave was given to plaintiff to amend, by adding parties and praying such relief as he might be advised. *Palk* v. *Lord Clinton*,
12 Ves. 66.

28. In a suit by one of the crew of a privateer against the owners, leave was given at the hearing to amend, by stating that the bill was on the behalf of the plaintiff, and all others. *Good* v. *Blewitt*,
13 Ves. 397.

29. After an undertaking to speed a cause, the plaintiff cannot, as of course, obtain an order to withdraw his replication and amend his bill. *Ryan* v. *Steuart*,
1 Cox, 397.

30. Such an order being obtained, was dismissed with costs. *Pitt* v. *Watts*,
16 Ves. 126.

31. After a motion to dismiss, and an undertaking to speed, the plaintiff cannot move, as of course, to amend, but there must be a special application. *Myers* v. ———, 4 Mad. 263.

32. In Chancery, it is a motion of course to withdraw replication and amend a bill, unless some further proceeding has been had in the cause, or the plaintiff has

undertaken to speed the cause; in the Exchequer it is not a motion of course, but the parties must make a special case: but a motion, to withdraw a replication, and rules to produce witnesses, and to amend, requires notice and a special case. *Lord Kilcourcy* v. *Ley*, 4 Mad. 212.

33. And in the Exchequer, the motion to withdraw replication and amend, after an order *nisi* to dismiss, must be upon affidavit of the materiality of the amendments, and the reason why such matters had not been introduced before. *Longman* v. *Calliford*, 3 Anst. 807.

34. Where the plaintiff obtained an order to amend his bill, without notice of an order to dismiss it, obtained eight months previously, but not served, the order to amend was held regular. *Young* v. *Smith*, 3 Mad. 196.

35. Where exceptions are allowed to an answer, and the plaintiff obtains an order to amend, and that the defendant may answer the exceptions and amendments at the same time; if the answer to the exceptions is filed any time before the order to amend &c. is served, such order must be discharged. *Paty* v. *Simpson*, 2 Cox, 392.

36. Where the plaintiff, upon a suggestion, that the cause was at issue only, when, in fact, it was set down for hearing, obtained an order to amend, the order was discharged with costs, but the cause was put off till the next term on paying the costs of the day, for the purpose of giving the plaintiff an opportunity of amending. *Harding* v. *Cox*, 3 Atk. 583.

37. In an injunction cause, where exceptions are taken to the answer, it is irregular to obtain an order to amend, until the exceptions are disposed of. *Dixon* v. *Redmond*, 2 S. & L. 515.

38. In the exchequer a plaintiff cannot move to amend his bill on an affidavit of equitable facts, without previous notice to the defendant: but, under particular circumstances, the court will, if it be late in the term, order the defendant to accept short notice of the motion. *Harrison* v. *Delmonte*, 1 Price, 117.

39. When the plaintiff has obtained an order to amend, the defendant having submitted to exceptions, the court will, on motion, order, as of course, that if he do not amend within a stated time, (a week in this instance,) the former order to be discharged. *Benedict* v. *Thackeray*, 5 Price, 592.

(*And see* p. 250. 358. *ante.*)

(*d*) *Matter of Amendment.*

1. Where the plaintiff took out letters of administration to the intestate, and charged the same by way of amendment, held that although the matter in fact arose since filing the bill, yet it might be charged either by way of supplement or amendment. *Humphreys* v. *Humphreys*, 2 P. W. 350.

2. But in a subsequent case, Lord Hardwicke held, that such matter could not be charged by amendment, it being within the rule that matter subsequent to the original bill, must come by way of supplemental bill and revivor. *Brown* v. *Higden*, 1 Atk. 291.

3. A bill cannot be amended in a part wherein it has been dismissed upon the merits. *Rappier* v. *Lady Effingham*, 2 P. W. 402.

4. After publication past and the cause set down, the plaintiff can amend by making parties only, and cannot introduce new charges, or put a material fact in issue, which was not in the cause before; such amendment, if necessary, must be by supplemental bill. *Goodwin* v. *Goodwin*, 3 Atk. 370.

5. Leave to amend by adding parties, includes the introduction of such facts as may be consequential upon such amendment. *Palk* v. *Lord Clinton*, 12 Ves. 65.

6. But where in such case the paintiff amended by striking out several charges, which had led the parties necessarily into the examination of witnesses, the court on application, ordered such charges to be restored, in order that the Court at the hearing might be enabled to give the defendant the costs occasioned by that part of the bill. *Bullock* v. *Perkins*, 1 Dick. 110.

7. Bill stated an agreement to make a lease to the plaintiff alone; defendant's answer stated the agreement to have been, to let to the plaintiff and another person jointly, and so it appeared in evidence: upon the hearing, plaintiff not allowed to amend, in order to make that other person a party, for that would be making a new case. *Denniston* v. *Little*, 2 S. & L. 11. (*n*)

And see further as to Matter of Amendment, p. 338, *ante.*

(e) *Effect of Amendment.*

1. Where the answer to the original bill was reported insufficient, and defendant filed a cross bill, after which plaintiff amended in material parts, and obtained an order, that the amendments and exceptions might be answered together, the order was discharged, the plaintiff having, by amending, waved his priority of answer to the original bill. *Long* v. *Burton*, 2 Atk. 218. *Steward* v. *Roe*, 2 P. W. 435.

2. Where a bill is amended both in discovery and relief, the pendency of suit as to those parts is only from the time of the amendment. *Long* v. *Burton*, 2 Atk. 218.

3. Plaintiff in original bill by amending loses his priority of suit, and his right to have an answer in the original bill before he is called upon to answer the cross bill, although such amendment be after the order for time to answer cross bill until after answer to original bill. *Johnson* v. *Freer*, 2 Cox, 371.

4. Nor is it necessary that the amendment should be material: but the proceedings on the original bill will not be stayed until an answer is put in to the cross bill. unless the plaintiff in the cross bill obtains an order for that purpose. *Noel* v. *King*, 2 Mad. 392.

5. Where a bill is amended after answer, it is considered as an original bill, and plaintiff is not bound by offers in the original bill, nor defendant by admissions in the answer. *Lord Abingdon* v. *Butler*, 1 Ves. J. 210.

6. But otherwise where the amendments are to matters merely collateral, for there the defendant shall be bound by his admissions. *Spurrier* v. *Fitzgerald*, 6. Ves. 548.

7. Amending a bill after a plea, is not allowing the plea: if, after an injunction, the plaintiff amend his bill, the amendments cannot be used in support of the injunction. *Vere* v. *Glynn*, 2 Dick. 441.

8. Where the plaintiff amends his bill, after plea set down, the plea will be allowed, with the usual costs; but the usual words, "upon hearing and debate," must not be inserted in the order. *Lopes* v. *De Tastet*, 3 Mad. 183.

9. Amendment of bill, after exceptions to the answer, operates as a waver of the exceptions. If the plaintiff is desirous of amending the bill, without prejudice to the exceptions previously taken, there should be a special motion to that effect. *De La Torre* v. *Bernales*, 4 Mad. 396.

10. In general, the amendment of a bill puts an end to all process of contempt for want of an answer; and the Court will not allow a plaintiff to amend without prejudice to a sequestration, notwithstanding he undertakes not to require any answer to the amendment; but otherwise, perhaps, when a specific amendment is proposed, by which the case of the original defendant would evidently not be varied. *Symonds* v. *Duchess of Cumberland*, 2 Cox, 411.

11. The plaintiff having an order to amend without costs, not requiring any further answer, and amending the defendant's office copy, the practice is, that the defendant must bring his office copy to the plaintiff's Clerk in Court to be amended; and is at liberty to put in a further answer within eight days after service of the order, before which time the plaintiff cannot file a replication. *Lloyd* v. *Lloyd*, 2 Cox, 431.

12. Plaintiff amending, without requiring a further answer, should call on the defendant for his office copy to be amended; but where this was neglected, but the defendant was otherwise apprised that an amendment had been made, and permitted the cause to come to a hearing, held that it was then too late to object. *Woodhouse* v. *Meredith*, 1 J. & W. 204.

13. Where the amendments are so considerable as to deface the record, a new engrossment is necessary.
Vernon v. *Vawdry*, 2 Atk. 119.
Boyd v. *Mills*, 13 Ves. 86.
Willis v. *Evans*, 2 B. & B. 228.

See further p. 250, *ante*, & Div. XLI. *post.*

(f) *Taken off the File by Consent.*

1. Bill and answer (the cause being agreed) ordered to be taken off the file by consent of plaintiff and defendant. *Tremaine* v. *Tremaine*, 1 Vern. 189.

X. Case.

1. The Master of the Rolls sitting for the Lord Chancellor, may direct a case to B. R. though not when sitting at the Rolls. *Horton* v. *Whitaker*, 2 Br. C. C. 88.

2. But the practice is since altered, and the Court of King's Bench now certify their opinion on cases sent there from the Master of the Rolls.
Daintry v. *Daintry*, 6 T. R. 313.
Mogg v. *Mogg*, 1 Mer. 661.

3. Facts of a case for the opinion of the Judges stated in the order by the Court, without a reference to a Master, *Ashburnham* v. *Kirkhall*, 1 Dick. 73.

4. Reference to a Master to settle a case for the opinion of the Court of King's Bench. *Ceal* v. *Ashurst*, 2 Dick. 474.

5. In a case sent to the Court of King's Bench, by the Master of the Rolls, the Lord Chief Justice offered to turn the case into a special verdict, in order to obtain the opinion of all the judges. *Wright* v. *Barlow*, 1 Mad. 524. (*n*)

6. When the estate in question is of small value, instead of sending it to be determined by a whole court, it may be directed to be heard and argued before two Judges at their chambers.— *Rigden* v. *Vallier*, 3 Atk. 735.

7. The Court of King's Bench refused to answer a case stated as a trust. *Parsons* v. *Parsons*, 5 Ves. 581.
Bayley v. *Morris*, 4 Ves. 790.

8. The Lord Chancellor, not being satisfied with a certificate of the Court of Common Pleas in the negative, sent the case to the Court of King's Bench; there being only one instance of sending a case back to the same court to be reviewed. *Trent* v. *Hanning*, 10 Ves. 495.

(*See further* p. 132, *ante.*)

XI. Cause, advancing or adjourning.

1. Where a defect of parties appears at the hearing, the cause is directed to stand over, on paying the costs of the day, with liberty for the plaintiff to amend by making proper parties. *Jones* v. *Jones*, 3 Atk. 110.
Palk v. *Clinton*, 12 Ves. 48.

2. But the objection for want of parties, at the hearing, should be taken upon opening the proceedings, and before the merits are disclosed. *Ibid.*

3. An order for a cause to stand over indefinitely, does not imply that it is put off till the next term. *Anon.* 2 Atk. 2.

4. Where general relief is prayed in one part of the bill and particular in another, it must stand over to be amended on paying costs of the day. *Cook* v. *Martyn*, 2 Atk. 3.

5. A plaintiff will not be permitted to put off the cause for defect of parties, without consent, or a special ground: as that he was not aware of the existence of such parties. *Innes* v. *Jackson*, 16 Ves. 356.

6. The court refused to allow a cause to stand over for the purpose of proving books upon interrogatories, where the plaintiff had neglected to prove them in the cause, improperly relying upon their being proved as exhibits at the hearing. *Lake* v *Skinner*, 1 J. & W. 9.

7. A cause set down to obtain a decree *pro confesso*, may be advanced in the paper on motion. *Hart* v. *Ashton*, 1 Mad. 175.

8. If a cross bill is filed in due time, the party may move for an order to stay publication in the original cause, till an answer is put in to the cross bill; but a cause will not be adjourned when near a hearing, because a cross bill has been filed and not answered *Coates* v. *Pearson*, 4 Mad. 262.

9. The court will not order a cause which is set down for hearing, to be advanced in the paper, on the ground that the subject matter of the suit is an arbitration of matter of account, and that if the award should be set aside, the applicant would, on going into the account again, which he would then be obliged to do, probably lose the advantage of a material and essential witness, who is old and bed-ridden, and not expected to live. *Dalzell* v. *Bailey*, 3 Price, 2.

XII. Certificate.

1. Where a party seeks to call in question a commission for the examination of witnesses. on a Master's certificate, it must be by motion to discharge the order for the commission, and not by exceptions to the certificate. *Chaffer* v. *Wills*, 1 Dick. 377.

2. Commissioner's certificate must be confirmed as a report. *Keeling* v. *Cartwright*, 1 Dick. 401.

3. Exceptions lie to the certificates of commissoners, in commissions of partition; which certificates are confirmed, as reports are. *Nicholas* v. *Mills*, 2 Dick. 533.

4. It has now become the settled practice to move to dismiss a bill for want of prosecution, upon the Six Clerk's certificate that there has been no proceedings, before such certificate is actually

granted. But whether a party can in a similar manner move upon the Master's certificate that no examination is put in, before the certificate is actually granted, and whether notice should be given by the Master before he grants it—*Quære*. *Wills* v. *Pugh*, 10 Ves. 402.

5. The question whether a witness is justified in refusing to answer interrogatories, should not be raised upon exceptions to the Master's certificate, that he has allowed the interrogatories, but, after the witness has answered, by exceptions to the Master's certificate, that his examination is or is not sufficient. *Stannyford* v. *Tudor*, 2 Dick. 548.
Paxton v. *Douglas*, 16 Ves. 242.

6. Whether the Court will order the Master to certify whether he was satisfied with the production of papers by a party under the decree—*Quære*. *Cotton* v. *Harvey*, 12 Ves. 391.

7. Where it is necessary for a Master, (to enable him to make his report) to have the evidence of entries in the books of the Bank of England, he is bound to grant the certificate, to justify the Bank in permitting an inspection, rather than compel the parties, by a refusal, to file a bill of discovery. *Brace* v. *Ormond*, 1 Mer. 409.

8. The Master having certified generally, that the examination was impertinent, the Vice-Chancellor, on motion, referred it back to the Master, to review his certificate, and state in what respects he considered the same as impertinent. *Anon*, 3 Mad. 246.

XIII. Certiorari.

1. Though the plaintiff is to examine and have publication within fourteen days after the return of the *certiorari*, to prove his suggestions, and give the Court jurisdiction, the defendant is not at liberty to examine or publish any thing to disprove it; and though the defendant should examine as soon as answer, yet the depositions shall not be published but in ordinary course; for after the plaintiff's first examination to affirm the jurisdiction, if the Court retain the cause, both parties are to examine orderly to the merits and body of the cause, and have publication, according to the ordinary rules. *Checkey* v. *Allen*, Toth. 145.

2. The plaintiff brought a *certiorari* bill; the defendant pleaded a decree in the Mayor's Court, and an enrolment, which was said to be only pronuncial, and it was referred to a Master to certify whether it was before the bill. *Cook* v. *Delebere*, 3 C. R. 67.

3. After a decree to account in the Exchequer of Chester, the defendant shall not have a *certiorari* bill, upon a pretence that his witnesses and deeds are out of that jurisdiction. *Davis* v. *Davis*, Rep. Temp. Finch. 452.

4. The plaintiff brought a *certiorari* bill to remove a cause out of the Mayor's Court, his witnesses living out of that jurisdiction, and inserted other matters relating to an account not in controversy in the Mayor's Court. After examination of witnesses, the defendant moved for a *procedendo*, insisting that if the cause should be heard in Chancery, he could not be relieved, not having any bill there; but a *procedendo* was refused, the bill containing other matters not determinable in the Mayor's Court, and the bill could not be divided: but the cause after hearing was dismissed. *Rich* v. *Jacques*, 1 C. C. 31.

5. A *certiorari* bill may be brought to remove a cause out of a Court of Equity in a county palatine, to this court. *Portington* v. *Tarbock*, 1 Vern. 178.

6. And where the lands, sued for, were in the county palatine of Durham, and one of the plaintiffs lived in the county of Middlesex, and the other was an infirm old man, and not able to follow the suit, a *certiorari* was granted to the Chancellor of Durham, to certify the proceedings depending before him, into this court. *Hilton* v. *Lawson*, Cary, 68.

7. If upon a *certiorari* bill the cause is brought on to a hearing, the Court, if it thinks fit, may make a decree, or send it back to the Mayor's Court, to be determined there; and sometimes the court sends it back after publication passed, and a *subpœna* served to hear judgment, and before the hearing. *Stephenson* v. *Houlditch*, 2 Vern. 491.

8. Where a *certiorari* bill removing a cause from the Mayor's Court was brought to a hearing, the bill in the Mayor's Court was first opened, then the answer; and then the counsel in the Mayor's Court stated their case and proofs, after which the plaintiffs in this Court made their defence. *Clifford* v. *Boston*, 1 Dick. 34.

9. A *certiorari* to remove a cause from the Court of Great Sessions in Wales, to

the Court of Exchequer, was directed to the Justices. *Parry* v. *Griffith*, 2 Anst. 480.

10. A writ of *certiorari* is returnable in the court from whence it issues. *Woodroffe* v. *Kinaston*, 1 Dick. 233.

11. Where the tenor of a record, instead of the record itself, is removed by *certiorari* out of an inferior court, it is erroneous, as no proceedings can be had upon it. *S. C.* 2 Atk. 317.

12. Where a *replevin* is in a Court of Record, it may be removed by *certiorari* either from the Court of King's Bench or from the Court of Chancery. *Ibid*, 2 Atk. 317.

13. A *habeas corpus* and a *certiorari* differ: the *habeas corpus* removes the cause *cum causa*, and the party must declare *de novo* in the superior court; but on the *certiorari* he must proceed on the record. *Ibid.*

14. Where a *certiorari* issues in order only to use the record as evidence, then the tenor, if returned, is sufficient, and countervails the plea of *nul tiel* record; but when the record itself is to be proceeded upon, the record must be returned. *Ibid.*

15. Whether it be before judgment or afterwards, makes no difference; in both cases the record itself must be removed. *Ibid.*

XIV. Clerks in Chancery.

1. The Six Clerks were formerly the proper and only Attornies of the Court, but the business encreasing, they have had clerks established under them, the number of whom was finally limited to sixty. *Hill* v. *Sewell*, 2 Br. P. C. 547. *Twort* v. *Dayrell*, 13 Ves. 197.

2. Where the defendant applied to the Six Clerk for a subpœna for costs, for want of bill filed, and by mistake he made out a *subpœna ad respondendum*, upon which the plaintiff got costs, the Court ordered that neither party should have process for costs against the other, but that defendant should have a *subpœna* against the Six Clerk for the costs to which she was originally entitled from the plaintiff. *Frankblanck* v. *Metham*, Cary, 110.

3. The Clerk in Court may proceed in Chancery for his bill, either against the solicitor or his client, though he cannot sue the client at law, for want of a retainer. *Anon*, Mos. 172.

4. A bill will lie by a Clerk in Court, against a solicitor, for payment of a certain sum, stated as the amount of the plaintiff's bill for fees and disbursements. *Barker* v. *Dacie*, 6 Ves. 681.

5. Voluntary release by a party to his adversary is not to defeat the Clerk in Court of his lien for costs. If the suit had ended on a *bona fide* compromise for a reasonable consideration paid, it would have been otherwise. *Ex parte Stanley*, 2 Ves. 25. *And see Taylor* v. *Lewis*, *Ib.* 111.

6. Whether a Six Clerk can stop proceedings until paid fees which had been paid to a Sixty Clerk who had absconded —*Quære*. *Taylor* v. *Lewis*, 2 Ves. 111.

7. It seems a Sixty Clerk cannot be changed at pleasure. *Ibid*, 2 Ves. 112.

8. A party was restrained from paying any part of the bill of fees, &c. due to her solicitor, until the Clerk in Court, employed by him in the cause, was fully paid his bill. *Stevens* v. *Avery*, 1 Dick. 224.

9. Under the order 18th June 1668, regulating the office of Six Clerks, they are entitled to receive their proportion of the fee from the Sworn Clerk, though he has given credit to the client. *Ex parte the Six Clerks*, 3 Ves. J. 589.

10. Where a defendant, one of the Sworn Clerks in Court, is in contempt for not answering, the practice is not, as formerly, to apply for an order to suspend him, but for a sequestration *nisi*. *Corbyn* v. *Birch*, 2 Dick. 635.

11. If the party's Clerk in Court be dead, no process can be taken out against the party until he has appointed a new Clerk in Court, and a *subpœna ad faciend. attornat.* must be taken out for that purpose. *Ratcliffe* v. *Roper*, 1 P. W. 420.

12. One of the Sworn Clerks of the Court of Chancery filed a bill against all the Six Clerks of the same court, praying that an agreement entered into by them for regulating the practice of the office might be set aside, that an order of the Master of the Rolls confirming the same might be rescinded, and that certain other regulations for transacting the business of the office might be established. A demurrer for that the plaintiff had shewed no title in himself to call upon the Court to interfere respecting any of the matters in his bill mentioned, was allowed. *Hill* v. *Sewell*, 2 Br. P. C. 541.

(*And see further* p. 322, *ante*.)

XV. (1) COMMISSION TO EXAMINE WITNESSES.

(*a*) *Where granted.*

1. Upon suggestion, without affidavit that, if certain persons should die, their death would be very prejudicial to the plaintiff's title, commission issued to examine them, although the defendant had not answered. *Bagnold* v. *Green*, 1 Dick. 2. Cary, 67.

2. Upon a *subpœna* in a suit to perpetuate testimony, the defendant appearing, consented to join in commission, so as the Lord Bacon orders touching examination of witnesses in perpetual testimony might be observed; but upon motion it was ordered that the commission should be made general, as in like cases where the parties join, for that it seemed to the Court the Lord Bacon's orders were intended to be observed only where the plaintiff hath a commission alone. *Lord Dacres* v. *Southwell*, Cary, 122.

3. The plaintiff is first entitled to sue out a commission to examine witnesses, and if the defendant hath an opportunity to examine his witnesses, and doth not, he is not entitled to a new commission; but if the plaintiff neglect to sue out a commission, the defendant may. *Barnesley* v. *Powell*, 2 Dick. 793. 3 Atk. 593.

4. Leave given to a plaintiff, on a bill to perpetuate the testimony of witnesses, to sue out a commission to examine witnesses, though no answer were come in, the defendant having stood out all process of contempt. *Coveney* v. *Athill*, 1 Dick. 355.

5. The old practice to insert in the decree a direction, that the Master is to be armed with power to examine witnesses, which still prevails in the Exchequer and other courts of equity, has been long disused in Chancery: by the present course the Master may certify, that a commission is necessary; which then issues of course. *Parkinson* v. *Ingram*, 3 Ves. 607. *Sandford* v. *Biddulph*, 9 Ves. 36.

6. A defendant, in an information for breach of the navigation laws, is not entitled to a commission to examine witnesses abroad, on motion made to the Court of Exchequer, under the 13th and 14th c. 2: pending the progress of the proceedings under the information. *Attorney-General* v. *Laragoity*, 2 Price, 166.

7. In a suit to obtain testimony for defence of a suit at law, the Court will not grant a commission to examine witnesses abroad, unless on good grounds shewn, although no injunction is moved for. *Shedden* v. *Baring*, 3 Anst. 880. *And see Cojamaul* v. *Verelst*, 4 Br. P.C. 407.

8. After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses, in order to falsify the defendant's examination, this tending to multiply causes, and make them endless. *Smith* v. *Turner*, 3 P. W. 413.

(*See further* pp. 402* 481, *post.*)

(*b*) ——— *Witnesses abroad.*

1. Commission to examine witnesses abroad, upon new matter stated at the hearing, and not in issue before, granted upon terms of not delaying an action directed to be tried at law. *Newland* v. *Horseman*, 2 C. C. 74.

2. The course of the Court is, that where an account must necessarily be directed at the hearing, a commission before the hearing shall never be granted to examine witnesses beyond sea, when the granting such commission will delay the directing the account; and the proper time to apply for such commission is after the account is directed. *Adams* v. *Bohun*, Barn. 270.

3. The ground for granting a commission beyond sea to examine witnesses, must depend upon the special circumstances of the case; but it is sufficient to shew that there is probable cause for granting such commission. *Jessop* v. *Duport*, Barn. 192.

4. A commission prayed for examining witnesses in the West Indies (as the facts arose there,) and to stay the defendant's proceeding at law on a policy; Lord Hardwicke, C. granted the commission and the injunction, as the voyage was at and from Carthagena to Porto Bello, and the facts must necessarily have arisen in the West Indies. *Chitty* v. *Selwin*, 2 Atk. 359.

5. A married woman living in America, being entitled to a legacy, a commission to examine her would have been directed; but as she had been examined under a commission issued by the American government, that was considered sufficient. *Campbell* v. *French*, 3 Ves. 321.

6. Commission granted to examine

witnesses in an enemy's country. *Cahill* v. *Sheppard*, 12 Ves. 335.

7. Application for a commission to examine witnesses in India, to prove the testator's intention, that his wife should take legacies given her by two codicils almost identical in their expressions, refused, except upon her oath that she believed such to have been his intention. *Coote* v. *Coote*, 1 Br. C. C. 448.

8. Motion for a commission to examine witnesses abroad, must be upon affidavit that the matter arose there, or upon reading sufficient to shew it out of the answer. *Akers* v. *Chancy*, 2 Br. C. C. 273.

9. In order to obtain a commission to examine a witness abroad, it is not necessary to state the points to which he is to be examined, it is sufficient to state his name, that his evidence is material, and that he is abroad. *Oldham* v. *Carlton*, 4 Br. C. C. 88.

10. Nor is it necessary to state the names of the witnesses to be examined. *Rougemont* v. *The Royal Exchange Company*, 7 Ves. 304.

11. A commission to examine witnesses abroad, cannot be obtained without an affidavit of materiality, although the suit is merely to obtain evidence to support an action. *Anon*, 1 Anst. 201.

12. On a bill for injunction, the Court of Exchequer will not grant a commission to examine a witness in India, without a special affidavit of materiality. *Moody* v. *Steele*, 2 Anst. 386.

(c) *Second Commission, where granted.*

1. A witness alleged he had mistaken himself at a commission. The commission being returned, he came to London, and made oath that he was surprised. A special commission issued to re-examine the witnesses, which was done accordingly; but this special commission was superseded by motion, by advice of the Master of the Rolls with the Six Clerks, as contrary to the course of the Court. *Randal* v. *Richford*, 1 C. C. 25. 2 Freem. 178.

2. Where some of the defendant's witnesses were served with precepts from the commissioners, but did not appear to be examined, a new commission was granted to the former commissioners, at defendant's charge, but for the examination of his witnesses, as well those who made default as others. *Shepard* v. *Shepard*, Cary, 159.

3. The defendant joined in a commission for the examination of witnesses, and had commissioners present at the execution of it, but had not any interrogatories. An application of the defendant for a new commission was refused, although made upon affidavit that he had neither seen nor knew the contents of the depositions. *Mineve* v. *Row*, 1 Dick. 18.

4. In a subsequent case, the application was granted, but the Master was to settle the interrogatories. *Earl of Coventry* v. *Countess of Coventry*, 1 Dick. 25.

5. Where a party hath a commissioner present at the examination, he shall not have another commission to examine as to the merits; but upon a suggestion that exhibits, after being proved before the commissioners, had been altered, a new commission was granted to examine as to that point. *Richardson* v. *Lowther*, 1 C. C. 273.

6. But where the commissioners of one party are from illness unable to attend, a new commission will be granted; but the affidavit must state that the party or his agents have not seen, heard, or been informed of the depositions on the other side. *Geast* v. *Barber*, 2 Br. C. C. 1.

7. If the defendant hath an opportunity to examine his witnesses under the plaintiff's commission, and doth not, he is not entitled to a new commission. *Barnesley* v. *Powell*, 2 Dick. 793. 3 Atk. 593.

8. But where the plaintiff's commissioners closed the commission before the proper time, by mistake, and without the knowledge of the defendant or his solicitor, the Court, after the depositions had been seen, granted a new commission, but confined the defendant to the proving exhibits, and examining to credit, and cross-examining a witness examined under the former commission, but he was not to examine new witnesses. S. C. 3 Atk. 593.

9. And where the depositions had been published by consent, before the usual time, in order to expedite the office copies, but the defendant had not seen, read, heard, been informed of, or was acquainted with the depositions, a new commission was granted. *Turbot* v. ———, 3 Ves. 315.

10. Order, after publication, for liberty to take out a new commission and examine witnesses by general interrogatories as to

the credit of a witness who had been cross-examined, and as to such particular facts only as are not material to what is in issue in the cause. *Wood* v. *Hamerton*, 9 Ves. 145.

And see White v. *Fussell*, 19 Ves. 127.

11. A bill to perpetuate testimony of a *modus* being amended by adding an essential party, after the commission executed, but before publication, a new commission was granted. *Biddiford* v. *Partridge*, 3 Anst. 646.

12. After publication in the original cause, plaintiffs in the cross cause moved for a commission to examine witnesses, which was granted, though it was urged, that it would tend to cure the defects of that evidence, which had been adduced in the original suit. *Scott* v. *Allgood* (*Exch.*) Prac. Reg. 87.

(*d*) *Execution and Return of.*

1. The Court directed a commission to examine witnesses abroad, to be delivered to a Master, to send the same by the post, and when executed, to receive it back again. *Newland* v. *Horseman*, 2 C. C. 76.

2. Where the commission is executed abroad, the sending of it out, and the receiving of it back, must be proved by affidavit. *Bourdillon* v. *Alleyne*, 1 Br C. C. 100.

3. A commission to examine witnesses residing in an enemy's country, must be executed at the nearest neutral port. —— v *Romney*. Amb. 62.

And see Cahill v. *Shepherd*, 12 Ves 335.

4. A commission being granted to examine witnesses at Algiers; the plaintiff died, by which, in strictness, the suit abated, but the witnesses were examined there before notice of the plaintiff's death: the examination held regular, though one of the witnesses was yet living. *Thompson's case*, 3 P. W. 195.

5. Feme sole sues out a commission to examine witnesses. Before they are examined, she marries. Their depositions ordered to stand. *Winter* v. *Dancie*, Toth. 99.

6. Witnesses examined on the defendant's part, after the plaintiff's commissioners were gone away with the commission. *Trevor* v. *Treveman*, Toth. 189.

7. Where a party hath had a commissioner present upon the first examination, he must not examine upon new interrogatories by another commission, as to the merits of the cause. *Richardson* v. *Louther*. 1 C. C. 274.

8. Commission executed after four in the afternoon of the day on which it was returnable, held to be regular. *Moreton* v. *Moreton*, 1 Dick. 21.

9. Where the witnesses to be examined *de bene esse*, were about to go abroad, the defendant was ordered to accept four days' notice of the execution of the commission. *Lee Dicher* v. *Power*, 1 Dick. 112.

10 A plaintiff may serve any two of defendant's commissioners with notice of the execution of the commission, and is not tied down to such only as the defendant should choose. *Anon*, 3 Atk. 633.

11. Giving notice of the execution of a commission to examine witnesses, to the plaintiff in an interpleading bill, and not to the other defendant, held to be good. *Duncannon* v. *Campbell*, 2 Dick. 648. *Brymer* v. *Buchannan*, 1 Cox, 425.

12. If a commission be taken out in the vacation, and has not a certain return, but only *sine dilatione*, it does not expire the first day of the following term, but may be continued in execution the whole of the next term to the last return. *Barnsley* v. *Powell*, 3 Atk. 593.

But see Jones v. *Mitchell*, 2 Vern. 197.

13. Upon motion for a commission, to take the defendant's examination, the time of the return is left to the Master, and not limited by the order. *Hanby* v. *Emmet*, 5 Ves. 683.

14. Depositions suppressed, because the solicitor's clerk in the cause did write as a clerk to the commissioners in the execution of the commission. *Newte* v. *Foot*, 2 C. R. 393.

S. C. Newton v. *Foot*. 2 Dick. 793.

15. Commission having been executed and sealed, with the depositions, by the commissioners, was lost on the road, and picked up by two travellers: on affidavit that they had not opened, or altered the same, the depositions were ordered to be received. *Smales* v. *Chayter*, 1 Dick. 99.

(*e*) *Commissioners.*

1. Where commissioners on one side

certified partiality in the commissioners on the other, the court said such collateral certificates were not required of the commissioners, who ought to certify the matters committed to their charge, and if there be misdemeanor, the party wronged should make affidavit thereof.
Cary, 43.

2. Commissioners to be examined on occasions of partiality and practice. *Morgan* v. *Bowdler*, Toth. 40.

3. Commissioners are not to consider themselves agents of the parties by whom they are nominated. *Watson* v. *The Duke of Northumberland*, 11 Ves. 160.

4. Solicitor in the cause cannot be a commissioner, or the depositions will be suppressed. *Fricker* v. *Moore*, Bun. 289.
Ex parte Selwyn, 2 Dick. 563.

5. But the Court refused to suppress depositions where one of the commissioners was a solicitor of a person having property, which might be involved in the same question as the one in issue in the cause. *Whitelocke* v. *Baker*, 13 Ves. 513.

6. Commissioners taking depositions are not bound to examine each witness to all the interrogatories. They have a discretion to exercise, and may reject what is not legal evidence. *Whitelock* v. *Baker*, 13 Ves. 511.

7. Commissioners, under a commission to examine witnesses, may adjourn. *Brown* v. *Vermuden*, 1 C. C. 282.

8. A special commission was granted to examine the quantity and value of certain ore, &c. The Six Clerks appointed time and place; *per cur.* the time and place are only for the first meeting of the commissioners; but after, they may adjourn to another time or another place. *Thornborough* v *Baker*, 1 C. C. 283.

(*And see* p. 483, *post.*)

XV. (2). Commission of Rebellion.

1. Where one of the commissioners permitted the defendant, taken on a commission of rebellion, to escape, he was himself ordered to stand committed to prison till he brought in the defendant. *Sacheverell* v. *Sacheverell*, Toth. 38.

2. In a similiar case, the commissioners were ordered to be committed till they paid the debt. *Nelson* v. *Yelverton*, Toth. 39.

3. Where the commissioner took the defendant upon a commission of rebellion, and, for safe keeping, delivered him to the high sheriff, who took charge of the prisoner accordingly, and afterwards refused to deliver him to the commissioners, or to bring him into Court, a day was given the sheriff to bring the body of the defendant into Court, upon pain of ten pounds. *Evans* v. *Rees*, Cary, 150.

4. Commissioners on a commission of rebellion for the non-performance of a decree, have it in their discretion to take or refuse bail, but if they refuse, they ought to bring the party into Court without delay. *Inglet* v. *Vaughan*, 1 C. R. 261.
1 Dick. 7.

5. A defendant against whom the serjeant at arms was ordered to go, for not producing deeds pursuant to a decree, being a lodger and keeping himself locked up, except on a Sunday, so that the serjeant at arms could not execute his warrant, and the plaintiff being, as it was supposed, without remedy, applied by motion that a commission of rebellion might issue, to commissioners who could break locks, &c. but it was denied; it being a writ, which if warranted, issues of course. *Edwards* v. *Pool*, 2 Dick. 693.

6. A commission of rebellion may be executed on a Sunday, though it issued but for want of an appearance, or for want of an answer only. *Ex parte Whitchurch*, 1 Atk. 57.

7. But the execution upon a Sunday will be disapproved of, unless in cases of urgent necessity; and if executed in church, the Court would punish the commissioners, and they would also be punishable at law. Prac. Reg. 131.

8. By the course of the Court a commission of rebellion issues only to the sheriff of Middlesex. 2 P. W. 657. (*n*).

9. If an action at law be brought in respect of irregularity in issuing a commission of rebellion, the Court will enjoin it. The irregularity being to be examined into by this Court only. *Bailey* v. *Devereux*, 1 Vern. 269.

10. If a defendant be taken upon a commission of rebellion, which issued irregularly, he shall have his costs.
Ibid.

XVI. Consolidating Suits.

1. Causes in equity cannot be consolidated till after a reference to the Master. *Forman* v *Blake*, 7 Price, 654.

2. A reference to ascertain whether several tithe causes should be consolidated, is not of course before answer. *Keighley* v. *Brown*, 16 Ves 344

XVII. Contempt.

(a) *Process of*

(*See* Div. VIII p. 386* *ante*).

1. Process of contempt to be made out in the proper county, where the party is resident, and the prosecutor to endeavour to procure the first and precedent process to be executed, or else to pay costs —*Ordo Curiæ*, 1 C R 53
Beames, Ord Ch. 60

2. It appearing by affidavit, that the defendant was both senseless and dumb, and therefore could not instruct his counsel to draw his answer, it was ordered that no attachment, or any process of contempt should be awarded against him for not answering, without special order of the Court *Altham* v *Smith*, Cary 132.

3 Contempt towards commissioners of charitable uses, punishable by the great seal *Commissioners of Charitable Uses* v. *Hicks*, 1 Dick. 61.

4 Process of contempt stayed against the husband, for want of the wife's answer, she having left him. *Lloyd* v. *Basnet*, 1 Dick. 143

And as to process of contempt against a Feme Covert, see p. 372, 380* *ante*.

5. If the defendant is in contempt for not answering, and on motion he obtains time, if it be not expressly ordered, that all contempts in the mean time shall be stayed, the plaintiff may go on, and prosecute the defendant for not answering *Anon*, 1 Vern. 104.

6. If a second or any further answer be put in by a defendant in contempt, and proves insufficient, the plaintiff may resume the process where it left off *Anon*, 1 C. C. 238.

Lord Abergavenny v. *Lady Abergavenny*, Kel. 5.

Child v. *Brabson*, 2 Ves. 110.

7. Where the defendant is in contempt, under an order for a messenger, and puts in his answer, to which exceptions are allowed, the plaintiff, not having accepted costs, may immediately proceed upon the old process, without subpœna or notice for a better answer, but if the defendant is in custody, the process is discharged pending the reference by tender of costs.
Boehm v. *De Tastet*, 1 V. & B. 324.
Hill v. *Turner*, 2 V. & B 372.

8. The same where the defendant, in contempt to a serjeant at arms for not answering, puts in an insufficient answer, if the plaintiff or his Clerk in Court accepts the costs, this purges the contempt, and in the process for a further answer, the plaintiff must begin *de novo* therefore it is usual and proper for the Clerk in Court to refuse accepting the costs of the contempt, if tendered, till after he has seen or is advised as to the sufficiency of the answer *Anon*, 2 P. W. 481.

9 After answer reported insufficient, plaintiff, if he has not accepted costs, may proceed upon his old process of contempt without any new order. *Coulson* v *Graham*, 1 V & B 331.
Bailey v *Bailey*, 11 Ves. 151.

10. Defendant in custody for want of his examination, is discharged immediately on putting it in, but if on reference it prove insufficient, the plaintiff, not having accepted the costs, may proceed from the last process, *Bonus* v *Flack*, 18 Ves. 287.

11. The practice of personal service as a foundation for process of contempt dispensed with where the party must have notice of what is demanded of him, as upon a short order for execution of a decree made while the party was present in court *Rider* v. *Kidder*, 12 Ves. 202.

12 Also in another case, under the circumstances, where the party had declared he would not execute an order, and had absconded to avoid it *De Manneville* v. *De Manneville*, 12 Ves 203.

(b) *Defendant under Criminal Charge.*

1. A party being in Newgate under a criminal sentence, cannot be brought up under a writ in mesne process, for the purpose of charging him, the leaving of such writ with the sheriff sufficiently charging him *Johnson* v. *Aylet*, 2 Dick. 658.

2. Where it appeared upon a special return to an attachment that the defendant was under a sentence of imprisonment for felony, the court refused to issue pro-

cess, as upon a return of *non est inventus.* —— v. *Kirkpatrick*, 3 Ves 471.

3. Nor can such defendant be removed by any process of the court, until the expiration of his sentence, a motion therefore for *habeas corpus* was refused. *S. C. Rogers* v. *Kirkpatrick*, 3 Ves. 573.

4. Defendant in Newgate, under a criminal sentence, having been brought up by *habeas corpus*, for not putting in his answer, was remanded to Newgate. As to the farther proceeding—*Quære. Lloyd* v. *Passingham*, 15 Ves. 179.

5. Order that defendant, a prisoner in Newgate under sentence for forgery, being brought up for want of answer, should be turned over to the Fleet, and then carried back to Newgate with his cause. *Moss* v. *Brown*. 1 V. & B. 78.

For taking bills pro confesso against such defendant, see Div. LXII. *post, and for issuing sequestration, see* Div. LXXV

(c) *Proving.*

1. A party ordered to be examined touching his contempt. *Harvey* v. *Harvey*, 2 C. C. 82.

2 Where a man is to be examined for a contempt, although the rule of court be, that he shall be examined in four days, or stand committed, yet, if the party be in the country, he shall have a commission to take his examination. *Anon*, 1 Vern. 187.

3. An attachment being taken out against the defendant in Ireland, since he could not be examined in person to the contempt, a commission was granted into Ireland to examine him *Anon*, Mos. 85

4 Reference to see if particular persons were guilty of a contempt. *On behalf of the Crown*, 1 Dick. 101.

5. A prosecutor may take out a commission to prove a contempt, and the contemnor can name but one commissioner, and cannot examine witnesses, but may cross examine the prosecutor's, but the Court, on application, will give him leave to examine witnesses to some special points. *Anon*, Mos. 312.

6. One witness sufficient to prove a contempt. *Sands* v. *Knighton*, Toth. 41.

But see Anon, 3 Atk 219.

7. Upon an ordinary contempt a commission was had by the plaintiff, who proved the contempt positively by one witness. The defendant alleged the process was by mistake served on a wrong person, and prayed a commission to examine to it, and it was granted. *Hammond* v. *Shelley*, 2 C. C 100.

(d) *Arrest and Commitment.*

1. A man committed for terrifying a witness about to be examined. *Partridge* v. *Partridge*, Toth. 40.

2. Master having made his report of what was due from tenant for rent, on affidavit of service of the report, and of demand, and non-payment of the rent. tenant ordered to stand committed. *Manly* v. *Eyton*, 1 Dick. 183.

3. A sheriff's officer was committed for a breach of franchise, in executing a writ within the liberty of the Rolls, without permission of the Master of the Rolls. *Ex parte Carpenter*, 1 Dick. 334.

4. The mayor of Coventry committed, for not obeying an order of the court. *The Attorney-General* v *The Mayor of Coventry*, 2 Dick. 781.

5 When a person is committed for a contempt of the Court, it is the duty of the gaoler to keep him a close prisoner. When the Court commits a man for contempt they will not direct, that he shall be kept a close prisoner, till the gaoler has been in default, in letting him have the benefit of the rules. *Ex parte* —— Barn. 374

6. The Court refused to commit a prisoner, in contempt for non-payment of money, as a close prisoner for a further contempt. *Call* v *Mortimer*, 4 Br. C. C. 89.

7. Advertisement inserted in the public prints, that whoever should discover, and make legal proof of the marriage in question shall have 100*l*. reward, adjudged a contempt of the Court, and the party procuring it committed. *Pool* v. *Sacheverel*, 1 P. W. 676.

8. Two printers committed to the prison of the Fleet, for publishing a letter touching the proceedings of this Court in causes. *Roach* v. *Garvan*, 2 Dick. 794.

S. C. Anon, 2 Atk. 469.

9. The publisher of an advertisement in a public journal, relating to an answer filed in this court, committed for the contempt. *Anon*. 2 Ves. 520.

And see Anon, 2 Atk. 472.

10. But where parties who are interested in an order for the appointment of a receiver, print it with the recital of the

several facts in the cause relevant to the order, and disperse it among the tenants this is no contempt, though very improper. *Barker* v *Hart*, 2 Atk. 488.

11 Commitment in the jurisdiction of lunacy, for a contempt by the publication of a pamphlet. ignorance of the contents will not excuse the printer *Ex parte Jones*, 13 Ves 237.

12. An order was obtained, without notice, for the commitment of the defendant for a contempt, in abuse of the process of the Court, unless he shewed cause to the contrary on personal service. *Van* v. *Price*, 1 Dick. 91.

13. A similar order *nisi* was made, except that leaving the order at defendant's house was ordered to be good service *Williams* v *Jones*, 2 Dick 477

14 Though contemptuous words were spoken of a subpœna, and the person serving is severely beaten, yet as these facts were proved by the oath of a single person only, the Court would not in the first instance order the party to stand committed, but made a rule upon him to shew cause why he should not stand committed *Anon*, 3 Atk 219.

15. Parties assaulting a deputy messenger of the Court in discharge of his duty, will be committed for contempt upon the affidavit of the deputy alone. *Elliot* v. *Halmarack*, 1 Mer. 302.

16 The Court will commit a party guilty of an act of violence in the register s office. *Ex parte Burrows*, 8 Ves. 535.

17. Where a defendant was ordered to be committed for contempt, but could not be found, and a sequestration issued, upon the return of the sequestrators' *nulla bona*, liberty was given to execute the warrant of commitment *Deardan* v. *Halsey*, 1 Dick. 31.

18 After the plaintiff at law had obtained judgment against P. and an award of execution on the *scire facias* to revive a judgment, P. obtains an injunction on the common terms of giving a release of errors, and afterwards brings a writ of error in the Exchequer chamber · this is a breach of the order and a contempt of the Court. *Anon*, 3 Atk. 297.

19. But the release having been given twelve years previously to the motion, the Court would not consider it as a contempt, but directed only that the proceedings on the writ of error should be stayed. *Ibid*, 3 Atk. 298.

20. Where a person attends a cause to which he is a defendant, and has notice of the decree, by being present when it was pronounced, if he does any act in contravention of it, he is guilty of a contempt, and liable to be committed to the Fleet. *Ship* v. *Harwood*, 3 Atk 564.

21. Petitioner was arrested on a Sunday by Lord Chancellor's tipstaff under a warrant from the Court for a contempt in disobeying an order the arrest was held to be lawful. *Ex parte Whitchurch*, 1 Atk. 55.

22. A man may surrender himself voluntarily to any warrant upon a Sunday, the order of commitment is, that the party do stand committed, and if present when the order is pronounced, he is a prisoner instantly. *Ibid.*

23 Judgment in error for want of an original writ, there having been a petition and order at the Rolls for one to issue, but the order not served, the defendants ordered to consent to set it aside, but a commitment for contempt in entering it up refused *Pengree* v. *Jonas*, 2 Br. C. C 141.

24. The Chancellor declared, that in future, if he should receive a private letter on the subject of a cause, he would consider whether the writer ought not to be committed. *Tagleton* v. *Coventry*. 8 Ves. 467.

25. A purchaser under a decree may be committed for disobeying an order to pay in the purchase money. *Lansdown* v. *Elderton*, 14 Ves. 512.

26 For the purpose of commitment under a short order to pay money, the person serving the order must have authority to receive the money. *Wilkins* v. *Stevens*, 19 Ves. 117.

27 Plaintiff cannot obtain an order to commit upon a fourth insufficient answer, unless he has a report of the insufficiency of such fourth answer, even though the defendant has filed a fifth answer. *Const* v. *Ebers*, Coop. 262.

28. In all cases of commitment for contempt there must be an affidavit of service. *Whitehead* v. *Thistlewait*, 3 Atk. 619.

29. No commitment on a foreign affidavit, as perjury cannot be assigned. *Musgrave* v. *Medex*. 19 Ves. 652.

30. Under a joint order against two, for payment of costs, or commitment, the party may proceed against both or either. *Ex parte Bishop*, 8 Ves. 333.

(e) *Escape or Discharge of Person committed.*

1. The Court of Chancery granted a *supersedeas* to the Warden of the Fleet to discharge the prisoners. *Caldwel* v. *Wheat*, 1 C. R. 90

2. One committed in equity for a contempt in rescuing another taken on the Lord Chancellor's warrant, is not liable to an escape warrant. *Pain's case*, 1 P. W 439.
S. C. *Hinchcliffe* v. *Payne*, 1 Sti 99.

3. Escape lieth not against the Warden of the Fleet, for escape of one in execution for breach of a decree. *Anon*, 2 Free. 146.

4. The defendant, committed to the Fleet for not performing a decree and a sequestration, and the plaintiff put in possession of the lands, shall not be discharged, till the lands are assured to the plaintiff, or money and damages satisfied. *Perryman* v. *Dunham*, 1 C. R. 152

5. Publisher of an advertisement, as to proceedings in Court, committed for contempt, was discharged on submission, and disclosing all the circumstances under which the advertisement was published. *Anon*, 2 Ves 520.

6. Defendant in contempt, discharged on putting in his answer and before the costs were ascertained, upon depositing the utmost sum to which they would amount, subject to taxation. *Broughton* v. *Martyn*, 4 Br C. C 296.

7. Defendant taken up on the process for want of an answer, is, upon putting in an answer, and paying or tendering the costs of the contempt, entitled to be discharged without waiting for the Master's report that it is sufficient. *Child* v. *Brabson*, 2 Ves. 110
Waters v. *Taylor*, 15 Ves. 418.
See also Boehm v. *De Tastet*, 1 V & B 324
Hill v. *Turner*, 2 V. & B. 372.
Bailey v. *Bailey*, 11 Ves 151.

8. But not where the defendant has put in three insufficient answers; he must then answer in custody. *Bailey* v. *Bailey*, *Ibid.*

9. Defendant in custody for want of his examination is discharged immediately upon putting it in. *Bonus* v. *Flack*, 8 Ves. 187.

10. Upon an order that a defendant shall be released from the Fleet, on paying the costs of his contempt, or a tender of the same, the Warden of the Fleet must release him on an affidavit of a tender of the costs. *Anon*, 1 Mad. 109.

11. A party in custody for a contempt, in disobedience of the process of the Court, will not be discharged, without undertaking not to bring an action, when by his own device the process had been served, in point of fact, on another person of the same name. *Bland* v. *Buckley*, 6 Price, 34.

12. The Court will order a person who has been in custody for any given time, under an attachment for a contempt of its authority in disobeying an injunction, to be discharged on motion, if the portion of his imprisonment be shewn to its satisfaction to be commensurate with the degree of the offence, on the terms of paying the costs of his contempt, notwithstanding the application be opposed on the part of the plaintiff, *Adlard* v *Smith*, 6 Price, 321

13. General rule that parties must clear their contempt, before they can be heard. *Vowles* v. *Young*, 9 Ves. 173.
Anon, 15 Ves. 174.

14 Parties under commitment for contempt, cannot be heard except on petition *Nicholson* v. *Squire*, 16 Ves. 259.

(f) *Waiver or Discharge of*

1 An attachment after a decree for dismission, is in nature of an execution at law, and a general pardon may pardon the contempt, but not the debt. *Bartram* v. *Dannett*, Rep T. Finch, 253.

2 Contempt discharged by a general pardon. *Anon*, 1 C. C 238.

3. A general act of pardon, though with an exception of contempts, extends to pardon contempts in marrying infant wards of a court of equity. *Phipps* v. *Earl of Anglesea*, 1 P. W. 696.

4 Generally, a party cannot be heard until he has cleared his contempt, but a step taken by the other party waves the contempt, except as to the right to costs, as costs in the cause, and not to be obtained by process of contempt. *Anon*, 15 Ves. 174.

5. A defendant having filed an answer and demurrer, after a *cepi corpus* returned on an attachment for not answering, and order for a messenger, obtained before the demurrer and answer (of which the plaintiffs had bespoken an office copy) had been taken off the file, was discharged

costs. *Curzon* v. *De la Zouch.* 1 Swan. 189 (*n*).

6. The right to process under an undertaking for a serjeant at arms, &c. immediately on exceptions to the report of an insufficient answer disallowed, is waved by plaintiff's taking out a *subpœna* for a better answer, and excepting to the report, he thereby entitling defendant to eight days after the exceptions are disposed of. *Agar* v. *The Regent's Canal Company*, Coop. 221. 19 Ves. 379.

XVIII. Costs.

(a) Security for—(1) When given.

1. If the plaintiff resides in another kingdom, he must give security to pay costs. *Gibson* v *Scudamore*, Mos. 7.

2. Plaintiff, consul abroad, not to give security for costs. *Colebrook* v. *Jones*, 1 Dick. 154.

3. Where the defendant usually resided at Oporto, and had not answered, but was in contempt, the court ordered him to give plaintiff security for costs until answer or further order. *Anon.* Bun. 183

4. The Court will compel a Scotchman to give security for costs as a foreigner. *Ker* v. *Duchess of Munster*, Bun 35.

5. Application that the plaintiff, living in Ireland, should give security for costs, will be granted, if made before answer. *Craig* v *Bolton*, 2 Br C. C. 609

6. Plaintiff resident in England, the suit being brought in the Irish Court of Chancery, was ordered to give security for costs, after appearance of the defendant, but before answer. *Stackpoole* v. *O'Callaghan*, 1 B. & B. 566.

7. The Court will not order that a plaintiff residing abroad shall give security for costs, where there is a co-plaintiff residing in England *Winthorpe* v. *Royal Exchange Assurance Company*, 1 Dick. 282. *Walker* v. *Easterby*, 6 Ves. 612.

8. Plaintiff is not compellable to give security for costs, unless he states himself, or it be sworn, that he is resident, or going to reside abroad. The mere description in the bill is not sufficient to call for security. *Green* v. *Charnock*, 1 Ves. J. 396. 3 Br. C. C. 371. 2 Cox. 284.

9. Affidavit to ground an order for plaintiff to give security to answer costs, when it doth not appear by the bill that he lives abroad out of the jurisdiction of the Court, if he hath left the kingdom since filing the bill, must go on and say, to settle abroad. *Anon*, 2 Dick. 775.

10. The simple fact that the plaintiff is gone abroad, is not a sufficient ground to compel him to give security for costs. *Hoby* v. *Hitchcock*, 5 Ves. 699.

11. The Court of Exchequer refused a motion, that the plaintiff should give security for costs, made on affidavit that he was about to leave the kingdom. *Adams* v. *Colethurst*, 2 Anst. 552.

12. Plaintiff, under an order of the Secretary of State, confined, and to be removed out of the kingdom, under the alien act, ordered on motion after appearance and before answer, to give security for the costs, according to the practice, where the plaintiff is resident abroad. *Selaz* v. *Hanson*, 5 Ves. 261.

13. If an ambassador's servant brings a bill, he must give security to answer costs, as being a person privileged, *Goodwin* v *Archer*, 2 P. W. 452.

14. If the plaintiff is in the service of a foreign envoy, he must give security to pay costs. *Anon*, Mos. 175.

15. The plaintiff, under the protection of a foreign ambassador, ordered to give security to answer costs. *Adderley* v. *Smith*, 1 Dick. 355.

16. Where the plaintiff was protected by the Hessian envoy, the Court of Exchequer refused to order him to give security for costs, the bill being for an injunction against defendant's proceeding at law, and the plaintiff therefore forced into Court. *Fenwick* v. *Fortescue*. Bun. 272.

17. Defendant having destroyed the subject of the suit, and absconding, shall find security for costs, or the plaintiff shall be permitted to dismiss his own bill without costs. *Knox* v *Brown*, 2 B. C. C. 186. 1 Cox, 359.

18. A plaintiff becoming bankrupt, will not therefore be compelled to give security for costs. *Anon*, 2 Anst. 407.

19. If the plaintiff does not reside where the bill describes him, the Court will compel him to give a note of his place of abode, or security for costs. *James* v. *Gilladam*, 2 Anst 552. *Collinson* v. *Cookson*, 2 Fow. Prac. 311.

20. Where it appears upon affidavit, that the *prochein amy* is insolvent, he must give security for costs. *Wale* v. *Salter*, Mos. 47. *Anon*, Mos. 86.

21. But in a later case the court refused to make a *prochein amy* in indigent circumstances give security to answer costs. *Squirrel* v. *Squirrel*, 2 Dick. 765.

22. And a *prochein amy* shall not be obliged to give security, because he is a privileged person. *Anon*, Mos. 86.

23. Where the evidence of a plaintiff *prochein amy* is necessary, and for that purpose, application is made for striking out his name as plaintiff, he must give security for costs incurred in his time. *Witts* v. *Campbell*, 12 Ves. 493.

24. *Cestuis que trust*, bringing an action in trustee's name, were ordered to give security for costs, although only co-defendants in the suit. *Annesley* v. *Sir J. Simeon*. 4 Mad. 390.

25. Where the original defendant, who had obtained security for costs, became bankrupt, his assignees, who had become parties by supplemental bill, were held entitled to call for a fresh security, as they could not have the benefit of the recognizance already entered into. *Ogborne* v. *Bartlett*, Beames on Costs, 359.

26. Security for costs, after answer, by plaintiff, who had gone abroad, refused on affidavit of his intention to return to this country, where he had left his family. *White* v. *Greathead*, 15 Ves. 2.

(2)——*When to be applied for*.

1. At law, if a defendant has taken any step in the cause he cannot have security for costs. *Anon*, 10 Ves. 287.

2. Where, on the face of the bill, the plaintiff appears to be beyond sea, or if it is in the knowledge of the defendant, he may apply for security to answer costs; but advantage should be taken of it before answer or time prayed to answer, otherwise it is waved. But at any time of the cause when it comes first to the defendant's knowledge, he may move for security. *Meliorucchy* v. *Meliorucchy*, 2 Ves. 24. 1 Dick. 147.

3. Security for costs refused, the plaintiff appearing by the bill to be residing in Ireland, and the motion not being made till after answer was filed. *Craig* v. *Bolton*, 2 Br. C. C. 609.

4. In a similar case the motion was refused, not being made till after defendant had obtained an order for time to answer. *Anon*, 10 Ves. 287.

5. A motion that defendant, residing at Oporto, should give security for costs before he returned there, refused, the answer having been filed. *Whitehead* v *Murat*, Bun. 183.

6. But where it was not discovered, till after publication, that defendant lived abroad, proceedings were staid till he gave security for costs. *Lonergan* v. *Rokeby*, 2 Dick. 799.

7. And if the plaintiff goes abroad after answer, with an intention to reside, and be domiciled abroad, the court will compel him to give security for costs, and the application being made after answer put in is no objection. *Weeks* v. *Cole*, 14 Ves. 518.

8. Where the answer is filed after the defendant has notice that the plaintiff has gone abroad, the defendant cannot move for security for costs, though the answer is so filed by mistake. *Dyott* v. *Dyott*, 1 Mad. 187.

(3)——*Form of Order for*.

1. An order was obtained, directing security to be given for costs, but the order did not direct the stay of all proceedings until such security should be given; and therefore, though no security was given, a motion of course, for a commission to examine some old witnesses, was held to be regular; but in future, the court intimated that the order in such cases should direct all proceedings to be stayed, until security was given. *Fox* v. *Blew*, 5 Mad. 147.

(4)——*Form and Amount of*.

1. When the party lives abroad, that there should be £40. to answer costs is the old rule, which, though now low, is not increased by the Court, unless upon a special case, as in this case, to the amount of £300. *Gage* v. *Countess Stafford*, 2 Ves. 557. 1 Dick. 265.

2. The Master ordered to settle what security the plaintiff, a foreign merchant residing in Spain, was to give to answer costs. *Odwyer* v. *Salvador*, 1 Dick. 372.

3. The usual security for costs by a plaintiff, residing out of jurisdiction, not increased upon special circumstances, as the distress of plaintiff, unless, the plaintiff asking some favour, terms may be imposed upon him. *Ogilvie* v. *Hearne*, 11 Ves. 598.

4. Where a plaintiff is bound to give

security for costs, each defendant employing a separate Clerk in Court, is entitled to a separate bond, but they all form but one security for £ 40. *Lowndes* v. *Robertson*, 4 Mad 465.

5. Where the plaintiff by the decree had liberty to bring an action in the Court of King's Bench, and such action was brought, the defendant applied to a judge of the Court of King's Bench, for the usual order for a security for costs, the plaintiff being, as stated in the bill, resident at Paris The judge referred the application to the Court of Chancery, and the Court ordered security to be given according to the course and practice of the Court in which the action was brought. *Despriz* v. *Mitchell*, 5 Mad 87.

6. The Court of Exchequer refused to allow a deposit of £ 40. the amount of the security, to stand in the stead of the security. *Ker* v. *the Dutchess of Munster*, Bun. 35.

(*b*) *Where ordered or decreed, generally.*

1. Where relief is decreed, costs are entirely in the discretion of the Court.
Haynes v. *Harrison*, 1 C. C. 105
Bromley v *Holland*, 7 Ves 28.
Jones v. *Coxeter*, 2 Atk 400
Vancouver v *Bliss*, 11 Ves 458.

2. It is conscience and not any authority directs the Court in giving costs. *Corporation of Burford* v. *Lenthall*, 2 Atk. 552.

3 Costs do not follow the event of the suit, where a fair question is raised. *Stames* v. *Morris*, 1 V. & B. 8. *O'Donnel* v. *Brown*, 1 B & B. 264.

4 But the party who fails is *prima facie* liable to costs, and he is bound to bring forward circumstances to repel this liability. *Vancouver* v. *Bliss*, 11 Ves. 450.

5 In general, the Court makes the unsuccessful party pay costs, unless there are particular circumstances, which induce the Court not to give costs; but it is not the course of the Court to order the costs of the unsuccessful party to be paid out of the contested property. In all suits for the recovery of an estate, the question must arise upon the construction of some instrument, and the parties litigate at the peril of costs. *Hampson* v. *Brandwood*. 1 Mad. 392.

6. There is no general rule as to decreeing costs, the Court must be governed by circumstances. *Skurret* v. *Athy*, 1 B. & B. 485.

7. A defendant endeavouring to get the plaintiff to come to an agreement with him, to take a very small sum of money in satisfaction of all his interest in the estate, is a reason for making him pay costs of suit *Avery* v. *Osborne*, Barn. 349.

8. No costs are given to a party claiming under a contract not meritorious, though recovered upon; not even to a trustee. 1 Ves. J. 55.

9. Though a defendant be decreed to pay costs, he shall not pay the costs of unnecessary parties. *Yaetes* v. *Grove*, 1 Ves. J. 280.

10 Where the plaintiffs entered into evidence perfectly unnecessary, they were directed to pay the defendants the costs of their depositions. *Shewen* v *Lewis*, 3 Mer. 167 (*n*).

11. When there has been vexatious litigation, full costs should be given; *aliter*, when a fair question has been raised for the opinion of the Court. *O'Donnel* v. *Browne*, 1 B. & B. 264.

12. Where several parties are entitled to share in one fund, and the shares of some are encumbered, so as to render inquiries or other proceedings in a suit necessary, which are not wanted as to the others, the Master will be directed, after dividing the fund, to calculate the costs of suit with reference to each share, and so to deduct them: thus each party will bear his own costs most equally. *Basevi* v. *Serra*, 3 Mer. 676.

13. When different demands arise in a cause, the costs should be arranged as the equities between the parties require. *Shine* v *Gough*, 2 B. & B 34.

14. Where the plaintiff's bill is ancillary to his legal title, as for removing outstanding terms, and he fails at law, he must pay costs in equity. *Meyrick* v. *Whishaw*, 4 Mad. 272.

15 In the Court of Exchequer, where there are conflicting cases cited, and there is a difference of opinion in the Court, they will not give costs. *Bracebridge* v. *Buckley*, 2 Price, 230.

16 Where a plaintiff prevails in nothing but what he might have insisted on at law, he shall pay costs. *Eyre* v. *Parnell*, 8 Br. P. C. 361.

17. Mentioned to be a rule, that there shall be no costs allowed a party who could never come to his right without the aid of a Court of Equity. *Walker* v. *Macpharson*, 8 Br. P C. 361.

See upon this principle, *Clifton* v. *Orchard*, 1 Atk. 610.

18. Costs are always to be allowed where the facts contested are presumed to be in the knowledge of the plaintiff that contests them. *Cockraine* v. *Blantire.* 8 Br. P.C. 361.

19. Costs not given against a party making a demand, of the payment of which there is only presumption. *Jones* v. *Turberville,* 2 Ves. J. 15.

20. Where the defendant will not admit a general right, but puts the plaintiff to the trouble and expenses of proving it, he shall pay the costs of suit. *Trinity House* v. *Ryalls,* 2 Br. P. C. 389.

21. As it may accelerate a decree, the Court postpones the consideration of costs till the cause comes back from the Master, although there may be sufficient for decreeing costs at the hearing. *Scarbrough* v. *Burton,* Barn. 255. 2 Atk. 111.

22. After a decree passed, the Court will not on a petition give the costs of the suit to a defendant, although a mere trustee, and as such entitled to them, if asked for at the hearing. *Colman* v. *Sarell,* 2 Cox, 206.

23. But where the decree directs that if a defendant gives further trouble, the plaintiff should be at liberty to apply for costs, the plaintiff may so apply by petition. *Scarbrough* v. *Burton,* Barn. 255. 2 Atk. 111.

(c) *In cases of*—(1) *Amendment.*

1. Upon payment of 20*s* costs, a bill may be amended after answer put in: but the Lord Chancellor said he would consider how to make a more adequate compensation to a defendant for the future, after a long answer, and other necessary proceedings on the part of the defendant. *Deggs* v. *Colebrooke,* 1 Atk. 396.

2. Plaintiff having amended the bill three times under three distinct orders to amend, upon payment of 20*s*. costs, obtained a fourth order to amend upon the same terms, and amended by adding a new engrossment of fifteen sheets. The Court would have granted an order that he should pay taxed costs for the amendment, but it appeared the last order was obtained upon terms of waving exceptions to the answer, and by the express consent of the defendant. *Brinsdel* v. *Tompson,* Barn. 332. *S. C. Anon,* 2 Atk. 123.

3. The plaintiff having amended four times, obtained a common order and amended; he was ordered to pay the defendant £7 extra the 20*s*. for the length of the amendments. *Freke* v. *Culpepper,* 1 Dick. 284.

4. Where the plaintiff amended under a common order to amend on payment of 20*s*. costs, the amendments being long, he was ordered to pay £3. additional costs. *Rowe* v. *Stuart,* 1 Dick. 58.

5. In a case where the plaintiff amended his bill three times, upon the usual terms of paying 20*s*. costs, and obtained a fourth order for that purpose, the amendments being frivolous, the Court gave the defendant taxed costs of the former amendments. *Rennet* v. *Green,* 1 Cox, 253.

6 The plaintiff having amended his bill three times obtained the common order to amend, on payment of 40*s*. costs: held to be regular, and the Court refused to order him to pay taxed costs, it requiring a case of particular oppression to break through the general rule. *Earl Mazarene* v. *Lyndon,* 2 Br. C. C. 291.

7. The plaintiff held liable to costs of amendment after answer. *Lord Abingdon* v. *Butler,* 1 Ves. J. 210.

8. The cause, at hearing, went off for want of parties, with liberty for the plaintiff to amend. The plaintiff, under the order, struck out many charges in the bill, upon which the defendant had necessarily examined witnesses: ordered, on application, to be restored, that the Court might give the defendant the costs of such part of the bill, as the plaintiff had waved. *Bullock* v. *Perkins,* 1 Dick. 110.

9. Where a cause stands over with liberty to amend, and the plaintiff neglects to amend, he must pay the costs of a motion, that he may amend within a limited time, or the bill be dismissed, such motion being made necessary by his default; but the Court refused costs where the notice of motion was silent as to costs. *Cox* v. *Allingham,* 3 Mad. 393.

10. Where the amendments entirely changed the nature of the bill, as by converting a bill against a bailiff for an account into a bill of foreclosure, after an issue against the plaintiff, finding him a mortgagee: upon motion, the Court held the defendant entitled to all the costs sustained beyond what he would have been put to, if the bill had been originally for a foreclosure, such as the costs of the issue and of that application. *Smith* v. *Smith,* Coop. 141.

11. Where the demurrer was set down for argument, and plaintiff amended

upon motion, the plaintiff was ordered to pay £ 5. as costs. *Anon*, 9 Ves. 221.

See further ante, p. 390*.

(2) *Cause standing over.*

1. When a cause, at the hearing, is ordered to stand over for want of parties, the plaintiff pays the costs of the day. *Anon.* 2 Atk. 15.
Jones v. *Jones*, 3 Atk. 110.

2. When the defendant, at the hearing, makes objection for want of parties, and the cause is directed to stand over, with liberty to amend, the defendant is not entitled to the costs of the day, unless the defect of parties is stated in the answer. *Mitchell* v. *Bailey*, 3 Mad. 61.

(3) *Commission.*

1. Commission for the examination of witnesses in Sweden; costs of the solicitor attending the execution of the commission were not allowed. *Hamond* v. *Wordsworth*, 1 Dick. 381.

2. Where the suit is for discovery and a commission to examine witnesses, and a commission issues under which both plaintiff and defendant examine witnesses, each shall pay their own costs as to the commission. *London Assurance Company* v. *Hankey*, 1 Anst. 9.

(*And see further*, p. 483, *post.*)

(4) *Contempt.*

1. A defendant examined touching a contempt, and discharged thereof, shall have costs of course. *Atkinson* v. *Ailoff*, Toth. 71.

2. Infant defendant pays no costs of a contempt. *Perkins* v. *Hamond*, 1 Dick. 287.

3. When a defendant is in contempt for not putting in an answer, and he puts in an answer which the plaintiff accepts, without insisting upon the costs of the contempt, the plaintiff cannot recover such costs under the process of contempt. *Anon*, 15 Ves. 174.

4. Nor, under such circumstances, can the plaintiff by motion obtain an order for the payment of such costs. *Smith* v. *Blofield*, 2 V. & B. 100.
Const v. *Ebers*, 1 Mad. 530.

5. But the plaintiff does not by such waver lose his right to the costs of the contempt, as costs in the cause. *Anon*, 15 Ves. 174.

6. In a late case the Court was inclined to think the costs of contempt would not be allowed at the hearing, as costs in the cause, but that the plaintiff, by waving the contempt, had lost them. *Const* v. *Ebers*, 1 Mad. 532.

7. If on issuing a writ of execution of an order for the payment of a sum of money, the money is paid, the costs are borne by the party issuing the writ; but when the defendant is taken on the attachment, for not obeying the writ of execution, the plaintiff may insist upon the costs before the defendant is liberated; though on the acceptance of principal and interest, and discharging him, the plaintiff loses his claim to costs. *Collins* v. *Crumpe*, 3 Mad. 390.

(5) *Demand tendered.*

1. It must be an actual tender, to excuse costs. *Gammon* v. *Stone*, 1 Ves. 339.

2. Tender after the bill filed of the balance, deducting the payments to the mortgagee, with costs, deprived the assignee of subsequent costs. *Williams* v. *Sorell*, 4 Ves. 389.
And see —— v. *Trecothick*, 2 V. & B. 181.

3. If, after answer in a suit for tithes, a tender be made, by motion in Court, of the sum actually due and costs to that period, the plaintiff proceeds at the peril of subsequent costs. *Dean of Bristol* v. *Donnesthorpe*, 1 Anst. 272.
Worral v. *Miller*, 3 Anst. 632.
And see Milnes v *Davison*, 3 Mad. 374.
Hull v. *Matthews*, 2 Anst. 444.

(6) *Demurrer.*

1. Where the demurrer upon record is overruled, and a demurrer *ore tenus* allowed, neither party shall have costs. *Tourton* v. *Flower*, 3 P. W. 371.

2. Demurrer filed, held on argument not good; and a demurrer at bar, good; the defendant is not to have costs. *Wood* v. *Thompson*, 2 Dick. 510.

3. Demurrer allowed, but without costs, because it was a demurrer only, without any answer, and came in by commission. *Elme* v. *Shaw*, 1 Vern. 282.

4. Where a demurrer with merely a denial of combination was filed under an order to plead, answer, or demur, not demurring alone, the Court, upon discharging

the demurrer as irregular, gave £5. costs *Lansdown* v. *Elderton*, 8 Ves. 526.

5. A demurrer set down for argument, being submitted to, and the bill amended, £5. costs were allowed. *Anon*, 9 Ves. 221.

6. Though on a demurrer to a person's being examined as a witness, being overruled, a subpœna cannot be taken out against him for costs, yet the Court will give them upon an application by motion. *Vaillant* v. *Dodemede*, 2 Atk. 592.

7. Demurrer of witness overruled, and he ordered to pay £5. costs. *Wardel* v. *Dent*, 1 Dick. 331.

8. Where the plaintiff having no right, prayed a redemption, and, after answer put in, disputing his title, purchased the right to redeem, and introduced such fact by way of amendment, the Court, upon allowing a demurrer, gave full costs. *Pilkington* v. *Wignall*, 2 Mad. 215.

9. Full costs given on a demurrer allowed to a third bill for the same cause, under the general order, 6th February, 1794, upon a subsequent application. *Griffith* v. *Wood*, 1 V. & B. 307.

10. Full costs were given on the allowance of a demurrer, though application for the purpose was not made till three weeks after the demurrer was allowed with common costs, where it appeared on affidavit, that the suit was vexatious. *Wood* v. *Dynelcy*. 1 Mad. 32.

11. When full costs are given upon the allowance of a demurrer, the form of the order is, "that the plaintiffs do pay unto the defendants the costs of the said demurrer, beyond the sum of £5. the usual costs of a demurrer, to be taxed, &c." *Pilkington* v. *Wignal*, 2 Mad. 348.

12. Taxed costs are given in the Court of Exchequer, on allowing a demurrer to the whole bill. *Jones* v. *Jones*, 7 Price, 663.

(7) *Dismission of Suit.*

1. By stat. 4 Anne, c. 16. s. 23, full costs to taxed, are to be allowed in all cases where the plaintiff dismisses his own bill, or it is dismissed for want of prosecution.

2. Where the cause is brought on bill and answer only, if the bill be dismissed against any of the defendants, there only 40*s*. costs are to be paid by the plaintiff; but if plaintiff has a decree against defendant, though only on bill and answer, there costs must be taxed. *Anon*, 2 P. W. 387.

3. By general order, 27 April, 1748, where the cause is set down on bill and answer only, or where it is so set down after withdrawing replication, it shall be discretionary in the Court to dismiss the suit with 40*s*. costs, or costs to be taxed, or with no costs. Beames' Ord. Ch. 450. 2 Atk. 288.

4. Where the Court did not think the answer full enough, and directed an issue upon the merits, this is not hearing a cause on bill and answer only, but a subsequent proceeding, and therefore out of the rule of dismission with 40*s*. costs. *Newsham* v. *Gray* 2 Atk. 286.

5. Where a cause is referred to a Master to take an account the Court looks on the reference as a subsequent proceeding beyond the bill and answer, and therefore if the bill is dismissed with costs, they are costs to be taxed *Ibid.*

6. Where a plaintiff merely keeps his cause alive, replies, and afterwards withdraws his replication, and sets it down on bill and answer, that it may be dismissed with 40*s*. costs only, this is evading the justice of the Court, and the Court will order costs as it shall think fit. *Ibid*, 2 Atk. 288.

7. Where the defendants denied all the equity of a bill, and the plaintiff brought the cause to a hearing on bill and answer only, in order to get off with 40*s*. costs, the Court on dismissing the bill upon the merits gave taxed costs *Johnson* v. *Brown*, 3 Atk. 1.

8. Notwithstanding the common course of the Court is to give only 40*s*. costs on dismission of a suit, heard on bill and answer, yet if the party be vexatious, full costs may be given. *Mansel* v. *Bowles*, 1 Br. C. C. 403. 2 Dick. 646.

9. The order, 27 April, 1748, did not alter the practice generally, but gave a discretion to vary it upon special cases. *Baily* v. *Corporation of Leominster*, 1 Ves. J. 476.

10. Where a bill, which might have been demurred to, is brought to a hearing, and dismissed, it will be without costs. *Bickley* v. *Donington*, 2 Eq. Ca. Ab. 253. *Earl Thanet* v. *Paterson*, [illegible]. 247. *Anon*, 3 Mad. 62. (*n*)

11. The bill being dismissed, costs to the plaintiff, on account of the difficulty and novelty of the case, were refused. *Wykham* v. *Wykham*, 18 Ves. J. 395.

12. Bill dismissed on hearing the cause, with costs to be taxed as to one defendant, and the plaintiff to pay £ 100. costs to the rest of the defendants. *Guest* v. *Harris.* 2 Dick. 684.

13. Bill dismissed with costs as to part, and without costs as to other part. *Finch* v. *Finch,* 1 Ves. J. 546.

14. Bill dismissed with costs as to some parties, and without costs as to others. *Jones* v. *Turberville.* 2 Ves. J. 15.

15. By the practice of the Court of Chancery, a bill cannot be dismissed with costs to be paid by the defendant to the plaintiff. *Cooth* v. *Jackson,* 6 Ves. 41. *Lewis* v. *Loxham,* 3 Mer. 429.

But see this doubted, Springfield v. *Olett,* 3 Mer. 430. (*n*)

Where the costs are involved in the question of dismission, see Div. XXVI. *post.*

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(8) *Election.*

1. No costs are given on application to put a party to election. *Ex parte Wright,* 2 Ves. J. 11.

(9) *Exceptions.*

1. Exceptants to a decree of charitable uses were allowed costs on those exceptions on which they prevailed; and on those where they did not, the respondents were held entitled to costs. *Corporation of Burford* v. *Lenthall,* 2 Atk. 551.

2. The Master, to whom it was referred, reported the proceedings under a commission for examination of witnesses irregular; on exceptions, the Court thought them regular, and allowed the exceptions, and the party who succeeded had his costs of the application: Lord Hardwicke, Ch. discharged the order for costs, because the plaintiff's was not a vexatious proceeding, but in the Master's opinion well founded; and the rule is not to give costs, but where no just ground appears for the proceeding. *Anon,* 3 Atk. 235.

3. Where the Master reports an answer insufficient, and upon exceptions it is held to be sufficient, the party succeeding in the application is not entitled to costs, but they shall abide the event of the cause. *Ibid.*

4. But the Court on special motion may give costs, though the Master reports in favour of the other party. *Ibid.*

5. And where the Master by his report certified certain proceedings to be regular, which, on exceptions to the report, were held to be irregular, the Court refused costs to the exceptants, as there was foundation for the reference. *Stevens* v. *Long,* 1 Dick. 282.

6. Exceptant ordered to pay costs of frivolous exceptions; 20*s.* for every exception overruled, and 10*s.* for every exception waved. *Read* v. *Ward,* 1 Dick. 110.

7. Exceptions to the Master's report of a good title overruled with costs. *Burnaby* v. *Griffin,* 3 Ves. 266.

8. Upon exceptions overruled, the Court has a discretion to give costs beyond the deposit. *Purcell* v. *M'Namara,* 12 Ves. 173.

9. Where a defendant submits to answer exceptions, before an order for reference, the plaintiff shall be entitled to the stamp duties, in addition to the usual costs. *General order of the Court of Chancery of Ireland,* 1 S. & L. 241.

See also Beames' Ord. Ch. 460 (*n*). *And* Div. XXXI. *post.*

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(10) *Fraud.*

1. Where a creditor by judgment recovered, is afterwards found guilty of fraud respecting the whole of his demand, he shall pay costs both at law and in equity. *Lloyd* v. *Wynne,* 2 Br. P. C. 374.

2. In a scene of iniquity and combination, though one be more guilty than another, the Court never distinguishes, but charges them altogether with costs. *Barnesley* v. *Powel,* 1 Ves. 290.

3. In the case of a gross fraud, the Court gave costs out of pocket, to be ascertained by the party's own oath. *Dyer* v. *Tymewell,* 2 Vern. 123. 2 Free. 112.

4. In notorious frauds, the Court anciently made a defendant pay exemplary costs, but that practice is now altered. *Waltham* v. *Broughton,* 2 Atk. 43.

5. Where a party has been guilty of fraud, he shall pay the costs of suit occasioned by it. *Colt* v. *Wollaston,* 2 P. W. 154. *Waltham* v. *Broughton,* 2 Atk. 43. *Earl Abingdon* v. *Butler,* 3 Br. C. C. 112. 1 Ves. J. 206.

6. The general rule in setting aside a bond for fraud or improper consideration, is to set it aside with costs; but where the plaintiff was *particeps criminis,* the Court

refused him costs. *Debenham* v. *Ox*, 1 Ves. 276.

7. But in a later case, the Court gave the plaintiff costs, upon the consideration that the relief was given on account, not of the individual, but of the public. *Jackman* v. *Mitchell*, 13 Ves. 581.

8. Where conveyances are set aside for want of consideration merely, without fraud, it is usual to consider the defendants as mortgagees, and therefore to allow them costs. *Peacock* v. *Evans*, 16 Ves. 512.
Gowland v. *De Faria*, 17 Ves 20.
Bowes v. *Heaps*, 3 V. & B. 111.

9. Costs are given upon a groundless imputation of fraud. *Mayor of Colchester* v. *Lowten*, 1 V. & B. 226.
Elliot v. *Cordell*, 5 Mad. 157.

(11) *Insufficiency.*

1. The costs of insufficient answers are provided for by a clear rule. In a town cause, the defendant pays for an insufficient answer, 40*s.* costs; for a second, 60*s.*; for a third, £4; for a fourth, £5. *Const* v. *Ebers*, 1 Mad. 530.

2. Where an answer is reported sufficient, and, on exceptions to the report, is held insufficient, the defendant is not to pay 40*s.* the costs of an insufficient answer. *Knightly* v. *Deacon*. 1 Dick. 82.

3. The defendant's examination was reported insufficient, and then the plaintiff died; upon the suit being revived, the Master was ordered to tax the costs of the insufficient examination. *Lyne* v. *Ably*, 1 Dick. 143.

4. Upon the Master's report that the plaintiff has put in an insufficient examination to interrogatories; the defendant is entitled to a reference to tax the costs in respect of such insufficiency. *Hubbard* v. *Hewlett*, 2 Mad. 469.

5. Exceptions for insufficiency having been allowed to two answers, the plaintiff amended, defendant answered the amendments, to which answer, exceptions were taken, and allowed. The defendant shall pay costs as for a third insufficient answer. *Harman* v. *Immins*, Bun. 203.

(12) *Irregularity of Process.*

1. The plaintiff is adjudged to pay to the defendant 50*s.* costs, prosecuting process of contempt against him, and no contempt proved. *Wrayford* v. *Wright*, Cary, 117.

2. Costs against the plaintiff and clerk that made out process, before filing of the bill. *Garneston* v. *Bradwell*, Cary, 46.

3. Subpœna served at the suit of a person unknown to the defendant, and upon appearance there was no bill in Court; the party serving it ordered to pay costs. *Anon*, Cary, 92.

4. Suitor having paid the officer his fee, and the officer having neglected his duty, by which means the process becomes irregular, the suitor is to pay the costs, but to have them over against the officer; and though the officer in such case die, yet his executors are liable, it being a duty and matter of contract. *James* v. *Philips*, 2 P. W. 650.
See ante, Div. XIV. p. 396*.

5. Costs incurred by the irregularity of one party to the prejudice of another, must be paid by the author of such irregularity. *Scott* v. *Becher*, 4 Price, 346.

6. Where an attachment had been irregularly issued, it was held that notwithstanding an offer has been made to pay all the expenses which the party has been put to, he had a right to have the judgment of the Court on the question of its regularity, and was therefore entitled to the costs of the motion for setting it aside. *Frowd* v. *Lawrence*, 1 J. & W. 655.

7. When a plaintiff issues process to which he has no right, the defendant is entitled to costs. *Swift* v. *Swift*, 1 B. & B. 326.

(13) *Issue.*

1. Though the verdict was against the plaintiff's title, yet the title being probable, the Court refused costs against him. *Trethewy* v. *Hoblin*, 2 C. C. 9.

2. If an issue be directed out of Chancery, and the party, plaintiff in the issue, gives notice of trial, and does not countermand in time, upon motion, the Court of Chancery will give costs. *Anon*, 2 P. W. 68.

3. Issues being directed to be tried at bar, the Court would not make part of the order, that the defendant should pay only nisi prius costs, if they were found against him. *Viscount Falmouth* v. *Innys*, Mos. 87.

4. Though there is no demand, nor rent paid, for thirty years, yet the defendant must pay costs at law to the person recovering there; but from his *laches* the plaintiff shall not have the costs in equity. *Anon,* 2 Atk. 14.

5. Where an action at law is directed, although the jury gives but sixpence damages, and sixpence costs, this will not prevent the Court giving the party prevailing his costs at law to be taxed. *Maguire* v. *Maddin,* 2 Br. P.C. 393

6. Although the plaintiff was to pay the costs of suit, the bill being to establish his right, yet he was held entitled to the costs of an issue, the finding of which was in his favor. *Clifton* v. *Orchard,* 1 Atk. 610.

7. The defendants were decreed, as of course, to pay the costs of issues found against them. *Coddrington* v. *England,* Barn. 436. 2 Atk. 167.

8. The Court will not, at the suit of a few parishioners, put the parish to the expense of an issue, to establish a right which may not come in question for several years. *Attorney General* v. *Parker,* 1 Ves. 43.

9. Where the material issue has been found for the party setting down the cause for further directions, he shall have the costs of the trial at law. *Blackburn* v. *Gregson,* 1 Br. C. C. 420.

10. Upon a second verdict, the same as the first, but for a less sum, only the last sum recovered, and the costs of the last trial, are to be paid out of money in Court, upon an injunction to stay execution on the first, the costs of which are to be returned. *Waddle* v. *Johnson,* 1 Ves. J. 30.

And see further, p. 256, 436. *ante.*

(14) *Lunacy.*

1. No costs are allowed to the lunatic's relations for attending on the passing the accounts relating to the estate. *Ex parte Wright,* 2 Ves. 25.
And see Tharp v. *Tharp,* 3 Mer. 510.

2. Costs to committee of lunatic refused, because he had not passed his accounts regularly, though no fraud. *Ex parte Clarke,* 1 Ves. J. 296.

3. No costs to the party taking out a commission of lunacy, which is traversed with success, however meritorious the case; the property never coming to the possession of the crown, there is no fund. *Ex parte Ferne,* 5 Ves. 832.

4. Where a commission of lunacy was kept several years without being put in execution, the Court discharged the commission and petition with costs. *Anon,* 2 Atk. 52.

5. Costs of the committee of a lunatic trustee conveying within the statute, must be paid out of the lunatic's estate. *Ex parte Brydges,* Coop. 290.

6. The costs of the committee of a lunatic mortgagee, requisite to enable him to reconvey to the mortgagor, under the stat. 4 Geo. 2. c 10 including the costs of the reference, are to be paid out of the lunatic's estate, whether the application be made by the mortgagor or by the committee, which is the usual course. *Ex parte Richards,* 1 J. & W. 264.

7. Where the trustee for payment of debts was a lunatic; and himself a creditor, on a petition by some of the creditors, for a commission to enable them to complete a sale, it was held that the petitioners must take the order at their own expense, and if a commission issued must pay the expenses of such commission, it being for their benefit, up to the time of perfecting the title to the estate in question, reserving the question as to their reimbursement, if any other person should afterwards adopt the commission. *Ex parte Tutin,* 3 V. & B. 149.

And see p. 297, *ante.*

(15) *Motion.*

1. Costs are not given on a motion, unless mentioned in the notice of motion, and then the motion is made at the peril of costs. *Mann* v *King,* 18 Ves. 297.

2. Costs will be given on motion against settled practice. *Hill* v. *Turner,* 2 V. & B. 372.

3. When a cause stands over, with liberty to amend the bill, and a motion becomes necessary, that plaintiff should amend within a limited time, the plaintiff pays the costs of such motion, it having become necessary by his default. *Cox* v. *Allingham,* 3 Mad 393.

4. Where there had been motions in the cause, the costs of which could not be obtained under the general decree of dismissal with costs, the Court ordered the decree of dismissal to be prefaced with

a direction for payment of these costs. *Wild* v. *Hobson*, 4 Mad. 49.

5. Costs of a motion dismissed are not costs in the cause. *White* v. *Lisle*, 4 Mad. 226.

6. A party not interested in a motion, who is served with notice, is entitled to the costs of appearing. *Heneage* v. *Aikin*, 1 J. & W. 377.

(16) *New Trial.*

1. The Master in taxing costs of a former trial, allowed £17. to the plaintiff for his costs in opposing the petition for a new trial, which the Court thought right under the circumstances of the case. *Hay* v. *Hay*, 3 Atk. 634.

2 The costs of an application for a new trial of an issue directed out of Chancery, denied; they do not, of consequence, in this Court come within the costs of suit. *Devie* v. *Lord Brownlow*, 2 Dick. 796. *White* v. *Wilson*, 13 Ves. 87.

3. Where a finding at law is confirmed, the party disputing it must pay costs. *White* v. *Lisle*, 4 Mad. 226.

4. There is no general rule against giving costs of a new trial, although the verdict was against the opinion of the Judge. *Gossley* v. *Barlow*, 1 Anst. 47.

(17) *Notice of Motion abandoned.*

1. No costs, upon a notice of motion abandoned, till the third time. *Shelly* v. *Shelly*, 8 Ves. 316.

2. Where a defendant gave notice of a motion, before the Vice-Chancellor, for leave to file a supplemental answer, without stating the particular facts to be introduced, and no order was made in consequence of such notice, and the defendant thereupon gave a notice of a like motion before the Lord Chancellor, stating the facts meant to be introduced, and afterwards abandoned it, he was ordered to pay the plaintiff the costs of the two notices. *Whitcombe* v. *Minchin*, 1 Wil. 1.

3. If a party give notice of motion, and does not move accordingly, he shall, when no affidavit is filed, pay to the other side forty shillings costs upon production of the notice of motion: but when an affidavit is filed by either party, the party giving such notice of motion, and not moving, shall pay to the other side costs, to be taxed by the Master, unless the Court itself shall direct, upon production of the notice of motion, what sum shall be paid for costs. *General Order*, 5 Aug. 1818. 1 Wil. 309. 1 Swan. 128. 3 Mad. 318.

4. When the Court is moved for the payment of costs, under the General Order of the 5th of August, 1818, on account of a notice of motion, which has been abandoned, such notice of the motion must be mentioned to the Court, and also be produced to the registrar before he draws up the order. *Withey* v. *Haigh*, 3 Mad. 437.

5. Motion cannot be renewed, unless the costs of the former notice of motion are paid, as directed by the General Order 5 Aug. 1818, *Bellchamber* v. *Giani*, 3 Mad. 550.

(18) *Plea.*

1. When a plea is directed to stand for an answer, with liberty to except, the plaintiff is entitled to costs. *Howling* v. *Butler*, 2 Mad. 245.

2. Where the Master, upon a reference of a plea, of former suit for the same matter, reports that the bills are for the same matter the defendants are entitled to the costs of the plea allowed, but where upon such a reference the Master makes a special report, and it appeared the plaintiff gave some occasion for the plea, he was refused costs, although the plea was overruled. *Huggins* v. *The York Buildings Company*, Barn. 83. 2 Atk. 44.

(19) *Scandal and Impertinence.*

1. £5 costs ordered to be paid for the length of an answer. *Dent* v. *Wardel*, 1 Dick. 339.

2. Whether examiners or commissioners who suffer scandal or impertinence to be inserted in depositions, shall not be made to pay the costs—*Quære*. *Cocks* v. *Worthington*, 2 Atk. 236.

3. Where the amendments of a bill are reported impertinent, the defendant is entitled to a reference to tax the costs immediately after the report made. *Muscott* v. *Halhed*, 4 Br. C. C. 222.

4 Counsel and agent are liable to costs for scandal and impertinence. *Rattray* v. *George*, 16 Ves. 234.

5. Where an answer, after a reference by the plaintiff, has been reported not impertinent, it is a motion of course to

refer it to the Master, to tax the defendant's costs. *Tyrrel* v. *Redifer*, 1 Mer. 132.

(d) In Suits respecting,—(1) *Account.*

1. Constant course of the Court, where mutual account is decreed, to reserve costs till after the report, that the Court may have it in their power to punish the wrong doer. *Rider* v. *Bayley*, 8 Br. P. C. 361. 2 Eq. Ca. Ab. 237.

2. The plaintiff always pays costs where an account turns against him, or when he prevails in nothing but what he might have insisted on at law. *Eyre* v. *Parnell*, 8 Br. P. C. 361.

3. Where the defendant trustee, by his answer submits to account, though he be found in debt, he shall not pay costs; but where he contests the balance as due to himself, and upon taking the account is found considerably indebted, he must pay costs as the plaintiff must have done if the balance had been found the other way. *Parrot* v. *Treby*, Pre. Ch. 254.

4. Costs generally follow the event of an account, but where the account is intricate or doubtful there shall be no costs. * *Pitt* v. *Page*, 1 Br. P. C. 1. 2 Eq. Ca. Ab. 237.

5. A decree for costs necessarily follows a decree for an account and payment of the principal and interest. *East India Company* v. *Ekine*, 2 Br. P. C. 382.

6. Costs are not always to follow the event of a cause: so, though money was found due to the defendant upon account, yet it appearing to be much less than he had claimed, he was not allowed costs. *Attorney General* v. *Brewers' Company*, 1 P. W. 376.

7. If an obligee will put in a bad answer and insist on more than what is really due, he shall lose his costs in Equity, though entitled to them at law. *Forward* v. *Duffield*, 3 Atk. 555.

8. Where agents, receivers, or trustees have accounted fairly, and paid money into Court, they have their costs, as of course, out of the fund. *Attorney General* v. *City of London*, 1 Ves. J. 246.

9. Where an executor was applied to for an account, and gave none, but upon a bill filed, stated the accounts in his answer, and the plaintiff nevertheless took a decree for an account, the Master having reported the accounts stated in the answer to be correct, the Court gave the plaintiff costs of suit to the decree, and the defendant the costs of the subsequent proceedings. *Anon*, 4 Mad. 273.

10. Where a defendant in possession under an *elegit*, contested the mode of taking the accounts and failed, and knowing that he was overpaid, still required the accounts to be investigated, he was allowed his costs to the time he ceased to be a creditor, and after that he was to pay costs to the plaintiff. *Skirrett* v. *Athy*, 1 B. & B. 435.

(2) *Administering Assets*

And see p. 213 *ante.*

1. Plaintiff's daughters by a second *venter* brought their bill against defendants, the daughters by a first *venter*, to prove their father's will, whereby lands were devised to be sold to raise plaintiff's portions; and on a trial at bar, and verdict for the will, defendants were ordered to join in a sale, but were allowed their costs both at law and in equity. *Crew* v. *Jolliff*, Pre. Ch. 93.

2. On a report of assets costs are decreed generally against the defendant, and not out of the assets. *Davy* v. *Seys*, Mos. 204.

3. Where a bill is brought to secure and have the benefit of a contingent interest devised over, the costs shall be paid out of the assets of the testator, who, by his will, has occasioned the difficulty. *Studholme* v. *Hodgson*, 3 P. W. 303.

4. Where a testator expresses himself so ambiguously, as to make it necessary to come to this Court, the costs shall be paid out of his general assets. *Joliffe* v. *East*, 3 Br. C. C. 25.
Baugh v. *Reed*, 3 Br. C. C. 192. 1 Ves. J. 257.
Nourse v. *Finch*, 1 Ves. J. 344.
And see Kidney v. *Coussmaker*, 1 Ves. J. 436.

5. Wherever a testator, by his will, raises a doubt upon the meaning of it, his general property pays for settling the doubt. *Barrington* v. *Tristram*, 6 Ves. 349.
Pearson v. *Pearson*, 1 S. & L. 12.

6. The costs of executing a will are always paid out of the residue undisposed of.
Howse v. *Chapman*, 4 Ves. 550.
Nisbett v. *Murray*, 5 Ves. 149.
And see Skrymsher v. *Northcote*, 1 Swan. 571.

7. The general personal estate, not specifically bequeathed, applied first in payment of all the costs, except of inquiries as to a guardian and maintenance for a specific legatee, and then to the general legacies. *Barton* v. *Cooke*, 5 Ves. 461.

8. Costs of litigation in the course of administering a will, are given out of the general assets, or, in case of deficiency, out of the fund. *Hampson* v. *Brandwood*, 1 Mad. 394.

9. On a bill by the devisee to establish the will, no costs given on either side. *Johnson* v. *Gardiner*, 1 Dick. 313.

10. Where the bill was by a devisee against the heir, to establish the will and execute the trusts, which was decreed accordingly, but not account directed, the plaintiff was decreed to pay defendant his costs. *Boson* v. *Boson*, 1 Dick. 300.

11. Where a marriage settlement was so darkly worded as to occasion litigation between the heir of the settlor, and his devisee. It was held that the doubtful construction would excuse the defendant from paying costs, but the Court would not compel the plaintiff who succeeded to pay costs out of the recovered estate. *Hampson* v. *Brandwood*, 1 Mad. 394.

12. In a suit respecting the disposition of a residue to charities, the costs of all parties were directed out of the fund. *Moggridge* v. *Shackwell*, 7 Ves. 36.

13. Where a question arises upon the interest in a trust fund, separated from the general residue, the costs must come out of the particular fund. *Jenour* v. *Jenour*, 10 Ves. 562.

14. Legatee or creditor coming in before the Master for his legacy or debt, and not a party to the cause, shall have his costs. *Maxwell* v. *Wettenhall*, 2 P. W. 27.

But as to Creditors see p. 421* *post.*

15. The Court directed the costs of a suit by an infant legatee to secure the legacy to be paid out of the testator's estate; but in future the costs in such a case will not be given as under the Stat. 36 Geo. 3. c. 52. s. 32. the executor can pay the legacy into Court, and the infant when of age may petition for it. *Whopham* v. *Wingfield*, 4 Ves. 630.

16. Costs of a suit for a legacy out of the residue; the suit being rendered necessary either by the conduct of the executrix, who was the residuary legatee, or by the disposition of the testatrix. *Wilson* v. *Brownsmith*, 9 Ves. 180.

17. Where the plaintiff established the gift of a bond by the testator as a good *donatio mortis causa*, the costs were directed out of the testator's estate. *Gardner* v. *Parker*, 3 Mad. 184.

18. A legatee agreeing, after a decree for the administration of the estate obtained in Chancery by another legatee, to stop proceedings in a suit previously instituted by him in the Exchequer, allowed his costs up to the time of his having notice of the decree. *Jackson* v. *Leaf*, 1 J. & W. 229.

And see p. 144, *ante* p. 421* *post.*

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(3) *Boundaries, Settling.*

1. On a bill to settle the boundaries of a manor, it was decreed that each party should give to the other a note of their boundaries, and that it should be tried in a feigned issue: and the issue being found for the defendant on the first, second, and third trial, the defendant was not only allowed the costs of all the trials at law, but also costs in equity, in regard the defendant had no bill, and the plaintiff might have tried it at law without coming into equity. *Metcalfe* v. *Beckwith*, 2 P. W. 376.

2. Though the interest of one party is more inconsiderable than the interest of another, yet they shall bear equally the expense of a commission for settling boundaries, and separating freehold and copyhold. *Norris* v. *Le Neve*, 3 Atk. 82.

(4) *Charities.*

1. The commissioners of charitable uses cannot decree costs on the statute 43 Eliz. but if there be an appeal from their decree, the Lord Chancellor may decree the costs not only of the appeal, but likewise of the commission; but though they decree costs, yet that shall not, upon an appeal, be sufficient to reverse the decree, for the Lord Chancellor may either increase or lessen the costs, or exempt the party from them entirely. *Rockley* v. *Keyly*, 1 Eq. Ca. Abr. 126. S. C. Pre. Ch. 111.

2. Commissioners of charitable uses have no power under the statute 43 Eliz. c. 4. to give costs, but the Court of Chancery can do it. *Aylet* v. *Dodd*, 2 Atk. 239.

Wharton v. *Charles*, Rep. T. Finch. 81.

3. Exceptants to a decree of charitable uses were allowed costs on those exceptions where they prevailed, and on those where they did not, the respondents were held entitled to costs. *Corporation of Burford* v. *Lenthall*, 2 Atk. 551.

4. Governors of a charity, though not guilty of corruption, yet, if extremely negligent, shall pay costs. *East* v. *Ryal*, 2 P. W. 284.

5. The trustees of a charity mismanage the fund, and neglect the objects of it: held that they should make good the deficiency out of their own estate, and pay the costs of the suit. *Haberdashers' Company* v. *Attorney General*, 2 Br. P. C. 370.

6. Where the information was of service to the charity, in recovering a sum which had been improperly charged to it by the trustees, the latter, although the balance of the account was in their favor, were refused their costs, but the costs of the relator were paid out of the improved rents of the charity estate. *Attorney General* v. *The Brewers' Company*, 1 P. W. 376.

7. Where the information was quite causeless and contrary to the right, the relators were ordered to pay the costs. *Attorney General* v. *Smart*, 1 Ves. 72.

Attorney General v. *Parker*, 1 Ves. 43. 3 Atk. 576.

8. And where there appeared no ground for relief, and the information appeared to proceed from improper private motives, it was dismissed with costs. *Attorney General* v. *Middleton*, 2 Ves. 327.

9. Where an information is dismissed upon the ground of no title in the relator, costs cannot be given out of the fund, the utmost the Court can do is, to dismiss the information without costs. *Attorney General* v. *Oglender*, 1 Ves. J. 246.

10. In an information for a charity, where there are any directions to be given, the relator shall not pay costs. *The Attorney General* v. *Bolton*, 3 Anst. 820.

11. In a charity cause the costs being decreed out of the estate, upon application they were directed to be taxed as between solicitor and client. *Attorney General* v. *Carte*, 1 Dick. 113.

12. In charity cases the Court often gives the relators costs beyond the taxed costs. *Osborne* v. *Denne*, 7 Ves. 425.

See further p. 144, *ante*.

(5) *Custom, Establishing.*

1. When a multiplicity of actions have been brought where a custom might have been tried in one, it is so vexatious, that the plaintiff shall have costs both at law and equity. *Coddrington* v. *England*, 2 Atk. 167. Barn. 436.

(6) *Discovery.*

1. The plaintiff in a bill of discovery pays the costs. *Simmonds* v. *Lord Kinnaird*, 4 Ves. 746.

2. The rule, that the plaintiff in a bill of discovery shall pay costs in all cases, is too general: he ought only where he files a bill in the first instance, not where compelled to it by the defendant's refusal. *Weymouth* v. *Boyer*, 1 Ves. J. 423.

3. Where the bill prays discovery and a commission, the defendant cannot have the costs of the discovery till the return of the commission. *Anon*, 8 Ves. 69.

Banbury v. ——, 9 Ves. 103.

4. If the defendant to a bill of discovery and a commission examines in chief, instead of confining himself to the cross-examination, he shall not have his costs. *Anon*, 8 Ves. 69.

5. Abatement by the marriage of a female plaintiff in a bill of discovery after answer. Defendant cannot have the costs. *Dodson* v. *Juda*, 10 Ves. 31.

6. If a party unconscientiously obtains judgment at law, and is then brought into equity for the discovery, he pays the costs of both proceedings; but if the discovery is obtained before the expenses at law are incurred, the party gets the costs in equity, because equity will not pronounce that he intends to take an unconscientious advantage; so where a party being sued at law upon a policy of insurance, obtained an injunction, and a commission to examine witnesses abroad; and, by means of the discovery, afterwards obtained a verdict, he was charged with costs of the discovery and injunction, but both parties having examined witnesses under the commission, each paid their own costs of the commission. *London Assurance Company* v. *Hankey*, 1 Anst. 9.

See further, p. 180. *ante*.

(7) *Dower.*

1. No costs are given, at law, to a plaintiff in a writ of dower. *Mundy* v. *Mundy*, 2 Ves. J. 128.

2. By analogy to the practice at law, costs do not follow a decree for dower merely; but where the widow had been vexatiously kept out of her dower, she was allowed her costs. *Worgan* v. *Ryder*, 1 V. & B. 20.

And see Curtis v. *Curtis*, 2 Br. C. C. 632.

3. On an assignment of dower by commissioners, the doweress shall have no costs, unless other questions are raised in which the party is litigious. *Lucas* v. *Calcraft*, 2 Dick. 594. 1 Br. C. C. 134. 1 V. & B. 20 (*n*).

(8) *Interpleader.*

1. Plaintiff in an interpleading bill, if he conducts himself properly, shall have his costs out of the fund, and the defendant who succeeds have them over again, from the defendant who fails in his claim, with his own costs. *Hendry* v. *Key*, 1 Dick. 291.
Hodges v. *Smith*, 1 Cox, 357.
Cowtan v. *Williams*, 9 Ves. 107.

2. Upon a bill of interpleader, the defendant who made it necessary, was ordered to pay all the costs; and the plaintiff has a lien for his costs upon the fund in Court. *Aldridge* v. *Mesner*, 6 Ves. 418.

3. Tenants filing a bill of interpleader against annuitants, and bringing the rents into Court, paid their costs out of the rents. *Aldridge* v. *Thompson*, 2 Br. C. C. 149.

4. Where a bill of interpleader is brought by a lessee against his landlord upon notice of ejectment by a stranger, it will be dismissed with costs; and where upon a reference to the Master it appeared that the bill was founded in fraud and collusion, it was dismissed with costs to the landlord, as between attorney and client. *Dungey* v. *Angove*, 2 Ves. J. 304.

And see further, p. 255. *ante.*

(9) *Partition.*

1. In a suit for partition no costs are given on either side, it being for the benefit of both parties. *Metcalfe* v. *Beckwith*, 2 P. W. 376.

2. On a bill for partition, the costs of executing the commission must be defrayed by the parties, in proportion to their interests. *Calmady* v. *Calmady*, 2 Ves. J. 568.

And see further, p. 323, *ante.*

(10) *Perpetuating Testimony.*

1. On a bill brought to prove a will *per testes*, and to perpetuate the testimony of witnesses, the defendant has no other remedy to have his costs than by moving for them. —— v. *Andrews*, Barn. 333.

2. And though the defendant has cross-examined the plaintiff's witnesses, yet if he has examined no witnesses of his own, he shall be allowed his costs. *Ibid.*

3. And the circumstance, that the defendant has brought a cross bill, makes no difference as to his right to costs in the original cause, upon the return of the commission *Ibid.*

4. Where a plaintiff on a bill to perpetuate the testimony of witnesses, has examined, and thereby had the fruit of her bill, neither herself, nor the defendant is entitled to costs. *Lady Codrington* v. *England*, Barn. 436. 2 Atk. 167.

See further, p. 334, *ante*; *and* 422* *post.*

(11) *Review.*

1. No costs are given upon a bill of review, whereby money, obtained by the defendant, under the decree in the original cause, was decreed back again to the plaintiff. *Jackson* v. *Eyre*, 3 C. R. 15. 2 Free. 181.
S. C. Jackson v. *Degry*, Nel. 83.

2. Costs are of course upon dismissing a bill of review, brought for error, where there is no error in the decree. *Bolger* v. *Mackell*, 5 Ves. 509.

(12) *Specific Performance.*

1. Where the objection to the title is such as justifies a purchaser in taking the opinion of the Court upon it, he shall not pay costs although the objection is overruled. *Cox* v. *Chamberlain*, 4 Ves. 631.
Aislabie v. *Rice*, 3 Mad. 256.

2. But where the vendor held under a

decree of foreclosure, to which mortgagees, made such pending the suit, were not parties, the Court held this not to be such an objection as to save the purchaser from costs. *Bishop of Winchester* v. *Paine*, 11 Ves. 195.

3. Where the question of title was difficult, and one which the parties were unable to decide without an application to the Court, a bill by the vendor was dismissed without costs. *White* v. *Foljambe*, 11 Ves. 337.

4. In general, possession taken by the purchaser is of great weight in deciding upon costs; but where such possession was taken at the instance of the vendor, representing the title to be perfect, and it proved defective, the vendor's bill was dismissed with costs. *Vancouver* v. *Bliss*, 11 Ves. 458.

5. Where the purchaser having been in possession, resisted a claim of interest upon the purchase money, and thereby occasioned the suit, he was decreed to pay costs. *Fludyer* v. *Corker*, 12 Ves. 25.

6. And where the purchaser insisted upon more than was comprehended in a description, to which he was referred, although it was comprehended in the advertisement of sale, the Court dismissed a bill brought for the extra parcel, but without costs. *Calverley* v. *Williams*, 1 Ves. J. 210.

7. The Court refused to give the plaintiff, the vendor, costs, where he could not make a good title at the time of his filing the bill. *Wynn* v. *Morgan*, 7 Ves. 202.

8. And in a similiar suit, where the Master reported against the title, but the Court granted another reference upon the production of an additional abstract, the vendor, plaintiff, was ordered to pay the costs to the second report. *Harford* v. *Purrier*, 1 Mad. 532.

And see Seton v. *Slade*, 7 Ves. 279.

9. Where the plaintiff, vendor, contended, but unsuccessfully, that the acts of the defendant amounted to an acceptance of the title, the Court in decreeing a specific performance refused to give costs. *M'Queen* v. *Farquhar*. 11 Ves. 467.

10. Where the plaintiff, vendor, proved, by one witness only, an agreement different from that stated by the bill, and the answers stated the agreement different from both; as there had been part performance, the Court decreed a specific performance, but the plaintiff to pay the costs. *Mortimer* v. *Orchard*, 2 Ves. J. 243.

11. Where the consideration was inadequate, the Court in decreeing an execution, refused to give costs as against the vendor. *Burrowes* v. *Lock*, 10 Ves. 470.

See further, p. 25, *ante; and* p.*427, *post.*

13. *Tithes.*

1. Costs are always given in a decree for an account of tithes, unless there has been a tender. *Stockwell* v. *Terry*, 1 Ves. 115.

2. On a decree for tithes, the Master reported only 9*s*. due to the plaintiff: yet this shall entitle him to his costs. *Griffith* v. *Lewis*, 2 Br. P. C. 407.

3. Plaintiff sued for thirteen different species of tithes, and proved but one, yet the Court decreed costs generally. *Smith* v. *Morgan*, Bun. 335.

But see Reporter's note, *Ibid.*

4. Bill by a lessee of tithes to establish his right, and for an account, was dismissed with costs as a bill by a purchaser to obtain an advantage he had no right to, and with full notice that he had no reason, by the terms of his purchase to expect it. *Strutt* v *Baker*, 2 Ves. J. 625.

5. Where a rector failed in his claim against vicar for tithes contrary to the endowment, the bill was dismissed with costs. *Dorman* v. *Curry*, 4 Price, 109.

And see further p. 436. *ante.*

(*e*) *For or against.*—(1) *Administrator.*

1. In general, administrators, like other trustees, are entitled to their costs; but where, on account of the conduct of the administrator, the question of charging him with interest was raised, the Court allowed him costs to the decree only, reserving the subsequent costs till the question of interest was decided. *Landen* v. *Green*, Barn. 389.

S. C. Wilkins v. *Hunt*, 2 Atk. 151.

2. In a creditor's suit against the administrator, and account decreed, the Master reported that defendant had assets sufficient to satisfy plaintiff's demand: costs were decreed generally against the

administrator. *Davy* v. *Seys*, Mos. 204.

(2) *Arbitrators.*

1. Where an arbitrator, during the arbitration, made use of expressions which showed extreme partiality, he was directed to pay the costs of setting aside the award. *Chicot* v. *Lequesne*, 2 Ves. 315.

2. If arbitrators plead the award to a bill to set it aside, they are bound in support of the plea to shew themselves incorrupt, impartial, or they will be made to pay the costs. *Lingood* v. *Croucher*, 2 Atk. 296.

3. Where an arbitrator is guilty of fraud or combination, in making an award, he will be liable to pay the costs of a suit to set it aside. *Lord Lonsdale* v. *Littledale*, 2 Ves. J. 453.

(3) *Bank of England.*

1. Specific bequest of stock to the executrix for life, and after her death to her daughters absolutely at twenty-one: the Bank resisting a transfer, according to an agreement to relinquish the life interest, without the direction of the Court, are entitled to their costs. *Austin* v. *The Bank of England*, 8 Ves. 522.

See also Marryatt v. *Bank of England*, 8 Ves. 524 (*n*).

Aynsworth v. *Bank of England*, 8 Ves. 525 (*n*).

2. Stock in the Bank being given to A. for life, and afterwards to B., and A. *having bought B.'s remainder, they joined* in an application to the Bank to permit a transfer; the Bank refusing, a bill was filed: the Bank ordered to be paid their costs. *Pearson* v. *The Bank of England*, 2 Br. C. C. 529. 2 Cox, 175.

3. Where the Bank refused a transfer applied for by the executrix, where there was no specific gift of the stock, and having obtained an injunction against the executrix' proceeding at law, the injunction was continued upon the terms of the Bank permitting a transfer, and paying defendant's costs, both at law and in Equity. *Bank of England* v. *Parsons*, 5 Ves. 669.

4. The Bank being made parties to discover what sum the executrix had transferred into her own name, need not be brought to a hearing: the plaintiffs therefore ordered to pay their costs. *Williams* v. *Williams*, 2 Br. C. C. 87.

5. If the Bank of England are unnecessarily made parties to a suit, the relief against them being obtainable under the statute 39 & 40 Geo. 3, the bill will be dismissed against them, with costs, to be personally paid by the plaintiffs. *Edridge* v. *Edridge*, 3 Mad. 386.

6. The costs of the Bank of England, when made parties for the security of a legacy, must be paid out of the capital of the legacy, and not out of the general personal estate. *Hammond* v. *Neame*, 1 Swan. 38.

(4) *Bankrupt.*

1. Costs personally against an uncertificated bankrupt in a case of fraud and misconduct. *Lock* v. *Bromley*, 3 Ves. 40.

For Costs in Bankruptcy see p. 116, *ante*,

(5) *Baron and Feme.*

1. Feme sole brings a bill, and pending the suit marries, and baron and feme bring a bill of revivor, and obtain a decree with costs: they shall have costs for the whole suit excepting the bill of revivor. *Durbaine* v. *Knight*, 1 Vern. 318.

2. A bill by husband and wife to redeem a mortgage of the wife's estate, the defendant put in a plea which was overruled, and then the husband died: held that the wife was entitled to the costs of the plea by survivorship. *Coppin* v. ——, 2 P. W. 496.

3. Costs against a husband in decreeing a retransfer of stock, the subject of a settlement, but which he had fraudulently caused his wife to transfer to him. *Lampert* v. *Lampert*, 1 Ves. J. 21.

4. Husband and wife sue for a legacy to the wife, which the defendant, the executor, had refused to pay without a settlement being made on the wife: the Court refused to give costs on either side, but the plaintiff offering to make a settlement, such must be made at his own charge. *Brown* v. *Elton*, 3 P. W. 202.

5. Bill by husband, after the wife's death, to be relieved from a bond given by her to her aunt, just before marriage. If there had been concealment from the husband, he would have been excused costs on dismissing the bill, on which no relief could be given, there having been consideration proved; but as it appeared also that the concealment was at the request of the wife, and the husband being her

administrator, the bill was dismissed with costs to be taxed. *Blanchet* v. *Foster*, 2 Ves. 264.

6. Where a feme covert has been guilty of a fraud solely, without her husband, and he receives no benefit from it, the Court will not make him pay costs. *Cotton* v. *Luttrell*, 1. Atk. 451.

7. In a suit to effectuate a sale of part of the wife's separate estate, resisted by the wife because made without consulting her trustees, and in collusion with her husband, who received the money, the Court established the sale, but refused to make the wife pay costs, but costs were given to the plaintiff as against the husband. *Grigby* v. *Cox*, 1 Ves. 517.

(6) *Corporation.*

1. A Corporation nominating a schoolmaster, contrary to the particular tenor of their charter, are liable to costs. *The Town of Salop* v. *The Attorney General*, 2 Br. P. C, 402.

2. A corporation, being trustees for a charity, and in possession of the charity estate, and suppressing or concealing any evidence relating to the charity, are liable to the costs of the suit. *Borough of Hertford* v. *Poor of Hertford*, 2 Br. P. C. 377.

(7) *Creditors.*

1. A. as a creditor of B. brings his bill against the proper parties for the sale of B's estate, alleging that he had by his will charged it with the payment of his debts. On the trial of an ejectment, a verdict is found against the will; and thereupon A's bill is dismissed with costs. But on an appeal, this decree, so far as it related to costs, was reversed. *Squire* v. *Pershall*, 2 Br. P. C. 396.

2. Tenant by *elegit* received profits beyond his debt, decreed to account and pay costs; he appealed for costs only, and was relieved. *Owen* v. *Griffith*, Ambl. 520.

3. A creditor being decreed to reconvey on payment of what was due on an estate in the West Indies, acquired by an unconscientious use of legal process, was deprived of costs subsequent to the payment of money into Court. *Lord Cranstown* v. *Johnston*, 5 Ves. 277.

4. Where a creditor by judgment recovered, is afterwards found guilty of fraud respecting the whole of his demand, he shall pay costs both at law and in equity. *Lloyd* v. *Wynne*, 2 Br. P. C. 374.

5. A creditor coming in before the Master, and not a party to the cause, shall have his costs. *Maxwell* v. *Wettenhall*, 2 P. W. 26.

6. The Court refused to allow the costs of proving a debt before the Master, under the usual decree upon a creditor's bill. *Abell* v. *Screech*, 10 Ves. 355.

7. A bill for relief upon a bond, submitting to pay what is due: if the obligee will put in a bad answer and insist on more than is really due, he shall lose his costs in Equity, though entitled to his costs at law, if he sue upon the bond. *Forward* v. *Duffield*, 3 Atk. 555.

8. A creditor restrained from proceeding at law, after a decree against the executor for administration of assets, was allowed to prove his costs at law as a debt under the decree; the action having been commenced before the bill filed. *Grote* v. *Fryer*, 3. Br. C. C. 23. 2 Cox, 201.

9. In a later case it was held that the executor must pay the costs occasioned by his not giving the creditor notice of the decree, but that after notice, the creditor has no costs. *Paxton* v. *Douglas*, 8 Ves. 520.

10. And if the creditor proceed after notice of the decree, he will lose the costs of such further proceedings, and also the costs of an application for an injunction to restrain him. *Curre* v. *Bowyer*, 3 Mad. 456.

(8) *Executors.*

1. Though executors are not to pay costs, yet they shall not be allowed any, because they are supposed to reimburse themselves by the credit they take in the account kept by them. *Humphrys* v. *Moore*, 2 Atk. 108.

2. Where an executor, who ought to have been co-plaintiff, was made defendant, the Court doubted whether he was entitled to costs, but they were at length allowed. *Blount* v. *Burrow*, 3 Br. C. C. 90.

3. A., on his death-bed, desires his executors not to trouble B. for a bond-debt; the executor nevertheless puts the bond in suit; decreed that he shall deliver up this bond to B. to be cancelled, and pay his costs both at law and in equity: but the decree was reversed as to the costs. *Wekett* v. *Raby*, 2 Br. P. C. 386.

4. Where a debt of a testator is recovered

against an executor at law, costs are given *de bonis propriis*, but in equity it is discretionary, whether the executors shall pay costs or not. *Uvedale* v. *Uvedale*, 3 Atk. 119.

5. And if the executor misbehaves himself, by paying simple contract debts, in preference to a bond creditor with notice, the Court of Chancery will follow the rule of law, and make him pay costs. *Jefferies* v. *Harrison*, 1 Atk. 468.

6. Where the estates of two testators have been blended, so as to create confusion, the executor of an executor shall be excused costs, though it appeared he had assets enough to pay the plaintiff's debt. *Sandys* v. *Watson*, 2 Atk. 80.

7. A decree against executors for a legacy to an infant: as the executors had spent more money about the infant than the amount of the legacy, the Court refused to give costs against them. *Davis* v. *Austen*, 1 Ves. J. 247.

8. Notwithstanding a testator directed that his executors, for any expenses they should be put to, should be allowed their costs out of his estate, yet as there was a plain fraud in this case in the executors, the Court decreed costs against them. *Hide* v. *Haywood*, 2 Atk. 126.

9. Where executors make an unfair appraisement, and otherwise misbehave themselves in their trust, they shall be liable to costs. *Shephard* v. *Smith*, 2 Br. P. C. 372.

10. Where there are two executors, though but one may be liable for funds misapplied, yet both shall be liable to the whole costs of suit. *Littlehales* v. *Gascoyne*, 3 Br. C. C. 74.

11. The answer of the executor to a bill for a legacy being evasive and contradictory, he was ordered to pay costs. *Reech* v *Kennegal*, 1 Ves. 126.

12. Costs were decreed against an executor for insisting upon a surplus. *Bayly* v. *Powell*, Pre. Ch. 92.

13. But where it was by way of submission to the opinion of the Court, the executors were decreed their costs. *Rashly* v. *Masters*, 1 Ves. J. 205.

14. It is a settled rule that the executors of an insolvent shall not have costs. *Adair* v. *Shaw*. 1 S. & L. 280.

And see p. 212, 415, *ante; & p.* *425, *post.*

(9) *Heir.*

1. Heir at law or heir male to the honor of a family, if probable cause to contend for the family estate, shall not pay costs. *Shales* v. *Barrington*, 1 P. W. 481.
Leman v. *Alie*, Amb. 163.

2. Bill by devisee against an heir at law to prove a will, the heir cross-examines the plaintiff's witnesses, and refuses to release his right, yet the heir shall have his costs given him on motion: otherwise, if he examines witnesses of his own. *Bidulph* v. *Bidulph*. 2 P. W. 286. *Angel* v. *Brown*, (cited) *Ibid.*

3. An heir at law is made defendant, and insists on his title: he shall have his costs, though it goes against him. But if an heir at law be plaintiff, and miscarries in his suit, he shall not have costs; but, on his suit appearing to be groundless, shall pay costs. *Luxton* v. *Stephens*, 3 P. W. 373.

4. An heir is entitled to his costs: for it is the law which casts the descent upon him; otherwise, as to an executor, for he may renounce. *Humphrey* v. *Morse*, 2 Atk. 408.

5. Where an heir at law will bring a bill to set aside a will for insanity, instead of an ejectment, he shall pay costs, if he fails; where he is brought before the Court as a defendant, and an issue directed to try the fraud, or insanity of the testator, though he fails in overturning the will, the Court will not give costs against him. *Webb* v. *Claverden*, 2 Atk. 424.

6. Where a devisee brings a bill merely *in perpetuam rei memoriam*, and the heir at law only cross-examines the witnesses produced to confirm the will, he is entitled to his costs; but if he examines witnesses to encounter the will, he shall not have his costs. *Berney* v. *Eyre*, 3 Atk. 387.
Blinkchorne v. *Feast*, 1 Dick. 153.
Vaughan v. *Fitzgerald*, 1 S. & L. 316.

7. And where a devisee brings a bill to perpetuate testimony, and prays relief, and the heir at the hearing insists upon a trial, and the will is established, the Court hath in many instances given costs to the heir, both at law and in equity, where he hath not been vexatious or guilty of tampering. *Blinkchorne* v. *Feast*, 1 Dick. 153.
Crew v. *Joliff*, Pre. Ch. 93.
Berney v. *Eyre*, 3 Atk. 387.
But see Gardiner v. *Johnson*, 1 Dick. 313.

8. But if the heir as defendant sets up a disability against the person who made the will, and fails, he shall not have his costs. *Berney* v. *Eyre*, *Ibid.*

9. Where the heir, defendant, set up insanity in the testator, and desired an issue, and failed, he was still held entitled to his costs in equity, the contesting the will not being wicked or fraudulent; but the Court refused to give the heir his costs at law, and made him pay the costs of a groundless motion for a new trial. *White* v. *Wilson*, 13 Ves. 87.

10. Where the heir at law was defendant, and raised a point, and failed, the Court refused costs for or against the heir. *Rashley* v. *Master*, 1 Ves. J. 205.

11. The Court will give costs against an heir, in case of spoliation, or secreting of a will. *Berney* v. *Eyre*, 3 Atk. 388.

12. Or where the bill is brought by the heir, and the suit proves groundless. *Luxton* v. *Stephens*, 3 P. W. 373.

13. If a bill is brought by an infant heir, to dispute a will, and the bill is dismissed, the plaintiff shall pay costs, because he may notwithstanding bring a bill or ejectments on coming of age, indeed, it is not certain whether another *prochein amy* may not bring a bill. *Blinkehorne* v. *Feast*, 1 Dick. 153.

14. And where the heir, who was of age, brought a suit to set aside a will, which upon an issue was established, he was ordered to pay costs at law and in equity. *Johnson* v. *Gardiner*, 1 Dick. 313.
Gough v. *Botevel*, 1 Dick. 396.

15. But where the heir, Sir Tanfield Leman, was disinherited, and brought a bill for discovery and inspection of deeds, and it appeared he had no title, the Court refused to give costs against him, but dismissed the bill, with liberty to the defendants to apply for costs, if the plaintiff should molest them. *Leman* v. *Alie*, Amb. 163.

16. Bill of heir at law against the devisee being vexatious, was dismissed with costs. *Seal* v. *Brownton*, 3 Br. C. C. 214.

17. Where an heir at law is brought before the Court by order, although there is no resulting trust in his favor, he shall have his costs. *Attorney General* v. *Haberdashers' Company*, 4 Br. C. C. 177.

18. Where the bill, after being revived against the heir, was dismissed with costs, this only entitled him to his costs, and not to the costs of his ancestor before revivor. *Lloyd* v. *Powis*, 1 Dick. 16. 3 C. R. 65.

(10) *Infant.*

1. If an infant sues for a legacy, costs must be paid out of the assets, and not out of the legacy. *Anon*, Mos. 5.

2. The costs of an unsuccessful defence of an infant, were charged not upon the general fund, but upon the infant's share. *Earl of Orford* v. *Churchill*, 3 V. & B. 59.

3. Decree against an infant and his trustees, that the costs should be paid out of the trust money, but reversed on appeal, because the money was to be laid out in land, wherein the infant was to be but tenant for life. *Peller* v. *Husband*, 8 Br. P. C. 361.

4. Where an infant does not proceed with a cause instituted by his *proch' in amy*, he shall not pay costs. *Turner* v. *Turner*, 1 Str. 708.
This was a rehearing of S. C. 2 P. W. 297.

5. The Court will order the costs of reference respecting an infant's maintenance without suit. *Ex parte Thomas*, Amb. 146.

6. The costs given to an infant trustee ordered to convey under the statute 7 Anne; but nothing but what is strictly necessary will be allowed: so the costs of a brief to counsel to consent for the infant will not be allowed. *Ex parte Cant*, 10 Ves. 554.

(11) *Mortgagor or Mortgagee.*

1. The second mortgagee brings a bill to redeem the first mortgagee, who had been put to great charge in foreclosing the mortgagor. The costs which the first mortgagee has been put to shall not be taxed as in case of an adversary suit, but he shall be allowed all his costs and charges as is done in case of a solicitor who lays out money for his client; and the profits of the mortgaged premises shall be first applied to pay off those costs, before they go to sink the principal. *Lomax* v. *Hide*, 2 Vern. 185.

2. So also where the heir put the mortgagee to the expense of a suit at law in an endeavour to invalidate the mortgage, and afterwards brought a bill to redeem, the mortgagee was allowed his full costs at law. *Ramsden* v. *Langley*, 2 Vern. 536.

3. Mortgagee was allowed the costs of

procuring administration to an incumbrancer under the will of the mortgagor, as a necessary party to the foreclosure. *Hunt* v. *Townes*, 9 Ves. 70.
See also Ramsden v. *Langley*, 2 Vern. 536.

4. On a bill to foreclose, the Court, in case the defendant redeemed, would not decree he should pay the costs of a cross cause, which he had brought to redeem, and was still depending. *Anon*, Mos. 45.

5. Generally, a mortgagee is entitled to costs, but where there has been unfair dealing on the part of the mortgagee, it makes an exception; and in such case the mortgagee will not be allowed his costs. *Taylor* v. *Baker*, 5 Price, 311.
Loftus v. *Swift*, 2 S. & L. 642.
Taylor v. *Baker*, 5 Price, 311.

6. Mortgagee, though entitled to costs in general, deprived of costs occasioned by improper conduct; and even compelled to pay costs. *Detillin* v. *Gall*, 7 Ves. 583.
And see Garforth v. *Bradley*, 2 Ves. 678.

7. Notwithstanding reasonable proposals may be made, the Court, on a bill of foreclosure, never refuses costs, unless there is proof of an actual tender. *Gammon* v. *Stone*, 1 Ves. 339.

8. The mortgagee was made to pay costs on the ground of a tender, and an appropriation of the money, which was paid into the Bank, and refused. *Shuttleworth* v. *Lowther*, (*cited*) 7 Ves. 586.
See further as to a Tender, p. *409, *ante*.

9. A mortgagee was held to have forfeited his right to costs, by insisting upon the conveyance as an absolute purchase. *Francklyn* v. *Ferne*, Barn. 30.

10. In a similar case the plaintiffs were decreed taxed costs to the time of the decree. *England* v. *Codrington*, 1 Eden, 169.

11. And where the mortgagee, taking advantage of the distress of the mortgagor, had the conveyance made in the form of a purchase, and afterwards resisted the right to redeem, he was made to pay costs to the decree. *Baker* v. *Wind*, 1 Ves. 160.

12. Mortgagee shall not onerate his pledge with costs, which he occasions by an unjust defence. *Mocatta* v. *Murgatroyd*, 1 P. W. 395.

13. A bill of foreclosure was dismissed with costs, so far as it sought to tack a bond to a mortgage against creditors. *Hamerton* v. *Rogers*, 1 Ves. J. 513.

14. On a reference under the usual decree against a mortgagee in possession, for an account, and redemption upon payment of principal and interest due, and costs, the Master reports the mortgagee overpaid; it is then too late to refuse him costs, although the suit was occasioned by his fraudulent accounts. *Gilbert* v. *Golding*, 2 Anst. 442.

15. Under a bill by the first mortgagee, the second and third mortgagees consenting to a sale, and the fund proving deficient, the costs are paid out of the fund in the first instance. *Knebel* v. *Scrafton*, 13 Ves. 370.

See further p. 318, *ante*.

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(12) *Pauper*.

1. Where a plaintiff, a pauper, had a decree for the duty and costs, and the Master taxed full costs; yet on motion, ordered that the plaintiff and his solicitor do make oath before a Master of what they had paid or were to pay, and that to be allowed, but no further. *Angell* v. *Smith*, Pre. Ch. 219.

2. Defendant put in a plea and demurrer to a bill by a pauper, and they were overruled: the Court ordered costs like other suitors, the counsel and clerks not giving labor to the defendant, but to the pauper. *Scratchmer* v. *Foulkard*, 1 Eq. Ca. Ab. 125.

3. But when a bill against a pauper is dismissed with costs, he is entitled to such fees as he has paid, and what he has actually disbursed at the time of the order, and no more. *Denn* v. *Russell*, 1 Dick. 427.
And see Frost v. *Preston*. 16 Ves. 160.

4. A pauper is liable to costs precedent to his admission. *Anon*, Mos. 66.

5. If a pauper amend by leaving out parties, he shall pay their costs. *Wilkinson* v. *Belsher*, 2 Br. C. C. 272.

6. The privilege of paupers for obtaining justice, is not to be perverted to injustice. The Court is tender as to dispaupering; costs against a pauper upon that ground not pressed, on the recommendation of Court. *Whitelocke* v. *Baker*, 13 Ves. 511.

And see p. 331, *ante*.

(13) *Prochein Amy.*

1. The *prochein amy* of the plaintiff, an infant, ordered to pay the costs of an improper and unfounded application. *Buckton* v. *Buckton*, 2 Dick. 794.

2. A bill brought on behalf of an infant, was dismissed with costs. The *prochein amy* was allowed the costs he paid. *Taner* v. *Ivie*, 2 Ves. 466. 1 Dick. 168.

3. But in a late case, where the foundation of the bill was imputed fraud, it was dismissed with costs to be paid by the next friend. *Elliott* v. *Cordell*, 5 Mad. 157.

4. Where the costs of suit were to be paid out of the estate, the Court refused a *prochein amy* the costs beyond taxed costs. *Osborne* v. *Denne*, 7 Ves 424.

5. But in a later case the next friend of an infant, was held entitled to fair expenses beyond taxed costs, under head of just allowances. *Fearns* v. *Young*, 10 Ves. 184.

And see p. 229. *ante.*

(14) *Solicitor.*

1. Where the bill was brought by a bankrupt, and charged his assignees as defendants, but process not being prayed against them, a plea for want of parties was allowed: the bill was ordered to be amended at the costs of the solicitor. *Fawkes* v. *Pratt*, 1 P. W. 592.

2. If a whole petition is recited in an affidavit of service, the Court will make the attorney, who drew it, pay the costs out of his own pocket. *Ex parte Smith*, 1 Atk. 139.

3. Where affidavits in support of a petition were sworn before the solicitor in the cause, he was ordered to pay the costs. *In the matter of Hogan*, 3 Atk. 813.

4. An attorney's saying that he only followed directions in drawing deeds under fraudulent circumstances, will not excuse him from paying costs. *Bennet* v. *Vade*, 2 Atk. 328.

5. Where one of the bail at law for the plaintiff had prosecuted a suit in equity, in the plaintiff's name, in his absence, the plaintiff not being to be found, and such bail acting throughout the cause as party and solicitor, he was ordered to pay the costs in equity, not as bail but in respect that he was party and solicitor. *Digardine* v. *Swift*, 1 C. C. 71.

6. Bill by creditors to set aside a marriage settlement, dismissed with costs, and defendants held, entitled to that judgment even against a plaintiff, who was made so without his authority: but his whole expense, and also the whole expense above the costs taxed of all the defendants, except the husband, were decreed to be paid by the solicitor for the plaintiffs, the transaction being considered as a combination between the husband, the creditors who authorized the bill, and the solicitor, to defraud the children. *Dundas* v. *Dutens*, 1 Ves. J. 196. 2 Cox, 235.

7. Where the name of a plaintiff was inserted without his authority, and he had no knowledge of it till served with a subpœna for costs, after the bill had been dismissed, the solicitor was ordered, on motion, to pay to the defendant the costs already ordered from plaintiff to defendant, together with plaintiff's costs of the application. *Wade* v. *Stanley*, 1 J. & W. 674.

See also Titterton v. *Osborne*, 1 Dick. 350.

And see further p. 416, *post.*

(15) *Trustee.*

1. Trustees, where there is no abuse of trust, are entitled to their costs. *Landen* v. *Green*, Barn. 390.
Graham v. *Graham*, 1 Ves. J. 272.
Attorney General v. *City of London*, 1 Ves. J. 246.

2. And they will not be deprived of costs, though guilty of slight misconduct, in respect of which they are charged with interest. *Sammes* v. *Rickman*, 2 Ves. J. 36.

3. Costs were allowed to trustees and executors brought into Court, though they made a claim and failed, being merely by way of submission. *Rashly* v. *Masters*, 1 Ves. J. 205.

4. But if a trustee, merely to have a point relating to his private interest determined, brings the *cestui que trust* before the Court, he shall pay the whole costs of the suit. *Henley* v. *Philips*, 2 Atk. 48.

5. So far as accounts are necessary to be taken, executors and trustees will be allowed their costs. *Raphael* v. *Boehm*, 13 Ves. 590.
Thompson v. *Sheppard*, 2 Cox, 161.

6. If a trustee, by his answer to a suit for that purpose, submits to account, he shall pay no costs, though found in debt; but if he controverts the account, and be found in arrear, he shall pay costs. *Parrot* v. *Treby*, Pre. Ch. 254.

7. No costs to a trustee, whose neglect occasioned the suit. *O'Callaghan* v. *Cooper*, 5 Ves. 117.

And see Caffrey v. *Darby*, 6 Ves. 497.

8. Bill being dismissed without costs, as a hard case, parties made trustees without their knowledge, and as such being necessary parties to the bill, cannot have costs against the plaintiff, but are left to their remedy against their principal: otherwise, perhaps, if the plaintiff had prevailed, because then those costs might have been given over against other defendants. *Brodie* v. *St. Paul*, 1 Ves J. 326.

9. The Court refused costs to a trustee under a deed which was voluntary and not meritorious. *Colman* v. *Sarrel*, 1 Ves. J. 50. 3 Br. C. C. 12.

10. Costs will not be refused to a trustee for reason of general misconduct; but where the trustee set up a trust different from what it really was, the Court thought it a ground for refusing costs. *Ball* v. *Montgomery*, 2 Ves. J. 191.

11. A trustee misbehaving himself, ordered to pay costs out of his own pocket, and not out of the trust estate. *Loyd* v. *Spillet*, 3 P. W. 347.

Brown v. *How*, Barn. 354.

12. Where a trustee, by his improper conduct, occasions the necessity of the suit, he shall pay the costs. *Fell* v. *Lutwidge*, Barn. 319.

13. Where a trustee, by his answer to a bill for the delivery up of deeds, stated that he was trustee for children's portions and mortgagees generally, without naming them; the Court decreed, the trustee to pay the costs, as by not naming the mortgagees, the plaintiff had lost an opportunity of amending. *Earl Scarborough* v. *Parker*, 1 Ves. J. 267.

14. A trustee who refused to join in a conveyance, and thereby occasioned the necessity of a suit, was ordered to pay the costs. *Jones* v. *Lewis*, 1 Cox, 199.

15. If trustees are charged with a loss occasioned by their negligence, though without any corrupt motive, the costs follow of course. *Caffrey* v. *Darby*, 6 Ves. 488.

16. Where trustees for sale purchased at an under value, though by auction and without fraud, they were charged with costs of suit to set aside the sale. *Sanderson* v. *Walker*, 13 Ves. 601.

17. The trustee of stock sold out the stock, and invested it in land without fraud or improper motive: the breach of trust subjected him to the costs of a suit to have the stock replaced. *Earl Powlet* v. *Herbert*, 1 Ves. J. 297.

18. Where the Court gives interest against executors, as a remedy for a breach of trust, costs against them follow of course. *Seers* v. *Hind*, 1 Ves. J. 294.

Rocke v. *Hart*, 11 Ves. 58.

19. But such costs are not now considered as of course, for there are many cases in which executors will be charged with interest, and yet not charged with costs. *Ashburnham* v. *Thompson*, 13 Ves. 404.

And see Sammes v. *Rickman*, 2 Ves. J. 36.

Dawson v. *Parrot*, 3 Br. C. C. 236.

20. Where the executor, instead of investing the fund according to the directions of the will, used it for his own benefit, he was charged with interest and costs of suit. *Piety* v. *Stace*, 4 Ves. 620.

21. Where an executor and trustee, in breach of trust, sells out the trust fund, and lends it on private security, he shall pay the cost of suit, so far as they are occasioned by his misconduct. *Pocock* v. *Reddington*, 5 Ves. 794.

22. An executor in trust for infants, unnecessarily calling in property which was out upon good security, and keeping large balances in his hands, and using it as his own, was charged with interest and costs of suit. *Mosley* v. *Ward*, 11 Ves. 581.

23. Where the executors had kept large balances in their hands for 20 years, and made profit, they were charged with interest and costs. *Ashburnham* v. *Thompson*, 13 Ves. 402.

24. Where the executors neglected to execute a trust for accumulation, directed by the will, they were charged with interest, and such part of the costs as related to their breach of trust. *Raphael* v. *Boehm*, 13 Ves. 590.

25. Trustee sued concerning the trust, obtained a dismission with taxed costs, but being afterwards sued for an account of the trust, he was allowed his true and

necessary expenses in the first suit beyond his taxed costs. *Amand* v. *Bradbourne*, 2 C. C. 138.

And see Fearns v. *Young*, 10 Ves. 184.

See also p. 452, *post; and as to Trustees of a Charity see* pp. 416*, *421, *ante*.

(16) *Vendor or Purchaser.*

1. A purchaser *pendente lite*, on filing a supplemental bill, is liable to all the costs from the beginning to the end of the suit. *Anon*, 1 Atk. 89.

2. Where in the abstract of title, a will, which formed part of it, was represented as proved, when in fact it was not, the vendors were decreed to pay the costs of a suit for its safe custody. *Harrison* v. *Coppard*, 2 Cox, 318.

3. Where biddings are ordered to be opened, and the costs of a purchaser taxed, the Court will not give a particular direction to the Master to include a specific expense. *Anon*, 2 Ves. J. 286.

And see p. 418*, *ante; and* p. 464, *post.*

(17) *Witness.*

1. Where a mere witness is made defendant to a bill in Equity, he will have his costs. *Cartwright* v. *Hotsley*, 1 Ves. J. 292.

2. A witness examined at a commission swears reflecting words; yet he ought not to pay costs, it being the commissioner's fault to take down such depositions. *Anon*, 2 P. W. 405.

And see p. 53, *ante.*

(*f*) *Setting off.*

1. Bill praying relief as well as discovery, whilst the plaintiff was proceeding at law on the same account, he amended by striking out the relief, and the bill thereupon was dismissed, as praying nothing but a discovery, and the costs of the dismission were taxed to the defendant at £38. The plaintiff recovered judgment against the defendant in damages and costs to the amount of £440, and petitioned to set off the costs at law against the costs in Equity; the Court thought it reasonable, but doubted if such an order could be made after dismission of the bill. *Gurish* v. *Donovan*, 2 Atk. 166. *S. C. Geerish* v. *Dunaceon*, Barn. 428.

2. Where a bill was dismissed with costs, as against one of the defendants, and at that time the plaintiff had recovered a verdict at law, and entered up judgment against that defendant for a much larger sum, an application to the Court, made on affidavit of the insolvency of the defendant, that these costs might be deducted out of the money due on this judgment, was refused. *Holworthy* v. *Mortlock*, 1 Cox, 202.
S. C. Holworthy v. *Allen*, 2 Br. C. C. 16.

3. Where there are costs in equity and at law due from the opposite parties, the Court will not set off the costs at law against those in Equity, if the solicitor in Equity claims his lien on the latter. *Smith* v. *Brocklesby*, 1 Anst. 61.

4. Motion to set off costs in a suit in C. B., for which the plaintiff had retained the defendant as the attorney, and undertaken to pay the costs, though he himself was not the party against the judgment in the Court of Exchequer, granted. *Murphy* v. *Cunningham*, 1 Anst. 271.

5. In case exceptions shall be referred to the Master, he shall tax to the plaintiff the costs of the exceptions allowed, and to the defendant the costs of the exceptions disallowed, and strike the balance. *General order of the Court of Chancery in Ireland.* 1 S. & L. 241.

6. Costs at law and in Equity between the same parties, set off after decree, omitting such a provision. *Shine* v. *Gough*, 2 B. & B. 33.

(*g*) *Taxation.*—(1) *Order for.*

1. A solicitor's bill may be taxed upon an undertaking to pay what is due, and without bringing the demand into Court, as was formerly the practice; but in general, if the client desires an account against the solicitor, he must bring a bill for that purpose: the account cannot be taken on the taxation of the solicitor's bill. *Anon*, 2 Ves. 451.

2. The whole of a solicitor's bill may be taxed when any point concerns business done in the Court of Chancery; and it makes no difference that part of the business was done for other persons, as well as the party applying for taxation. *Margerum* v. *Sandiford*, 3 Br. C. C. 233.

3. Agency business does not come within the statute for taxing attorney's bills. *Binsted* v. *Barefoot*, 1 Dick. 112.

4. A bill of fees and disbursements for agency business ordered to be taxed. *Paget* v. *Nicholson*, 1 Dick. 285.

And see Beames on Costs, p. 307.

5. Costs decreed out of the estate, upon application, directed to be taxed, as between solicitor and client. *Attorney General* v. *Carte*, 1 Dick. 113.

6. The Court has no officer to tax the costs of an application for a commission of review, and therefore does not give costs. *Ex parte Fearon*, 5 Ves. 633.

7. The Court, under its general jurisdiction over solicitors, without a cause in Court, ordered a solicitor to deliver his bill of costs, he claiming a lien upon title deeds in his possession. *Ex parte Earl of Uxbridge*, 6 Ves. 425.

8. Proceedings before the Lord Chancellor, in exercise of the visitatorial power upon a Royal foundation, are not within the statute for taxing bills of costs. *Ex parte Dann*, 9 Ves. 547.

9. Order in bankruptcy under the act 2 G. 2. c. 23. s. 22. to tax a solicitor's bill for striking the docket, and a journey to get an affidavit of debt, being business relating to the bankruptcy, though previous to it. *Ex parte Smith*, 5 Ves. 706.

And see further as to Costs in Bankruptcy, p. 49, *ante*.

10. A sum certain given for costs when small, to avoid the expense of taxing them. *Wilding* v. *Wilding*, 4 Br. C. C. 100.

11. If the bill of costs has been settled and paid, and such payment acquiesced in, it will not be referred for taxation as a matter of course, but requires a special case, as fraud or exorbitant and improper charges. *Langstaffe* v. *Taylor*, 14 Ves. 262.

Pistor v. *Dunbar*, 1 Anst. 186.

12. Solicitor's bills of costs referred to be taxed, after a bond, and mortgage executed for payment of the balance alleged to be due on the bills. *Aubrey* v. *Popkin*, 1 Dick. 403.

Walmesley v. *Booth*, 2 Atk. 29.

13. Security taken by a solicitor from his client for unliquidated costs, will not prevent the taxation of his bill, containing extraordinary or improper charges, and such security will be valid for so much only as is found actually due upon taxation. *Drapers' Company* v. *Davis*, 2 Atk. 295.

Newman v. *Payne*, 2 Ves. J. 199. 4 Br. C. C. 350.

14. Where a solicitor has been seven years in getting his bills taxed after the order so to do, and they are lost in the meantime in the Master's office, the Court will not allow it to go again to the Master. *Yea* v. *Yea*, 2 Anst. 494.

15. Where a person dies after having obtained an order of reference to tax a bill, upon an undertaking to pay; his representative shall not revive it but upon the same terms. *Murphey* v. *Balderston*, 2 Atk. 114. Barn. 265.

16. On the client's neglecting to attend the Master on the taxation of the bill, the Chancellor would not order him to bring the money into Court, but only that the order of reference should be discharged, if he did not procure a report in a fortnight. *Anon*, Mos. 68.

17. An order for the taxation of a bill of costs entitled in the cause, is regular, if obtained by a party to the cause; but if one, not a party, seeks to obtain an order for taxation, it must be by application under the stat. 2. Geo. 3. c. 23. s. 22. *Bignol* v. *Bignol*, 11 Ves. 328.

18 But if the other party has proceeded under the order, it would be considered as a waver of the irregularity. *Ibid.*

19. Whether a party to the cause, having obtained an order for taxation in the cause, can pursue it under the stat. 2 Geo. 3 — *Quære.* *Ibid.*

See also p. 49, *ante, and* p. 416, *post.*

(2) *Review of.*

1. Where a submission to arbitration in a cause in the Court of Exchequer is made a rule of the Court of King's Bench, and by the award the costs are to be taxed by the Master of the Court of Exchequer, the Court of Exchequer have no jurisdiction to direct a review of the taxation, the Master in such taxation not acting as an officer of the Court of Exchequer. *Chapman* v. *Lansdown*, 1 Anst. 273.

(3) *Costs of.*

1. Reference to the matter to tax the solicitor's costs of taxation. *Cogan* v. *Cave*, 1 Dick. 96.

2. The solicitor delivered in a bill of costs, including an item of £90, which, even if due, could not be allowed on taxation; he delivered a second without that item; on referring the latter for taxation

ess than a sixth was taken off: the Court would not give costs on either side. *Webb* v. *Stone*, 1 Anst. 260.

3. Where a solicitor has been guilty of great delay in bringing in his bills, the Court will not give him the costs of taxation, although a sixth of the bill is not taken off. *Yea* v. *Yea*, 2 Anst. 589.

4. In a case where not a twenty-eighth part was taken off, the Court refused the solicitor the costs of taxation. *Ramsden* v. *Hilton*, 1 Dick. 322.

5. Where less than a sixth was taken off, the solicitor was allowed the costs of taxation, but he was charged with useless expense created by him in the course of proceeding before the Master. *Yea* v. *Frere*, 14 Ves. 154.

See further p. 117, *ante; and* p. 417, *post.*

(*h*) *Lien for.*

1. A solicitor, who is in disburse for his client, has a right to be paid out of a duty decreed to an administrator, and has a lien upon it before the bond creditors of the deceased; nor can the administrator controvert this rule by insisting on applying the assets in a course of administration. *Turwin* v. *Gibson*, 3 Atk. 720.

2. Where costs were decreed to all parties out of real estate, they were held to be a lien upon the estate; and, one of the parties dying bef re taxation, that his heir was entitled. *Blower* v. *Morrets*, 3 Atk. 772. 1 Dick. 254.

3. A solicitor prosecuting the suit to a decree, has a lien for his bill on the estate recovered, in the hands of the person recovering, but not in the hands of the heir. *Barnesley* v. *Powell*, Amb. 102.

4. Where the parties compromised the suit without the knowledge of the solicitor, the Court ordered part of the money in Court to be attached, to answer the solicitor's bill of fees and disbursements. *Fairland* v. *Enever*, 1 Dick. 114.

5. A solicitor who has declined to act for his client, has not a lien for his costs upon a fund in Court. *Cresswell* v. *Byron*, 14 Ves. 271.

6. The solicitor has a lien upon all papers come to his hands for the purpose of business, though they do not so come in the particular cause in which his demand for costs arose. *Ex parte Nesbitt*, 2 S. & L. 279.

7. Where a Clerk in Court had obtained an order for taxing the costs of the solicitor who employed him, and afterwards another order for payment of the costs of taxation, he was allowed to detain the papers of the solicitor's client, till the costs reported due under the first order were paid, but not for the costs of taxation. *Cockerel* v. ——, Barn. 264.

8. The Clerk in Court has a lien upon papers in his custody belonging to the client, although the client may have paid the solicitor who employed the Clerk in Court. *Farewell* v. *Coker*, 2 P. W. 460.

9. An agent employed by a solicitor has no lien for costs beyond what the client may be indebted to the solicitor for business done in the cause, to which the papers belong. *Anon*, 2 Dick. 802.

10. Where a party changes his solicitor, the first solicitor has a lien upon the papers in his hands for his costs. *Merrywether* v. *Mellish*, 13 Ves. 161.

11. But the former solicitor cannot by virtue of his lien stop proceedings in the cause till he is paid his bill. *Merrywether* v. *Mellish*, 13 Ves. 161. *O'Dea* v. *O'Dea*, 1 S. & L. 315.

12. An attorney has a lien upon title deeds deposited by his client, against those who take the estate under an appointment by such client. *Hide* v. *Wigmore*, Mos. 14.

And see Ex parte Lee, 2 Ves. J. 285.

13. But a tenant for life depositing the title deeds of the estate with an attorney, does not give the attorney a lien as against the remainderman, for that would be charging the estate of the remainderman. *Ex parte Nesbitt*, 2 S. & L. 279.

14. A solicitor cannot, on the ground of his lien, refuse to produce a deed for the benefit of another person, for whom the client is bound to produce it. The lien is only between the solicitor and client. *Furlong* v. *Howard*, 2 S. & L. 115.

15. The lien of the attorney for the costs in the cause is not subject to the demand of the other party on his client for the costs of another suit. *Gabbit* v. *Chaytor*, 1 Anst. 279.

And see Smith v. *Brocklesby*, 1 Anst. 61.

And see p. 418, *post; and* Div. XIV. *ante.*

(i) *Payment of.*

1. The defendant, who was decreed to pay the costs, being run away, and the *prochein amy* poor, the solicitor was paid his bill of costs out of money lodged in Court for the benefit of the plaintiffs during their infancy. *Staines* v. *Maddox*. Mos. 319.

2. Costs directed to be paid out of an estate vested in defendant; who refusing to pay them, sufficient of the estate was ordered to be sold for the payment. *Cannon* v. *Beely*, 1 Dick. 115.

3. An account taken and an estate sold under a decree, by which the costs of all parties were given out of the estate: order for payment of costs to the plaintiffs and defendants, before the report was made final: previous notice to the creditors before the Master not necessary. *Hare* v. *Rose*, 2 Ves. 558.

4. Where the poverty of a plaintiff would not allow her to carry on the cause, her costs were ordered to be taxed and paid to her, to enable her to go on with the cause. *Jones* v. *Coxeter*, 2 Atk. 400.

5. Plaintiff not relieved from costs decreed against him, on the ground of his being insolvent before the cause was heard. *Smith* v. *Fry*, 1 Dick. 288.

6. Costs given, and the fund being in Court, ordered to remain till the account; the costs to come out of the balance, if any, due to the party, as far as it would go. *Crowe* v. *Ballard*, 1 Ves. J. 221.

7. Costs awarded by the Court must not become the subject of an action, particularly costs in bankruptcy. *In the matter of Dillon*, 2 S. & L. 110.

For the recovery of costs by attachment, see Div. VIII. *ante.*

(k) *Refunding.*

1. On reversing an order for allowing a demurrer, the costs which had been levied for and paid were ordered to be refunded. *Oats* v. *Chapman*, 1 Ves. 542. 2 Ves. 100. 1 Dick. 148.

2. So if a bill be dismissed with costs, and the decree not signed or enrolled, but the costs levied, and the decree reversed upon a rehearing, the costs must be refunded. *Ibid*, 2 Ves. 100.

3. Where costs awarded in bankruptcy were recovered in an action upon a written undertaking of the assignee, the Court ordered them to be refunded. *Ex parte Dillon*, 2 S. & L. 110.

XIX. Counsel.

1. Counsel have a right to drafts to make use of them as precedents only, but not to detain them when either party concerned may be benefited by inspecting of them. *Sir William Stanhope* v. *Roberts*, 2 Atk. 214.

2. Consent of counsel is to be given upon their own conception of the authenticity of their instructions, and if given, is binding on the client. *Mole* v. *Smith*, 1 J. & W. 673.

3. Where two counsel, instructed by different solicitors, appeared upon a petition for the same party, the authority of the solicitors was directed to be verified by affidavit. *Butterworth* v. *Clapham*, 1 J. & W. 673 (*n*).

4. The former practice of the bar, not to accept a retainer against a client, from the adversary, without giving notice, and an option, is relaxed; but the retainer ought not to be accepted if the counsel knows what may be prejudicial to the former client, though that client refuses to retain him. *Earl Cholmondeley* v. *Clinton*, 19 Ves. 274.

XX. Cross Bill.

(*See also* Div. LXIV, LXXIX. *post.*)

1. Cross bills are in nature of a defence, and were first allowed, that the party might state his own case more to his advantage, than he could as a defendant; but the same matter cannot be examined to after publication. A cross bill should be brought time enough to be examined to before publication in the original suit passes. *Ward* v. *Eyles*, Mos. 377.

2. A cross bill is a defence and so connected with the original, that they are always considered but as one cause. *Kemp* v. *Mackrell*, 3 Atk. 812.

3. R. and his wife filed an original bill, to which the defendant D. put in his plea, and it was allowed; D. filed a cross bill against R. and his wife, to which they put in their answer, and exceptions were taken; then R. and his wife filed their amended bill against D. who appeared and prayed six weeks time to put in his answer to the

amended bill, after R. and his wife shall have answered the cross bill: the plaintiff in the cross bill having procured a report that the answer of R. to it was insufficient, R. by that means lost the priority of suit. *Rattray* v. *Darley*, 3 Atk. 724.

4 Original bill being abated by intermarriage of the plaintiff, and not being revived until after a cross bill is filed, loses its priority. *Smart* v. *Floyer*, 1 Dick. 260.

5. Where no process is taken out upon the original bill, and a cross bill is filed, the plaintiff in the original suit cannot compel defendant to answer his bill first. *Price* v. *Coningsby*, Bun. 124.

6. A. files a bill against B. and C. who put in insufficient answers, and then file a cross bill against A. B. becomes a bankrupt, his assignees bring their bill, in nature of a bill of revivor, against A., but they shall not proceed till C. has answered A.'s bill. *Child* v *Frederick*, 1 P. W. 266.

And as to the priority of suit being lost by Amendment, see p. *393, *ante*.

7. Where a defendant in a cross bill, but plaintiff in the original, is in contempt for not putting in an answer, it is irregular to move to stay proceedings; the proper motion is to enlarge publication in the original cause, to a fortnight after the answer is come in to the cross bill. *Creswick* v. *Creswick*, 1 Atk. 291.

8. Semble, a cross bill should be filed in the court in which the original is filed; but where the defendant to a cross bill had answered a part, it was held that he had waved the objection. *Glegg* v. *Legh*, 4 Mad. 193.

But see Earl of Newbury v. *Wren*, 1 Vern. 221.

9. If a creditor coming in under a decree, requires relief which cannot be had by re-hearing the original cause, he ought to file a cross bill. *Latouche* v. *Lord Dunsany*, 1 S. & L. 49.

10. Defendant to a bill for specific performance, proving an agreement different from that insisted on by the plaintiff, may have a decree upon his answer submitting to perform, without a cross bill, which, if filed, would be dismissed with costs, being now unnecessary. *Fife* v. *Clayton*, 13 Ves. 546.

11. Cross bill being for a mere legal title, dismissed with costs, though the original bill was dismissed. *Calverley* v. *Williams*, 1 Ves. J. 213.

XXI. Decree.

(a) Obtaining.

1 The plaintiff may have a decree either according to his equity, or the defendant's offer in the answer, though he replies to it. *Anon*, Mos. 41.

2. A defendant being examined as a witness for the plaintiff, will not prevent a decree against him in the same cause as to other matters, than those he has been examined to. *Nightingale* v. *Dodd*, Amb. 583.

See also p. 479, *post*.

3. A decree for establishing the rights of the lord of the manor. *Wentworth* v. *Prince*, 1 Dick. 154.

Brown v. *Howard*, 1 Eq. C Ab. 163.

4. An original independent decree may be had in this Court, where all the facts are stated by the bill; notwithstanding a former decree for the same matter in Wales. *Morgan* v. ———, 1 Atk. 408.

5. The Court will not make an inconsistent decree in a second cause between the same parties, on account of the confusion it would create: but at the same time Lord Harwicke, Ch., declared, he would not, upon an order in a former cause, tie up the plaintiff, but would direct the cause to stand over so as to give him an opportunity of laying the matter before the Court on a bill of review, or otherwise as he should be advised. *Shepherd* v. *Titley*, 2 Atk. 348.

6. Where there is a second suit between the same parties, you may insist on an acquiescence under a decree in the first, unless the bill be dismissed without prejudice to the question in that cause. *Ibid*, 2 Atk. 354.

See also p. *389, *ante*.

7. One defendant not appearing, the whole line of process against him being gone through, is equal to the proceeding to outlawry at common law, and there may be a decree against the other defendants who have appeared. *Vanessen* v. *South Sea Company*, 1 Ves. 395.

S. C. 1 Dick. 140.

Parker v. *Blackbourne*, Pre. Ch. 99.

Philips v. *The Duke of Buckingham*, 1 Vern. 228.

7. Decree for the execution of a trust to pay debts, against the trustees, the

other defendant not appearing, after process to a sequestration. *Dowries* v. *Thomas*, 7 Ves. 206.

9. A final decree cannot be made upon an interlocutory order without consent. *Allen* v. *Bower*, 3 Br. C. C. 149. And see *Glinan* v. *Cooke*, 1 S. & L. 36.

10. The answer of an administrator to a creditor's bill, stating that he believes the debt is due, whether sufficient foundation for a decree—*Quære. Hill* v. *Binney*, 6 Ves. 738.

11. The rule that you can have no decree upon the evidence of a single witness against the answer, holds only where the facts denied in the answer are equally strong with those that are affirmed by the deposition. *Walton* v. *Hobbs*, 2 Atk. 19.
Le Neve v. *Le Neve*, 3 Atk. 649.

12. There are many cases where the Court have decreed upon the testimony of one witness, when what he swears is uncontradicted by the answer. *Le Neve* v. *Le Neve*. *Ibid.*

13. Where the evidence of a single witness against a negative in a defendant's answer is corroborated by a greater number of circumstances, it is sufficient to found a decree. *Sir Thomas Jansen* v. *Rany*, 2 Atk. 140.
Biddulph v. *St. John*, 2 S. & L. 532.

14. Where the plaintiff had laid out a sum of money upon the faith of an agreement, the Court decreed a specific performance upon the evidence of a single witness; and although the agreement sworn to by the witness was different from the one stated in the bill, or that sworn to by the answer. *Mortimer* v. *Orchard*, 2 Ves. J. 243.

15. The Court refused to make a decree upon the oath of one witness against the positive denial in the answer, but without prejudice to an action, and with an option to the plaintiff to take an issue. *Evans* v *Bicknell*, 6 Ves. 174.

16. No decree upon the evidence of a single witness against the answer, unless the answer is not positive, or the witness is confirmed by circumstances. *Pillage* v. *Armitage*, 12 Ves. 80.
Kingdome v. *Boakes*, Pre. Ch. 19.

17. Under the prayer for general relief, the plaintiff may, at the bar, pray particular relief; but the particular relief must be consistent with the case made by the bill. *Grimes* v. *French*, 2 Atk. 141.
Hiern v. *Mill*, 13 Ves. 114.
But see Palk v. *Clinton*, 12 Ves. 48.

18. A party praying specific relief to which he is not entitled, as a sale under a trust, instead of a redemption or foreclosure, cannot under the general prayer have the relief to which he is entitled. *Palk* v. *Lord Clinton*, 12 Ves. 48.

19. Where a plaintiff fails to entitle himself to a decree according to the agreement set forth in his bill, he is not entitled under the general prayer to a decree for the agreement admitted by the answer. *Legal* v. *Miller*, 2 Ves. 299.
Pillage v. *Armitage*, 12 Ves. 78.

20. And where the answer denied the agreement set forth in the bill, but admitted a different agreement, and the plaintiff amended the bill, still insisting on the agreement first stated, but praying either an execution of that, or, if not so entitled, of the admitted agreement, the bill was dismissed, but without prejudice to another for the performance of the admitted agreement. *Lindsay* v. *Lynch*, 2 S. & L. 1.

21. But if the plaintiff amending his bill, had abandoned the first agreement, he would have been entitled to a decree for that admitted by the answer. *Ibid*, 2 S. & L. 9.

22. In an information on behalf of a charity, though the title be mistaken, yet if a title appears in the cause, a decree will be made establishing the charity: the relator is not bound to recover *secundum allegata et probata* as in a common suit. *Attorney General* v. *Brereton*, 2 Ves. 426. 2 Dick. 783.

23. Where the information prays wrong relief, the Court on behalf of a charity will give proper relief. *Attorney General* v. *Whiteley*, 11 Ves. 247.

24. The Court cannot decree against a title in the Crown, apparent on the record, though not insisted on at the hearing. *Freeman* v. *Parsley*, 3 Ves. 424.

25. In the constant practice in Ireland, for judgment creditors, after the death of conusor, to obtain a decree for a sale of his lands, failing personal assets. *O'Fallon* v. *Dillon*, 2 S. & L. 19.

(b) Between Co-defendants.

1. To make a decree between co-defendants, grounded on evidence between plain-

tiffs and defendants, is a jurisdiction long settled, and is the constant practice of a Court of Equity (*per Lord Redesdale*). *Chamley* v. *Lord Dunsany*,
2 S. & L. 710.

2. Where a case is made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a Court of Equity may and is bound to make a decree between the defendants; the defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter that may be then decided between him and his co-defendant; and the co-defendant may insist that he shall not be obliged to institute another suit for a matter that may be then adjusted between the defendants: and if a Court of Equity refuse so to decree, it would be good cause of appeal by either defendant (*per Lord Eldon*). *Ibid*,
2 S. & L. 718.

3. A decree made between co-defendants, upon evidence arising from pleadings and proofs between plaintiffs and defendants. *Conry* v. *Caulfield*,
2 B. & B. 255.

See also Bernal v. *Marquis Donegal*,
3 Dow, 151.

(*c*) *By Default.*

1. Where a decree was obtained by surprise, it was ordered that the defendant should be at liberty to shew cause against the decree, before the costs of his default were paid, and that the whole costs should be reserved until the time of shewing cause. *Price* v. *Solly*, 1 Dick. 21.

2. Defendant appears, and cause goes off till a future day, when defendant makes default, there may be an absolute decree against him. *Halsey* v. *Smyth*,
Mos. 186.

Venemore v. *Venemore*, 1 Dick. 93.

3. On shewing cause against a decree by default, an objection for want of parties was allowed. *Jackson* v. *Lee*,
1 Dick. 92.

4. After a decree *nisi*, and, upon defendant's second default, the decree made absolute, the defendant obtained an order to rehear the cause upon terms: the Court would not discharge the order. *Hankwitz* v. *Ocarrel*, 1 Dick. 109.

5. Defendant having made default at the hearing, order directing an issue must be an order *nisi*, in the first instance. *Peacock* v. *MacKericher*,
2 Dick. 434.

6. Upon a decree by default of the defendant at the hearing, the evidence is not to be entered as read. *Stubbs* v. ——,
10 Ves. 30.

7. Where a decree by default has been made absolute, the proper course to set it aside is by presenting a petition for a rehearing; therefore a motion to discharge the order to make absolute, and for a day to shew cause was refused. *Attorney General* v. *Brooke*, 3 Mer. 698.

8. Decree made by default upon service of a subpœna, not endorsed, to hear judgment, is irregular, and will be discharged on motion. *Powell* v. *Martin*,
1 J. & W. 292.

9. Decree by default in suit of interpleader. *Hodges* v. *Smith*,
1 Cox, 357.

10. To shew cause against a decree on default by defendant at the hearing, the order must be to set down the cause on some day immediately, not after the causes already set down. *Margravine of Anspach* v. *Noel*, 19 Ves. 573.

11. A decree taken *ex parte*, is taken at the peril of the party obtaining it, if he cannot support it by his pleadings and proofs, it is not the judgment of the Court, but the act of the party, concerning what the judgment of the Court would be, if the other party had appeared. *Carew* v. *Johnston*. 2 S. & L. 300.

12. The plaintiff, owing to the neglect of his solicitor, made default at the hearing, and the bill was dismissed, and order of dismission enrolled; upon application, the Court ordered the enrolment to be discharged upon payment of costs. *Robson* v. *Cranwell*, 1 Dick. 61.

And see Pickett v. *Loggon*,
14 Ves. 231.

13. In a similar case the Court refused to vacate the enrolment of the decree of dismission. *Pickett* v. *Loggon*,
5 Ves. 702.

But see S. C. 14 Ves. 231.

(*d*) *Rectifying.*

1. Where it does not appear by the register's minutes that any evidence was read at the hearing of the cause, the Court ought not, upon a subsequent application, to make an order that the evidence should be entered as read. *Eden* v. *Earl of Bute*,
1 Br. P C. 466.

2. On a bill to carry into execution a former decree, the Court may consider the

directions, and whether there has been any mistake. *West* v. *Skip*, 1 Ves. 245.

3. An omission in a decree, if perfectly of course, may be supplied on motion; and where the common direction to examine all parties upon interrogatories was omitted, the Court ordered that the Master be at liberty to examine &c. instead of varying the decree; but it is not a motion of course. *Wallis* v. *Thomas*, 7 Ves. 292.

4. And where, upon a creditor's bill against executors, a direction for an account of the personal estate was omitted, the Lord Chancellor thought the direction so clearly of course, that he granted the motion; but if there had been a shadow of doubt, the motion should have been made at the Rolls, where the decree was pronounced. *Pickard* v. *Mattheson*, 7 Ves. 293.

5. In a charity case, an omission in the original decree, not declaring the nature of the charity, corrected upon farther directions, without a rehearing. *Attorney General* v. *Whiteley*, 11 Ves. 241.

6. Whether interest can be claimed by petition, the decree containing no direction as to interest.—*Quære*. *Bruere* v. *Pemberton*, 12 Ves. 386.

7. Order on motion, with consent, to rectify a clear mistake in a decree. *Newhouse* v. *Mitford*, 12 Ves. 456.

8. And such order must be a separate supplemental order. *Lane* v. *Hobbs*, 12 Ves. 458.

9. Addition to or alteration of a decree cannot be effected by motion or petition; to add any thing to a decree, the consequence of any proceeding directed by the decree, the cause must be set down for further directions; to alter the decree in the minutest particular, the cause must be reheard. *Lord Shipbrooke* v. *Lord Hinchingbrook*, 13 Ves. 393.

And see Creuze v. *Hunter*, 2 Ves. J. 164.

10. After enrolment of a decree, errors appearing on the face of schedules will be permitted to be corrected upon motion, without a bill of review; but the Court will not permit an affidavit producing a new fact to be used for that purpose. *Weston* v. *Haggerston*, Coop. 134.

11. Directions omitted by mistake in a decree, introduced on motion, with the consent of all parties. *Skrymsher* v. *Northcote*, 1 Swan. 573.

12. Where there is a misnomer in a decree, and in consequence in the Accountant-General's books, the Court will, on motion supported by affidavit, order such misnomers to be corrected. *Hawker* v. *Buncombe*, 2 Mad. 391.

13. All applications to rectify a decree must be by petition. *Grey* v. *Dickenson*, 4 Mad. 464.

14. The decree being, amongst other things, that the parties should produce before the Master all books, papers, &c. the words, "as the Master shall direct," were added on a motion for that purpose. *Punderson* v. *Dixon*, 5 Mad. 121.

15. The Court will order the minutes of a decree, declaring stock not to be part of the personal estate of an intestate, on a general claim by some of the next of kin, against a particular claim by others, to be varied by adding the words "together with the dividends which have accrued, due thereon," on a special motion for that purpose, and without a re-hearing, where the amount is small, and the alteration is reasonable, and consonant with the tenor of the original decree. *George* v. *Howard*, 7 Price, 661.

(c) *Entering and Enrolling.*

1. A decree made, and ordered, that if the defendant died before Easter, yet that the plaintiff might afterwards enrol it. *Labyne* v. *Alley*, 3 C. R. 27.

2. The plaintiff, an administrator, died after a decree pronounced, but before entry of the order, and the entry is suspended by the administrator *de bonis non*. *Pew* v. *Cadmore*, 3 C. R. 33.

3. Decrees of this Court take effect from the time they are pronounced; and the death of the parties shall not hinder the enrolment in convenient time. *Clapham* v. *Phillips*, Rep. T. Finch. 169.

4. The House of Lords, in limiting the time of appeal, considers the enrolment of the decree as on the same day the decree is pronounced. *Smythe* v. *Clay*, 1 Br. P. C. 453.

5. A decree may be enrolled after the party's death, by order. *Anon*, 2 C. C. 227.

6. *Secus*, if the party was administrator only. *Warren* v. ——, 2 C. C. 247.

7. Bill to reverse a decree, for that it was signed and enrolled after the party's death, dismissed. *Yeavely* v. *Yeavely*, 3 C. R. 44, 73.

8. If a material party dies before a de-

cree is enrolled, yet it may be enrolled afterwards; and if more than six months expire before the enrolment, yet, by leave of the Court, it may be done after that time. *The Duke of Buckingham* v. *Sheffield*, 2 Eq. Ca. Ab. 279 (*n*); Amb. 586.

9. A decree may be enrolled without special order, though more than a year has elapsed since it was pronounced. *Tisdall* v. *Lady Charleville*, 2 S. & L. 392.

10. Decree *ad computandum* enrolled, some of the answers being omitted, it was certified to be irregular, and held to be so. *Holmden* v. *Tilly*, 1 Dick. 20.

11. The Court never suffer a decree to account to be signed and enrolled, because it ties up their hands from relieving, if there should have been any defect in the directions of the decree. *Staunton* v. *Oldham*, 2 Atk. 383.

12. If after a decree a *caveat* be entered to stay the signing and enrolling, it stays the signing twenty-eight days; not only after pronouncing the decree, but twenty-eight days from the presenting it to the Lord Chancellor to be enrolled, and notice given by the Lord Chancellor's secretary to the Clerk on the other side. *Burnett* v. *Theobald*, 1 P. W. 609.

13. To oblige a man to sign, and enrol a decree made against himself, in order to entitle him to bring a bill of review, is altogether unnecessary. *Standish* v. *Radley*, 2 Atk. 177.

See Div. LXXI. *post.*

14. Liberty was given to amend the enrolment of a decree, although the amendment was material. *Eyles* v. *Ward*, 1 Dick. 58. Mos. 255.

15. It is discretionary in the Court to set aside an enrolment of a decree on circumstances; as where the plaintiff continued an infant till near the time of hearing, or beyond sea, and the cause neglected by the solicitor, so that the merits were not heard. *Kemp* v. *Squire*, 1 Ves. 205.

And see Pickett v. *Loggon*, 5 Ves. 702. 14 Ves. 231.

16. Enrolment of a decree may be opened, if the enrolment was gained by surprise, or there is any irregularity in it. *Anon*, 1 Vern. 131.

And see Robson v. *Cranwell*, 1 Dick. 61.

17. Enrolment of a decree vacated, being too quick, though strictly regular. *Anon*, 1 Ves. 326.

18. Decree not signed and enrolled, cannot be pleaded. *Kinsey* v. *Kinsey*, 2 Ves. 577.

Anon, 3 Atk. 809.

19. *Caveat* to stop enrolment for forty days. *Ibid.*

20. A *caveat* entered against the enrolment of a decree, stays the signing for twenty-eight days after the docket has been presented and notice given: and the twenty-eight days are twenty-eight clear days. *Robinson* v. *Newdick*, 3 Mer. 13

21. In strict practice the docket ought not to be presented until after the order to enrol *nunc pro tunc* has been obtained, and actually passed and entered. *Ibid.*

22. Service on the Clerk in Court, of notice of a docket having been presented for signature, is sufficient service. *Ibid*, 3 Mer. 15.

23. A plaintiff is allowed the vacation of the term in which the decree is pronounced, and the following term to draw up the decree in, but not the vacation of the last term. And if he does not draw it up in that time the defendant may. *Calvert* v. *Dignum*, 4 Price, 133.

24. But if the decree is made upon the merits, the Court will not open the enrolment, to give an opportunity of appeal. *Charman* v. *Charman*, 16 Ves. 115.

See as to the Enrolment of a Decree by Default, p.*433, *ante.*

(*f*) *Adding Parties to.*

1. An executor, not a party, introduced into the decree as a party, and ordered to account. *Pitt* v. *Brewster*, 1 Dick. 37.

2. Decree made, establishing a will; some of the residuary legatees, though abroad, apply to have the benefit of the decree, submitting to be bound by it: ordered, that they might enter their appearance by their Clerks in Court, and that they should have the like benefit of the decree, as if they had put in an answer, and had appeared at the hearing of the cause. *Banister* v. *Way*, 2 Dick. 686.

3. Administrator not brought before the Master by motion after a decree passed and entered, if any thing in it affecting him by way of order to pay: otherwise, if only to witness what is done. *Habergham* v. *Vincent*, 1 Ves. J. 68.

4. Creditors let in at any time while the fund is in Court, though the time has elapsed. *Lashley* v. *Hogg*, 11 Ves. 602.

And see p. 161, *ante.*

(g) *Form and Operation of.*

1. Default of payment under a decree upon a bill for redemption operates as a foreclosure. *Bishop of Winchester* v. *Paine*, 11 Ves. 199.
And see Cholmley v. *Countess of Oxford*, 2 Atk. 267.

2. In some cases the Court in the decree expresses the reasons upon which it is founded, but this is very uncommon. *Ex parte the Earl of Ilchester*, 7 Ves. 373

3. No stress is to be laid on the words "that each party do pay" in a decree *quod computet*, for, till the account be taken, it is impossible to pronounce which will be the debtor or creditor. *Smith* v. *Eyles*, 2 Atk. 385.

4. Decree directs a computation of interest at £5. *per cent.* on all sums received by the executor while in his hands, "and that the Master do in such computation make half yearly rests." The object of such direction is to charge compound interest, and the decree, though perhaps going farther than usual, was held, under the circumstances, the executor having kept the whole property in his hands, properly executed by a computation of interest upon each receipt from the day it was received, the balance of receipt, with the interest so calculated, and payments being struck at the end of the half year; and that balance, so composed of principal and interest, being carried forward as an item in the account, producing interest. Affirmed on rehearing. *Raphael* v. *Boehm*, 13 Ves. 407.

5. Where a creditor files a bill for the payment of his own debt only, the Court does not direct a general account of the testator's debts, but only an account of the personal estate, and of that particular debt, which is ordered to be paid in a course of administration. *Attorney General* v. *Cornthwaite*, 2 Cox, 44.

6. By a decree, confirming the Master's report, a defendant declared entitled to a balance reported due to him with interest, though no offer by the bill, praying an account, to pay it. *Bodkin* v. *Clancy*, 1 B. & B. 216.

7. Where a decree giving relief to a party, whose title was gone at law, directs the accounts on the rents reserved in *bonâ fide* leases of tenants not parties to the suit; the party relieved will be restrained from proceeding at law to evict the tenants. *Shine* v. *Gough*, 1 B. & B. 436.

8. A decree *quod computet* makes no variation as to an executor; and before a final decree he may confess a judgment; and it does not at all alter the nature of the demand. *Smith* v. *Eyles*, 2 Atk. 385.

9. A decree *quod computet* does not pass *in rem judicatam* till the final decree. *Ibid.*

10. In decrees to account, there formerly was a direction that the Master, if he found any special matter, might state it specially, but this clause is now left out; but the Master may state special matter notwithstanding. *Anon*, 2 Atk. 621.

(h) *Prosecuting.*

1. Verbal agreement no stay to execution of a decree. *Wakelin* v. *Walthal*, 2 C. C. 8.

2. An original bill to execute a decree against a purchaser claiming under parties bound thereby. *Organ* v. *Gardiner*, 1 C. C. 231.

3. The case was referred to law, and it was ordered that the defendant do not insist on a title, set aside by the decree. And he does insist on it: whereupon the plaintiff read the decree, but was nevertheless nonsuited, and then moved the Court of Chancery for a commitment of the defendant, and establishment of the possession, which was ordered. *Anon*, 1 C. C. 267.

4. After a decree, all parties to the suit, who are interested, may take steps to have the benefit of it. *Carrington* v. *Holly*, 1 Dick. 280.

5. Plaintiff, coming in under a decree in a cause, in which he is no party, for a debt for which he has filed his bill, in case the plaintiffs in the former cause delay prosecuting the suit, may prosecute the suit in their names, indemnifying them. *Torin* v. *Fowke*, 1 Dick. 235.

6. Bill by a legatee for his legacy; there had been a suit by another legatee, and a decree for account of testator's estate, and payment; the plaintiff in this cause at liberty to prosecute that decree. *Sheppard* v. *Messider*, 2 Dick. 797.

7. Any creditor may obtain an order for prosecuting a decree for an account. *Creuse* v. *Hunter*, 2 Ves. J. 165.

8. One defendant may prosecute a decree against another, as where a co-obligor pays for principal. *Walker* v. *Preswick*, 2 Ves. 622.

9. A defendant may enforce a decree, confirming a report in his favor. *Bodkin* v. *Clancy*, 1 B. & B. 217.

10. In case of unreasonable delay in prosecuting a decree in a suit by next of kin against an administratrix, the Court will give leave to a creditor to prosecute such decree. *Sims* v. *Ridge*, 3 Mer. 458.

11. Where, for three years after a decree in a creditor's suit, no interrogatories had been filed to examine the defendant as to monies in her hands, a creditor being restrained by injunction from proceeding at law, obtained leave on motion to prosecute the suit. *Powell* v. *Wallworth*, 2 Mad. 183.

12. A creditor who has come in under the decree, will be permitted to prosecute the suit, where the plaintiff delays so to do, although such creditor is interested in part only of the decree. *Edmunds* v. *Acland*, 5 Mad. 31.

As to Execution of a Decree see Div. XXXII. *post.*

(*i*) *Where and how far binding.*

1. Generally, none are bound by a decree, but such as are parties to it. *Natchbolt* v. *Porter*, 2 Vern. 112.

2. But where the decree was, that the defendant and all other miners of A. should pay a tithe of lead ore; it was held to bind all miners of A., as well parties as others, both for the time being and to come. *Brown* v. *Booth*, 2 Vern. 184.

3. So in a suit between the lord of a manor and some of the tenants to establish a custom, all the tenants will be bound, though not parties to the bill. *Brown* v. *Howard*, 1 Eq. Ca. Ab. 163.

4. And where one, not a party, having notice of a decree, paid money contrary to it, though to the hand legally empowered to receive it, he was held bound; and, by another suit, was compelled to repay it. *Harvey* v. *Montague*. 1 Vern. 57.

5. Purchasers *pendente lite* are bound by the decree. *Yeavely* v. *Yeavely*, 3 C. R. 48.
Gaskell v. *Durdin*, 2 B. & B. 169.

6. All original parties to the suit, or those that are made parties thereto, or to the decree, of full age, and such as claim under them, *pendente lite*, are regularly bound by the decree. *Style* v. *Martin*, 1 C. C. 152.

7. The mortgagees of an equity of redemption, made such pending the suit, are bound by a decree of foreclosure, though not made parties. *Bishop of Winchester* v. *Paine*, 11 Ves. 194.

8. A decree against the lessee and all claiming under him; he surrenders to him in reversion, who was held to be bound by the decree for so long time as the lease would have continued. *Chapman* v. *Bissow*, Toth. 61.

9. A decree in Equity is like a judgment for debt or damages at common law.
Nanney v. *Martin*, 1 C. R. 233.
Bishop v. *Godfrey*, Pre. Ch. 179.

10. A decree in Chancery is as effectual to charge the person, as an execution at law. *Elvard* v. *Warren*, 2 C. R. 192.

11. Decree is not equal to judgment so as to affect lands, though it is in course of administration. *Astley* v. *Powis*, 1 Ves. 496.
Mildred v. *Robinson*, 19 Ves. 585.
Bligh v *Earl Darnley*, 2 P. W. 621.

12. A final decree, upon a sum ascertained, is equal to a judgment: but a mere decree for an account of plaintiff's demand, and of the personal estate come to the hands of the defendant, with a mere direction for payment out of the result of that account, does not prevent the executor praying a judgment. *Perry* v. *Phelips*, 10 Ves. 34.

13. A decree for the execution of an agreement to inclose a common, parties having an interest in the common, but not parties to the agreement, shall not be bound. *Thirreton* v. *Collier*, 1 C. C. 48.
S. C. Anon, 3 C. R. 13. Nel. 79.

14. A decree, by consent, of a personal estate, binds a purchaser for valuable consideration. *Wyndham* v. *Wyndham*, 3 C. R. 22. 2 Free. 127.

15. A decree against tenant in tail, who had agreed to sell his estate; he stands out all process of contempt for not obeying it, yet his issue are not bound by it. *Powell* v. *Powell*, Pre. Ch. 279.

16. An infant is bound by a decree in a cause where he is plaintiff, as much as a person of full age. *Gregory* v. *Molesworth*, 3 Atk. 626.

17. An infant defendant is not bound by a decree in a Court of Equity, but must have a reasonable time after he comes of age to shew cause against it.
Sir John Napier v. *Lady Effingham*, 2 P. W. 401.
S. C. on Appeal, 4 Br. P. C. 340.

18. Though an infant cannot be foreclosed without a day to shew cause, yet a decree for sale of lands to pay debts will bind an infant. *Booth* v. *Rich*, 1 Vern. 295.

Cooke v. *Parsons*, 2 Vern. 429.

19. And an infant defendant is bound by a decree of foreclosure, unless he can show error in the decree. *Mallack* v. *Galton*, 3 P. W. 352.

20. Co-defendants not bound as to their rights with respect to each other, unless called upon to contend upon them.—*Harmood* v. *Oglander*, 8 Ves. 123.

(*k*) *Impeaching or setting aside.*

1. The decree avoided by original bill, upon matter subsequent to the decree. *Cocker* v. *Bevis*, 1 C. C. 61.

And see Venables v. *Foyle*, 1 C. C. 3.

2. A decree may be set aside by original bill, where it has been obtained by fraud. *Lloyd* v. *Mansell*, 2 P. W. 73.

3. A decree though obtained by fraud cannot be set aside on petition, it must be by bill. *Mussel* v. *Morgan*, 3 Br. C. C. 74.

Bennett v. *Hamill*, 2 S. & L. 574.

And see Pickett v. *Loggon*, 5 Ves. 702.

4. But where the decree is drawn up in a manner not warranted by the minutes, it may be set aside with costs on motion. *Loftus* v. *Swift*, 2 S. & L. 642.

5. Where, after a decree, an alteration of circumstances makes an original bill necessary, in order to have the benefit of the decree, such bill opens the decree, and the defendants are at liberty to controvert it. *Johnson* v. *Northey*, Pre. Ch. 134. 2 Vern. 409.

Lawrence v. *Berny*, 2 C. R. 127.

6. A decree cannot be impeached collaterally in another cause. *Lady Clinton* v. *Lord Robert Seymour*, 4 Ves. 440.

7. A decree taken *pro confesso* in the ordinary course, after appearance, not under the statute 5 Geo. 2, c. 25, is the same as any other decree, and can be impeached as any other decree, only directly by a bill of review, or a bill to set it aside for fraud, not collaterally by an original suit seeking a decree inconsistent with it. *Ogilvie* v. *Hearne*, 13 Ves. 563.

8. Where matters have been examined in Equity, and determined, the Court is cautious in unravelling former decrees, agreements, or releases. *Cann* v. *Cann*, 1 P. W. 723.

9. On a bill to set aside a decree against an infant for fraud, if the same be not fraudulent, though in every respect not so equitable, the Court will not set it aside. *Richmond* v. *Tayleur*, 1 P. W. 737.

10. An infant aggrieved by a decree, not bound to stay till he is of age, but may apply as soon as he thinks fit to reverse it, either by a bill of review, re-hearing, or by original bill, alleging specially the errors in the former decree. *Ibid.*

11. In a decree of foreclosure, though an infant has a day to shew cause against the decree after he comes of age, yet he is not to go into the account, nor is he so much as entitled to redeem the mortgage, but is only allowed to shew error in the decree. *Mallack* v. *Galton*, 3 P. W. 352.

12. It is a rule that whenever a decree is entered by consent, the merits shall never after be inquired into, unless there be an objection, that the word consent be struck out of the order. *Norcott* v. *Norcott*, 7 Vin. Ab. 398.

13. It was an established rule not to set aside a decree obtained by a consent.

Harrison v. *Rumsey*, 2 Ves. 488.

Smith v. *Turner*, 1 Vern. 273.

But see Butterfield v. *Butterfield*, 1 Ves. 133, 154.

14. A stranger, if he be bound by a decree, may falsify it. *Style* v *Martin*, 1 C. C. 152.

15. Where a parish is sued, four moved to defend, and a decree against them; one who claims under none of the four, may contest the decree. *Brown* v. *Vermuden*, 1 C. C. 272.

(*l*) *Lost.*

1. A docket and enrolment of a decree lost and ordered to be new enrolled. *Deta* v. *Dickenson*, 3 C. R. 20.

2. And where, after thirty years, the enrolment of a decree was lost, the cause was directed to be reheard. *Devering* v. *Cooper*, 3 C. R. 27.

3. Where the decree 80 years previously had been drawn up and acted under, though never entered, and the pleadings and decree were lost; a paper writing, purporting to be a copy of the decree, was ordered to be entered as the decree, and enrolled *nunc pro tunc*. *Jesson* v. *Brewer*, 1 Dick. 370.

4. Where the original decree was lost, but had been acted upon by reports, and was recited in an order on further direc-

tions; it was allowed to be drawn up from an office copy and entered *nunc pro tunc*. *Donne* v. *Lewis*, 11 Ves. 601.

5. Decree pronounced twenty-three years ago, having been lost, ordered, on motion, to be redrawn according to the minutes, and entered *nunc pro tunc*. *Lawrence* v. *Richmond*, 1 J. & W. 241.

XXII. Demurrer.

(a) *At what time, and where, a Defendant may demur.*

1. A *subpœna* no record, nor ought to be demurred unto. *Ward* v. *Lake*, 1 C. C. 50. 2 Free. 180. 3 C. R. 15. Gilb. Rep. in Eq. 234.

2. An answer cannot be demurred to. *Williams* v. *Owen*, 2 Free. 181. 2 C. C. 8.

3. A husband alone cannot demur for his wife. *Sturling* v. *Green*, Toth. 73.

4. The defendant having made oath, that he could not answer without sight of writings in the country, and then putting in a demurrer, an attachment was awarded against him. *Farmer* v. *Fox*, Toth. 15. Cary, 158.

5. On time given to answer, the defendant may put in a plea, for that is an answer, and on oath, but cannot put in a demurrer. *Anon*, 2 P. W. 464. *Penn* v. *Lord Baltimore*, 1 Dick. 273.

6. A demurrer filed after order for time to answer, is irregular, and may be taken off the file. *Dyson* v. *Benson*, Coop. 110.

7. A defendant obtaining an order for time to answer only, consents to answer, and cannot afterwards put in a demurrer, though only to part, and answer to the rest of the bill. *Kenrick* v. *Clayton*, 2 Dick. 485. 2 Br. C. C. 214.

8. Defendant having obtained an order for time to answer, cannot put in an answer and demurrer without a special case. And as the demurrer, being coupled with an answer, could not be taken off the file, it was ordered to be expunged or overruled. *Taylor* v. *Milner*, 10 Ves. 444.

9. A defendant, after an order for time to plead, answer, or demur, not demurring alone, cannot put in a demurrer with an answer to the charge of combination only. *Done* v. *Peacock*, 3 Atk. 726.

And see p. 379, *ante*.

10. Where the defendant to an injunction bill, the time for answering being expired, elected to have an injunction taken against him, upon a *dedimus potestatem*, he cannot demur alone. *Edmonds* v. *Savery*, 3 Mer. 304.

11. After time obtained to answer, a motion will not be granted for leave to demur, unless under special circumstances, as surprise; merits only are not a sufficient ground for the application. *Bruce* v. *Allen*, 1 Mad. 556.

12. A defendant allowed to demur after he had stood out all process of contempt to a sequestration. *Harvey* v. *Matthew*, 1 Dick. 30.

13. A demurrer may be put in at any time before process of contempt, if the defendant has not prayed a commission, or obtained an order for time to take his answer. *East India Company* v. *Henchman*, 3 Br. C. C. 372. *Sowerby* v. *Warder*, 2 Cox, 268.

14. Where a defendant has demurred, he may assign another cause of demurrer at the bar, paying costs. But when a defendant has pleaded, and there is no demurrer in Court, he cannot demur at the bar, though he would pay costs. *Durdant* v. *Redman*, 1 Vern. 78.

15. A defendant may demur anew at the bar *ore tenus*; but then, on its being allowed, he cannot have his costs. *Tourton* v. *Flower*, 3 P. W. 371.

16. On the argument of a demurrer, the defendant is entitled to demur *ore tenus*, paying the costs of the demurrer on the record. *Attorney General* v. *Brown*, 1 Wil. 342. 1 Swan. 288.

17. A defendant must take advantage of a defect in form by a demurrer; it is too late to object, after he has answered. *The Archbishop of York* v. *Sir Miles Stapleton*, 2 Atk. 136.

18. When a defendant has answered to a discovery prayed by a bill, he cannot afterwards demur to it. *Abraham* v. *Dodgson*, 2 Atk. 157.

19. If a demurrer be not filed in sufficient time, the *laches* cannot be taken advantage of after it has been set down for argument. It should in such case be moved to be taken off the file. *Baker* v. *Booker*, 6 Price, 379.

20. Though a defendant has not demurred to a bill, being too trifling for the Court to entertain, yet he may take advantage of the objection at the hearing. *Bruce* v. *Taylor*, 2 Atk. 253.

21. Length of time since a transaction

which is the subject of dispute may be taken advantage of by demurrer. *Sherrington* v. *Smith*, 2 Br. P. C. 62.
Jenner v. *Tracey*, 3 P. W. 287, (*n*).
Beckford v. *Close*, (*cited*) 4 Ves. 476.
Hardy v. *Reeves*, 4 Ves. 479.
Foster v. *Hodgson*, 19 Ves. 180.
And see Hovenden v. *Lord Annesley*, 2 S. & L. 637.

22. After a demurrer overruled, there cannot be a second demurrer, unless the bill be amended. *Bancroft* v *Wardour*, 2 Br. C. C. 66.
S. C. Bancroft v. *Warden*, 2 Dick. 672.

23. After a demurrer to the whole bill overruled, the defendant may put in a demurrer, less extended, but not without leave of the Court. *Baker* v. *Mellish*, 11 Ves. 68.

24. Demurrer to a bill after a decree, under which nothing remained to be carried into execution, but to save costs only. The demurrer was overruled. *Price* v. *Humphrey*, 1 Dick. 381.

25. Demurrer lies where it is clear that if the charges of the bill be true, it would be dismissed at the hearing with costs. *Utterson* v. *Mair*, 2 Ves. J. 95.

And see p. 345, *ante*.

(*b*) *Form of.*

1. A demurrer cannot, as a plea may, be good in part and bad in part. *Earl of Suffolk* v. *Green*, 1 Atk. 450.
Baker v. *Mellish*, 11 Ves. 70.
Baker v. *Pritchard*, 2 Atk. 387.

2. But though a demurrer cannot be good in part and bad in part, yet it may be good for one defendant and bad for another. *Mayor of London* v. *Levy*, 8 Ves. 403.

3. A defendant cannot demur and plead, or demur and answer, to the same part of the bill. *Jones* v. *Earl of Strafford*, 3 P. W. 80.
Dormer v. *Fortescue*, 2 Atk. 282.
Savage v. *Smallbroke*, 1 Vern. 90.

4. Where a man demurs for that the bill contains several matters not relating one to the other; if he does more by answer than deny combination and confederacy, he overrules his demurrer. *Done* v. *Peacock*, 3 Atk. 726.

5. A demurrer to the relief is overruled by an answer to the discovery of the facts on which the relief is prayed. *Roberts* v. *Clayton*, 3 Anst. 715.
Tidd v. *Clare*, 2 Dick. 712.

6. If the bill pray discovery and relief, a defendant cannot demur to the discovery, without demurring to the relief. *Morgan* v. *Harris*, 2 Br. C. C. 124.

7. A demurrer cannot be to any thing but what appears upon the face of the bill, else it would be a speaking demurrer. *Brownsword* v. *Edwards*, 2 Ves. 245.

8. Where there is an argument in the body of a demurrer, such as "in or about the year 1770, which is upwards of twenty years before the bill filed," it is a speaking demurrer, and therefore bad. *Edsell* v. *Buchannan*, 2 Ves. J. 83.
4 Br. C. C. 254.

9. The ground of a demurrer must be a short point, upon which it is clear the bill would be dismissed with costs at the hearing. *Brooke* v. *Hewitt*, 3 Ves. 253.

10. No general rule that a demurrer for want of parties must state the parties. *Pile* v. *Price*, 6 Ves. 781.

11. If the plaintiff be not entitled to the relief, though he be entitled to the discovery, a general demurrer is good.
Price v. *James*, 2 Br. C. C. 319.
Colles v. *Swayne*, 4 Br. C. C. 483.
Gordon v. *Simpkinson*, 11 Ves. 509.
Muckleston v. *Brown*, 6 Ves. 63.
Corporation of Carlisle v. *Wilson*, 13 Ves. 276.

12. But this does not preclude the defendant from demurring to the relief and answering to the discovery. *Hodgkin* v. *Longden*, 8 Ves. 2.
And see North v. *Earl Strafford*, 3 P. W. 148.

13. A demurrer to so much of an amended bill as had not been answered in the answer to the original bill, is bad. *Mynd* v. *Francis*, 1 Anst. 6.

14. Defendant answers the original bill which is afterwards amended, and the defendant then demurs generally to the whole amended bill. Whether this is a ground for taking the demurrer off the file, or only for overruling it on argument — *Quære*. *Atkinson* v. *Hanway*, 1 Cox, 360.

15. A demurrer should precisely distinguish the parts of the bill demurred to. *Chetwynd* v. *Lindon*, 2 Ves. 450.
And see Robinson v. *Thompson*, 2 V. & B. 118.

(c) *Arguing.*

1. Where a demurrer to a bill of review is allowed, it may be enrolled; but if overruled, that cannot be enrolled so as to prevent the demurrer's being re-argued. *Woets* v. *Tucker*, 2 Vern. 120.

2. The Court can save nothing on a demurrer. *Gregor* v. *Molesworth*, 2 Ves. 110.

3. The Court cannot let a demurrer stand for an answer. *Anon*, 3 Atk. 530.

4. Answer read to support a demurrer. *Heath* v. *Lake*, 1 Dick. 43.

5. A man, who demurs at law, demurs in chief, and it is a perpetual bar if judgment be against him; but if a demurrer is overruled in Equity, a defendant may insist upon the same matter by his answer. *Dormer* v. *Fortescue*, 2 Atk. 284.

6. Demurrer in the petty bag, made a *concilium*, and ordered to be argued, and afterwards overruled. *Ballard* v. *Hobbs*, 1 Dick. 333.

7. If the defendant do not appear in support of a demurrer, the Court, on production of an affidavit of service of a subpœna to hear judgment, will not overrule the demurrer, but hear the plaintiff. *Penfold* v. *Ramsbottom*, 1 Swan. 552.

8. A demurrer in the Vice-chancellor's paper, cannot be directed by him to be heard at an earlier day than the paper mentions, but may be advanced to the head of the paper on that day. *Anon*, 1 Mad. 557.

9. When an injunction bill is impeded by a demurrer, the Court will feel inclined on motion to advance the demurrer, if pressing reasons are shewn for so doing; but where a party, whose estate was sought to be protected, died three years before the bill filed, such delay unaccounted for, was a reason why such a motion should be refused. *Jones* v. *Taylor*, 2 Mad. 181.

10. When a demurrer is struck out of the paper for want of appearance, it cannot be set down again, without an order for that purpose, which may be obtained either upon petition or by motion. *Tolson* v. *Lord Fitzwilliam*, 4 Mad. 403.

(d) *Withdrawing.*

1. Order for the defendant to be at liberty to withdraw a demurrer set down to be argued, on payment of taxed costs. *Downes* v. *East India Company*, 6 Ves. 586.

(e) *Of Witness.*

1. A witness demurred to an interrogatory, because he claimed interest in the land, and disallowed, because she did not swear to the interest, nor what interest she claimed. *Jefferson* v. *Dawson*, 2 C. C. 208.

2. A witness cannot demur, because the questions asked him are not pertinent to the matter in issue. *Ashton* v. *Ashton*, 1 Vern. 165.

3. A defendant cannot demur but for matter appearing on the bill, but a witness may demur, because he is concerned in interest, though it does not appear by the interrogatory; but if it does not appear in the cause, he must make oath of it. *Nightingale* v. *Dodd*, Mos. 228.

4. Where, at the execution of the commission for the examination of witnesses, one of the witnesses demurred to being examined, the commissioners returned the demurrer with the commission; the commission and return were ordered to be delivered to the two senior Six Clerks not towards the cause, who were to copy so much of the interrogatories as was demurred to, and so as not to disclose any part of the depositions, and then to seal it up, and deliver it to the Six Clerk in the cause. *Smithson* v. *Hardcastle*, 1 Dick. 96.

And see p. 347, *ante*.

XXIII. Deposit on Rehearing or Exceptions.

1. An original and two supplemental bills, are considered but as one cause; and therefore, upon a rehearing, but one deposit is necessary. *Cowper* v. *Scott*, 1 Eden, 17.

2. Lord Hardwicke, C. thought a defendant's making the usual deposit on a petition for a rehearing, was a great hardship on a plaintiff, and not an adequate compensation. *Astel* v. *Montgomery*, 2 Atk. 138.

3. Commissioners making different returns, a new commission ordered; but the defendants should not have excepted, but moved to suppress the returns; the deposit therefore ordered to be paid to the plaintiff. *Corbet* v. *Davenant*, 2 Br. C. C. 252.

4. Where a party excepting to the Master's report prevails in any of the exceptions, he is entitled to the deposit.—*Parker* v. *Prout*, 4 Br. C. C. 1.

5. Where a purchaser, by exceptions to the Master's report, took a [illegible] objection to the title, but which was overruled, the deposit was divided. *Cox* v. *Chamberlain*, 4 Ves. 638.

6. Where an exception to a Master's certificate was new and special, the deposit was returned. *Paxton* v. *Douglas*, 16 Ves. 244.

7. Where several exceptions are taken to an answer, and the Master reports the answer sufficient, and one general exception is taken to his report, and some of the exceptions to the answer are allowed, some not, and others waved, the Court, in its discretion, may order the deposit to be divided. *Dawson* v. *Busk*, 2 Mad. 184.

8. Where voluminous exceptions had been taken in a case which admitted of a much shorter form, though some were allowed, the Court ordered the deposit to be returned. *East India Company* v. *Keighley*, 4 Mad. 39.

XXIV. Depositions.

(a) *Filing.*

1. Depositions taken under a commission for examination under a decree, when returned, are filed by the Six Clerks; but depositions taken before the Masters are kept in their offices. *Parkinson* v. *Ingram*, 3 Ves. 607.

(b) *Amending.*

1. A deposition of a witness amended after publication, where it was clear the examiner was mistaken in taking it down, or the witness in making it. *Griells* v. *Gansell*, 2 P. W. 647.

2. The plaintiff's christian name being mistaken in the title of the interrogatories, the depositions could not be read, nor would the Court permit the title to be amended, though most of the witnesses, since their examination, were gone to sea. *White* v. *Taylor*, 2 Vern. 435.

3. The depositions of witnesses taken under a commission, the title of which was mistaken, ordered to stand, and the mistake to be set right. *Robert* v. *Millechamp*, 1 Dick. 22.

4. The witness complained by petition and affidavit, that the examiner had, by mistake, taken down his depositions contrary to what he had really deposed to: upon examination of the witness in Court, it was ordered that the deposition be amended and resworn by the witness. *Darling* v. *Staniford*, 1 Dick. 358.

5. Upon an affidavit of a witness, that the examiner had mistaken him, his deposition amended on examination in Court. *Penderil* v. *Penderil*, Kel. 25.

6. But a similiar application was subsequently refused. *Traherne* v. *Burdus*, Kel. 26.

7. Motion to amend depositions after publication, refused; the examination having been deliberately read over to the witness; but semble, a mistake or omission of the examiner would be rectified by the Court. *Ingram* v. *Mitchell*, 5 Ves. 297.

(c) *Suppression of.*

1. Setting down depositions in a wrong sense; they are suppressed, and the witnesses examined again. *Peacock* v. *Collins*, Cary, 66.

2. A witness, after being examined, becomes plaintiff, and interested in the subject of his deposition: it shall not be suppressed. *Drury* v. *Drury*, Toth. 146.

3. On the return of a *subpœna*, if a witness will not appear and be examined, the party may take an attachment against him; and if he appears and deposes on the other side, his depositions may be suppressed on motion. *Dolman* v. *Pritman*, 3 C. R. 64.
S. C. Anon, 2 Free. 134.

4. Depositions suppressed, where they were written down in the exact form by the attorney, before they were taken. *Anon*, Amb. 252.

5. A witness was examined two days after publication passed, the time having been previously appointed by mistake. Publication passed, and the defendant having cross-examined the witness, the Court refused to suppress the deposition. *Hamond* v. ———, 1 Dick. 50.

6. If a witness secrets himself and is not forthcoming to be cross-examined, his depositions will be suppressed. *Flowerday* v. *Collet*, 1 Dick. 288.

(d) *In what cases they may or may not be read.*

1. Witness examined for the plaintiff, and was to be cross-examined by the de-

fendant; but before he could be cross-examined he died; yet this Court ordered his depositions to stand. *Arundel* v. *Arundel*, 1 C. R. 90.

2. The depositions of a witness read, though he died before cross-examination, the cross-examination not going to any point to which the witness had been examined in chief, nor to his credit, but to matters capable of proof by other witnesses. *O'Callaghum* v. *Murphy*, 2 S. & L. 158.

3. Where a witness dies after examination, but before such examination is signed by him, the depositions cannot be used. *Copeland* v. *Stanton*, 1 P. W. 414.

4. But where the defendant, after publication, examined a witness, and, on the usual affidavit that the defendant, his clerk, or solicitor, had not seen the depositions, got an order to re-examine this witness, but the witness died before re-examination, the Court allowed defendant to use the former examination of the witness. *Debrox* v. ———, *(cited) Ibid.*

5. Depositions of a witness examined *de bene esse*, he dying before he was examined in chief, ordered to be read at a trial at law. *Masden* v. *Bound*, 1 Vern. 331.

6. Where a person has been examined in Chancery, his deposition may be read at law, between the same parties, if the witness is dead or unable to attend. *Fry* v. *Wood*, 1 Atk. 445.

7. Depositions taken on a bill of revivor, afterwards dismissed upon the ground that the party had no title to revive, cannot be read: otherwise, if the bill had been dismissed for want of equity merely. *Backhouse* v. *Middleton*, 1 C. C. 173. 3 C. R. 39. *S. C. Anon*, 2 Free. 132.

8. Where a bill to perpetuate testimony is dismissed upon the ground that such a bill ought not to be brought to a hearing, the depositions may nevertheless be read. *Hall* v. *Hoddesdon*, 2 P. W. 162. *Vaughan* v. *Fitzgerald*, 1 S. & L. 316.

9. Depositions taken in a former cause cannot be read in another cause, against one who does not claim under the party against whom those depositions were taken. *Tolson* v. *Lamplugh*, 2 C. R. 43. *Eade* v. *Lingood*, 1 Atk. 204. *Coke* v. *Fountain*, 1 Vern. 413. 1 Vent. 347.

10. But if a legatee brings a bill against the executor, and proves assets, another legatee, though no party, may have the benefit of those depositions. *Coke* v. *Fountain*, *Ibid.*

11. Where a question is the same, and the defence the same, in two causes between the same parties, depositions taken in one cause may be read in the other. *Nevil* v. *Johnson*, 2 Vern. 447.

12. Depositions in a former cause in Chancery admitted to be read upon motion, the same matter being then under examination as now, though neither the plaintiff nor any under whom he claimed was party to the former suit. *Terwit* v. *Gresham*, 1 C. C. 73.

13. Depositions of a witness made in another cause or another Court may be read for the purpose of confronting his evidence, and without an order of Court. *Anon*, Mos. 118.

14. Application to use depositions taken in a former cause, between other parties, at the hearing of this cause, as to the credit of a witness, refused. *Mackworth* v. *Penrose*, 1 Dick. 50.

15. Depositions in the original cause not permitted to be read in the cross cause, because the point in issue in the cross cause was not in issue in the original cause. *Christian* v. *Wrenn*, Bun. 321.

16. Depositions in the cross cause allowed to be read on the account directed in the original cause, notwithstanding the cross bill was dismissed, for that does not vary the truth of the depositions. *Lubiere* v. *Genou*, 2 Ves. 579.

17. Evidence in the cross cause, concerning the matters in issue in the original cause, not allowed to be read after a decree in that cause; otherwise, as to the depositions in the cross cause not relating to the matters put in issue in the original. *Wilford* v. *Beaseley*, 3 Atk. 501.

18. Where neither party examines witnesses in the original cause, the depositions of witnesses examined to the same matter put in issue by that cause, may be read at the hearing of the cross cause. *Ibid.*

19. Depositions to a fact not put in issue by the bill, will not be permitted to be read. *Clarke* v. *Turton*, 11 Ves. 240. *And see Willan* v. *Willan*, 19 Ves. 600. *Blake* v. *Marnell*, 2 B. & B. 47.

20. A bill is brought by a wife for maintenance, on suggestion of cruel usage

by the husband; and on the part of the defendant, as an excuse for his ill usage, depositions were offered, to prove a criminal conversation: unless it is expressly charged by the answer, the Court will not suffer such depositions to be read, the matter not being in issue. *Watkyns* v. *Watkyns*, 2 Atk. 96.

21. A charge of misbehaviour against a wife is not sufficient to put in issue the fact of adultery; but, under a general charge of lewdness, depositions to particular acts of criminal conversation will be admitted. *Clark* v. *Periam*, 2 Atk. 337.

22. Depositions of a witness, disinterested at the time of making them, ordered to be read in the cause, wherein he was afterwards plaintiff. *Goss* v. *Tracy*, 2 Vern. 699. 1 P. W. 287.
Haws v. *Hand*, 2 Atk. 615.
And see Needham v. *Smith*, 2 Vern. 463.
Glynn v. *The Bank of England*, 2 Ves. 42

23. The deposition of the *prochein amy* of the plaintiff cannot be read for the plaintiff, he being liable to costs. *Head* v. *Head*, 3 Atk. 511.

24. The deposition of a wife of a *prochein amy* cannot be read, as the husband is liable to costs. *Head* v. *Head*, 3 Atk. 547.

25. Where one defendant is charged with a fraud, his deposition cannot be read for another, as it may tend to excuse him with regard to his own costs. *Eade* v. *Lingood*, 1 Atk. 204.

26 Depositions of one defendant may be read for another defendant, where the Court thinks there is no material evidence against the first defendant, or that no decree can be made against him. *Dixon* v. *Parker*, 2 Ves. 224.

27. Deposition of one defendant may be read for another, and for the plaintiff likewise; but if the defendant, who is offered in evidence for another defendant, may, by any possibility, be liable to costs, this is always a reason for refusing his evidence, because he is interested so far as to be swearing to excuse himself. *Barret* v. *Gore*, 3 Atk. 402.

28. The deposition of a defendant against whom plaintiff can give no evidence, may be read for another defendant. *Piddock* v. *Brown*, 3 P. W. 288.

29. If the cause is brought on to a hearing, and stands over with liberty to add a party, if he is a material defendant and concerned in interest, the depositions taken before cannot be read against him. *Neblet* v. *Daniel*, Bun. 310.

30. If there is an agreement in writing between A. and B., the steward of C., for sale of A's estate to C., but the covenant by B., and he bound in penalty for the performance, and A. brings bill against B. and C., charging there was a defeazance prepared, but the execution prevented by B.; B.'s deposition cannot be read for C., especially if B. has examined witnesses. *Dixon* v. *Parker*, 2 Ves. 219.

31. If a person joins fraudulently in granting an estate without the usual covenants, but only that he has done no act to incumber, his deposition may be read to impeach his title to the estate, and to shew it was done to carry on the fraud. *Man* v. *Ward*, 2 Atk. 22[illegible].

32. Depositions taken in a cause wherein tenant in tail is a party, cannot be read against the issue in tail; nor in a cause in which the father, tenant for life, was a party against the son, who was remainderman in tail. *Earl of Peterborough* v. *Duchess of Norfolk*, Pre. Ch. 12.

33 Where, on a bill brought by A. against B. C. and D., the defendants had examined some witnesses, it was held that B., being now plaintiff, may read those depositions against the plaintiff, or any of the defendants in the first cause. *Barstow* v. *Palmes*, Pre. Ch. 233.

34. If on bill brought by devisees to establish a will, the heir at law prevails to set it aside, he shall have the benefit of the depositions in this cause, in another cause brought by him against a purchaser from the devisee *pendente lite*. *Garth* v. *Ward*, 2 Atk. 175.

35. It is too late at the hearing of the cause to object to depositions taken *de bene esse;* there should have been a motion to discharge the order for publication. *Dean of Ely* v. *Warren*, 2 Atk. 190.

36. An order had been obtained to read *inter alia* the examinations of Margaret Lingood, taken before Commissioners of Bankrupts under a commission against Thomas Lingood; they cannot be read, unless it be proved in the cause that there were such examinations taken before the commissioners: for the proceedings in a commission against Thomas, are, as to Margaret, *res inter alios acta*. *Eade* v. *Lingood*, 1 Atk. 203.

37. The Court will not make an order upon a Master to admit depositions, taken in a former cause between the same parties, to be read; as it is putting parties to an unnecessary expense: the proper course being to take exceptions to the report, if the Master should be mistaken. *Anon,* 3 Atk. 524.

38. Depositions *de bene esse* taken in Sweden, ordered to be read as evidence, the council of Sweden having refused to let the commission for examination in chief be executed there. *Gason* v. *Wordsworth,* Amb. 108. 2 Ves. 336.

39. The depositions of witnesses of the *Gentoo* religion, sworn according to their ceremonies, were admitted as evidence. *Omychund* v. *Barker,* 1 Atk. 21.

And see further p. 484, *post.*

(*e*) *Lost.*

1. A witness having been examined *de bene esse*, on a commission *ex parte*, and dying before he was examined in chief, and the commission being lost, an order was made that the commissioner in whose custody the draft depositions remained sealed, should return the same unopened, and that they should be delivered to the Six Clerk unopened, and be engrossed, and such engrossment be filed, and made use of as the original deposition might have been. *Jones* v. *Donithorne,* 1 Dick. 352.
And see Smales v. *Chayter,* 1 Dick. 99.

2. The Court refused to order copies of depositions to be recorded and exemplified, where the original had been lost, and, in trials at law subsequent to the dismission of the suit, the witnesses had sworn contrary to their depositions. *Brabant* v. *Perne,* 2 C. R. 36.

(*f*) *Of Foreign Witnesses.*

1. The Court refused to permit depositions taken in the French language, to be delivered out for the purpose of translation. *Fanquier* v. *Tynte,* 7 Ves. 292.

See further p. 486, *post.*

XXV. DISCLAIMER.

1. Where the defendant disclaims, the party is not to reply; if he does, and serves the defendant with a subpœna to rejoin, the defendant may have costs against him for the vexation: otherwise, where the disclaimer is to part and answer to another part of the bill. *Williams* v. *Longfellow,* 3 Atk. 582.

2. A defendant cannot get rid of a disclaimer without a strong case on affidavit. *Seton* v. *Slade,* *Hunter* v. *Seton,* 7 Ves. 265.

XXVI. DISMISSION OF SUIT.

(*a*) *By Plaintiff.*

1. The plaintiff cannot move to dismiss his bill after decree. *Guilbert* v. *Hawles.* 2 Free. 158. 1 C. C. 40.

2. Although a cause be brought to a hearing, and an issue directed, until the issue is tried, and there hath been a determination, let the cause be in what stage it may, the plaintiff may, upon motion, dismiss the bill, upon payment of costs; otherwise, if there had been a decree. *Carrington* v. *Holly,* 1 Dick. 280.

3. Motion by plaintiff to dismiss his own bill without costs, cannot be granted without the express consent of the defendants in Court. *Fidelle* v. *Evans,* 1 Br. C. C. 267. 1 Cox, 27.

4. But the Court made the order in a case where the defendant, by his own act, had rendered the suit useless, and had absconded. *Knox* v. *Brown,* 2 Br. C. C. 186. 1 Cox, 359.

5. The plaintiff cannot, on motion, dismiss his bill without costs, on the ground that the Court would have decreed according to it, unless there be a consent. *Anon,* 1 Ves. J. 140.

6. Plaintiff can in no case dismiss his bill without costs: with costs it is of course; but after motion to dismiss without costs refused, consent is necessary. *Dixon* v. *Parks,* 1 Ves. J. 402.

7. Plaintiffs will not be permitted to withdraw themselves from that character, if by so doing the remaining plaintiffs in the suit are injured; but the Court will allow it upon terms, which will secure the other plaintiffs from such injury: and therefore, a motion by some of several plaintiffs, that the bill, so far as they are

concerned, might be dismissed with costs, was granted on terms. *Holkirk* v. *Holkirk*, 4 Mad. 50.

8. Bill dismissed by one co-plaintiff, as to himself with costs, without the consent of the other, the defendant consenting. *Langdale* v. *Langdale*, 13 Ves. 167.

9. Bankruptcy of the defendant is no abatement, and will not therefore enable a plaintiff to dismiss his own bill without costs. *Rutherford* v. *Miller*, 2 Anst. 458.

(*b*) *By Defendant.*

1. If a bill is depending, and the plaintiff files another for the same matters, the defendant may move to have them referred, and one dismissed. But if a bill is dismissed in the Exchequer, and then filed in Chancery, the defendant cannot dismiss it on motion, but must plead to it. *Anon*, Mos. 268.

2. On a bill to be relieved against the penalty of a bond, if the principal and interest are not paid on the day fixed by the Master, on defendant's setting down the cause again, the bill will be dismissed with costs. *Newsham* v. *Gray*, 2 Atk. 287.

3. In a suit by vendor for a specific performance, where the Master's report is against the title, the defendant may move that the bill be dismissed with costs.—*Walters* v. *Pyman*, 19 Ves. 351.

4. Upon an election to proceed at law, the bill is dismissed with costs; and in case of a special election to proceed at law as to part, and in equity as to another part, the bill, as to what the plaintiff elects to proceed at law, ought to be dismissed with costs. *Anon*, 3 P. W. 90 (*n*).

5. Where an order was made, that defendants should not be compelled to answer, till a fortnight after the plaintiff should produce an instrument, stated in the bill, and fifteen months elapsed without any such production, it was ordered, on the motion of the defendants, that unless the instrument should be produced by a given day, the bill should be dismissed with costs, which order was afterwards made absolute. *The Princess of Wales* v. *The Earl of Liverpool*, 2 Wil. 29.

6. A defendant, though he has become bankrupt, may move to dismiss. *Rhode* v. *Spear*, 4 Mad. 51.

(*c*) *By Consent.*

1. After a decree the bill cannot be dismissed, even by consent; but an arrangement for disposing of the fund in Court may have effect by consent on farther directions. *Lashley* v. *Hogg*, 11 Ves. 602.

2. After a decree, merely directing enquiries to enable the Court to determine for the first time what is to be done, the parties may on motion by consent have such an order as could be made on further directions, as in this case to dismiss the bill with costs. *Anon*, 11 Ves. 169.

3. A bill cannot be dismissed by agreement of the parties, some step in Court must be taken for that purpose. *Rowe* v. *Wood*, 1 J. & W. 345.
And see Forsyth v. *Manton*, 5 Mad. 78.

4. Where the parties under an order of the Court of K. B. refer all matters of difference to arbitration, and all suits in law and equity; and the award directs that all suits in law and equity should be discontinued, the party cannot upon this award move to dismiss a bill in Equity; the course is, if the plaintiff proceeds in the suit, to move for an attachment in the Court of which the submission to arbitration is made a rule; so if he refuses to have the bill dismissed, if that is the meaning of the award. *Hutchison* v. *Hodgson*, 2 Anst. 361.

(*d*) *For want of Prosecution.*

1. Though the next day after the last day of the term be not in strictness part of the term, and therefore no motion can be made on the petty bag side, yet, as to other purposes, it is part of the term; for which reason a motion made at that time to dismiss a bill for want of prosecution, on a certificate that there had been no proceedings within three terms, of which the last term was one, was denied. *Anon*, 1 P. W. 522.

2. Demurrer and answer to a bill: order for dismissing the bill for want of prosecution before the demurrer was disposed of, held irregular. *Done* v. *Allen*, 1 Dick. 55.

3. An application of the defendant to dismiss the bill for want of prosecution, is proper only when the defendant has no means of taking any step in the cause; therefore a defendant cannot make such a motion when he has filed a general de-

murrer, for he may set the demurrer down for argument. *Simpson* v *Densham*,
2 Cox, 377.
S. C *Anon*, 2 Ves. J. 287.

4. Wherever there is a plea put in to a bill, though there is an answer likewise, the bill cannot be dismissed for want of prosecution, till the plea is argued. *Anon*,
Barn. 280.

5. Where a bill is for a discovery merely, the defendant cannot move to dismiss it for want of prosecution, but can only pray an order on the plaintiff to pay defendant the costs of suit to be taxed. *Woodcock* v. *King*, 1 Atk. 286.

6. Bill to perpetuate testimony may be dismissed for want of prosecution any time before replication and examination. *Anon*, Amb. 237.

7. You cannot move to dismiss a bill after publication is passed, and it is no hardship to the defendant, for if the bill is dismissed at the hearing, he will have his full costs. *Ship* v. *Warner*,
3 Atk. 558

8. A defendant may move to dismiss a bill for want of prosecution, at any time before a rule to produce witnesses. *Fell* v. *Morris*, 1 Cox, 176.

9. After rejoinder, a defendant cannot move to dismiss a bill for want of prosecution, for, after issue is joined, the defendant may proceed himself. *Tozer* v. *Tozer*, 1 Cox, 288

10. If the plaintiff produces the order for a *subpœna* to rejoin, and an affidavit of some of the parties being out of the kingdom, the Court will not dismiss the bill for want of prosecution. *Anon*,
2 Atk. 604.

11 Original bill dismissed for want of prosecution, the plaintiff having become a bankrupt, and his assignees neglecting to revive. *Hall* v. *Chapman*,
1 Dick. 348.

12. A plaintiff becomes a bankrupt: the bill cannot be dismissed for want of prosecution, should his assignees not think proper to file a bill in nature of a bill of revivor. *Sellers* v. *Dawson*,
2 Dick. 738.

13. It is now held that the bankruptcy of the plaintiff does not prevent the usual motion to dismiss for want of prosecution, with costs. *Davidson* v. *Butler*,
2 Anst. 460 (*n*).

14. But where the plaintiff becomes bankrupt, the Court will not dismiss the bill without giving the assignees time to adopt the suit. *Mumford* v. *Randall*,
1 Rose, 196.
S. C. *Randall* v. *Mumford*,
18 Ves. 424.
Porter v. *Cox*, 5 Mad. 80.
Buck, 469.

15. The bill was retained for twelve months, with liberty for the plaintiff in the mean time to bring an action, and to proceed to trial, and in default, the bill "to be dismissed with costs." The plaintiff did not proceed according to the liberty given to him, and, thereupon, the defendant moved to dismiss the bill: held to be improper, not being such a judgment as could be pleaded, and the cause ordered to be set down for further directions. *Cater* v. *Dewar*, 2 Dick. 654.

16. In a similar case, where the order was, that if the plaintiff should not try such action within a twelvemonth, then the bill "to stand dismissed with costs." Held that though the plaintiff did not try the action within the time, the bill was not *ipso facto* out of Court; but that defendant might either set down the cause for further directions, or move to dismiss the bill. but where the cause is ordered to stand over for a limited time, with liberty for the plaintiff to add parties, and in default thereof the bill "to stand dismissed with costs," the cause, in default of amendment, is out of Court without further order, the defendant not having it in his power to set down the cause in a condition to be heard. *Stevens* v. *Praed*,
2 Cox, 374.

17. A cause coming on to be heard, stood over, with liberty for the plaintiff to amend, by adding parties; he amended accordingly, but did not proceed further. The defendant may move to dismiss the bill for want of prosecution, and for this purpose it is not necessary to set down the cause again. *Mitchel* v. *Lowndes*,
2 Cox, 15.

18. Shewing cause against dissolving an injunction, is not such a proceeding in a cause as to prevent the bill being dismissed for want of prosecution. *Earl of Warwick* v. *Duke of Beaufort*,
1 Cox, 111.

19. After an order to speed the cause, the plaintiff has a whole term and vacation to proceed in before the bill can be dismissed. *Mangleman* v. *Prosser*,
3 Br. C. C. 191.

20. After three terms expired without any step taken, a bill may be dismissed

for want of prosecution, on motion of course not requiring notice. *Degraves* v. *Lane*, 15 Ves. 291.

21. But this is only in case no replication has been filed; and such order will not be discharged on special circumstances, but on payment of costs. *Jackson* v. *Purnell*, 16 Ves. 204.

22. An order to dismiss, obtained as a motion of course, without notice, is regular after three terms, and no replication filed, although so obtained pending an injunction staying execution. *Naylor* v. *Taylor*, 16 Ves. 127.

23. Notice of motion, to dismiss a bill for want of prosecution, is not necessary where three terms have elapsed after answer, and no replication has been filed: nor is the Six Clerk's certificate necessary on the motion, if it is produced to the register, when the order is drawn up. *The Attorney General* v. *Finch*, 1 V. & B. 368. *Day* v. *Snee*, 3 V. & B. 170.

24. And the order is regular, though the Six Clerk's certificate appear, on the face of the order, to be of a subsequent date. *M'Mahon* v. *Lisson*, 12 Ves. 465.

25. On a motion to dismiss for want of prosecution, the Clerk in Court, in his certificate as to proceedings in the cause, and which may be obtained after the motion is made, must not state any proceedings subsequent to the motion. *King* v. *Noel*, 5 Mad. 13.

26. An order to dismiss a bill for want of prosecution, after the regular time elapsed, and an injunction having been ordered on the merits, but not issued, cannot be discharged for irregularity, although obtained upon motion by the defendant without notice. *Hannam* v. *S. London Water Works*, 2 Mer. 61.

27. An undertaking to speed a cause, signed by counsel, and left at the register's office on the same day a motion to dismiss is made, is sufficient to prevent the bill being dismissed, if the defendant's solicitor has notice before the order to dismiss is drawn up. *Lyndon* v. *Lyndon*, 3 Mad. 240.

28. Replication being filed after notice of motion to dismiss, the motion is not sustainable, but the defendant is entitled to costs. *Spurrier* v. *Bennett*, 4 Mad. 39.

29. Notice was given of a motion to dismiss, and on the day the motion was made, a replication was filed: held, that the bill did not stand dismissed, and that the defendant was not entitled to the costs of the motion. *Reynolds* v. *Nelson*, 5 Mad. 60.

30. Where, in consequence of misrepresentation of the plaintiff's Clerk in Court, that a step had been taken in the cause, a motion to dismiss, of which notice had been given, was abandoned; and some time after, upon discovery of the fact, the motion was made, and order to dismiss obtained, and the day before the order was actually obtained, the step in the cause was taken: held that the order must be discharged, but at the cost of the plaintiff, as it was owing to his misrepresentation, that the order had not been obtained in the first instance. *Anon*, 14 Ves. 492.

31. If a plaintiff, having obtained an order to amend, for the purpose of keeping his bill in Court, does not get the order drawn up and served until the defendant has a right to move to dismiss, the order under such circumstances must be considered a nullity, and cannot prevent the dismission of the bill. *Anon*, 7 Ves. 222. *Morris* v. *Owen*, 1 V. & B. 523.

32. But an order to amend, obtained after notice of motion to dismiss, and on the same day the motion to dismiss is made, will prevent the bill being dismissed for want of prosecution. *White* v. *Hall*, 14 Ves. 208.

33. Acceptance of the answer of a defendant in contempt, is such a waver of the contempt as to enable the defendant to dismiss the bill for want of prosecution. *Anon*, 15 Ves. 174.

34. A motion to dismiss for want of prosecution, is not of course pending the usual reference of the title on motion, in a suit for specific performance. *Biscoe* v. *Brett*, 2 V. & B. 377.

35. Motion to dismiss a bill for want of prosecution since the answer filed, will not be prevented by an injunction. *Day* v. *Snee*, 3 V. & B. 170.

36. The only answer that can be given on a motion to dismiss, is an undertaking to speed the cause; if there are any particular circumstances in the case, they must be the object of a special application. *Steadman* v. *Ellis*, 4 Mad. 240.

37. The Court will not hear special cause against dismission of a bill, unless notice of the cause intended to be shown be previously given to the plaintiff. *Christie* v. *De Tastet*, 1 Price, 242

38. Reference for scandal and impertinence is a sufficient proceeding with effect to save a bill from being dismissed. *Goodwin* v. *Davis*, 1 Price, 373.

(*e*) *At the Hearing.*

1. If a cause comes to a hearing on a bill of discovery, it must be struck out of the paper, but the bill cannot be dismissed, not praying relief. *Anon*, Mos. 185.

But see Gurish v. *Donovan*, 2 Atk. 166, *S. C.* Barn. 428.

2. If a bill to perpetuate testimony is set down to be heard, it will be dismissed with costs, but without prejudice to perpetuating the testimony. *Anon*, Amb. 237.

And see Vaughan v. *Fitzgerald*, 1 S. & L. 316.

3. Bill of two plaintiffs claiming jointly, dismissed at the hearing as to one of them. *Gemmel* v. *Block*, 2 Dick. 513.

4. Bill dismissed against defendant, there being no equity against him, though he made default at the hearing; but, on account of such default, without costs. *Speidall* v. *Jervis*, 2 Dick. 632.

5. Defendants were in contempt to a sequestration, for want of their answer; bill dismissed against them at the hearing for want of equity. *Molesworth* v. *Lord Verney*, 2 Dick. 667.

6. It is not a necessary consequence that the bill will not be dismissed, because it has been retained for the purpose of trying an issue at law. *Harmood* v. *Oglander*, 6 Ves. 225.

7. Where the plaintiff brings a bill with a knowledge he had no right, the bill shall be dismissed with costs. *Stockdale* v. *South Sea Company*, Barn. 363.

8. A bill was dismissed with costs from the coming in of the answer, only where the answer contained a good defence, but the plaintiff appeared to have reason for filing the bill for the discovery. *Hodgson* v. *Dand*, 3 Br. C. C. 475.

9. Where a plaintiff, after undertaking to speed the cause, obtains leave to set it down upon bill and answer, but does not serve a subpœna to hear judgment, or appear when the cause is called on, the bill will be dismissed with costs. *Rogers* v. *Goore*, 17 Ves. 130.

10. In a suit for injunction to restrain invasion of copyright and an account, a case was made for the opinion of a Court of law, and the Judges certified that the plaintiff had no interest in the copyright in question. This will only determine that the plaintiff cannot succeed in his motion for an injunction, but is not sufficient to enable the defendant to call for the dismissal of the bill. *Brooke* v. *Clarke*, 1 Swan. 550.

11. Where the defendant set down the cause, and the solicitor, undertaking to appear without a subpœna, made default, when the cause was called on: held, that for want of an affidavit of the service of a subpœna to hear judgment, the bill could not be dismissed, the cause could only be struck out of the paper; but that on an application for that purpose, the solicitor would be made to pay the costs occasioned by his default of appearance. *Ellis* v. *King*, 5 Mad. 21.

12. It is the practice in equity to keep an heir at law before the Court, even though he admit the will; semble for the purpose of giving more complete effect to any decree, which the Court may make, and which might require his concurrence. *Jackson* v. *Radford*, 4 Price, 274.

13. To prevent litigation, a bill was decreed to be dismissed without costs, upon the plaintiff waving any action at law; otherwise, to be dismissed with costs. *Harnett* v. *Yeilding*, 2 S. & L. 560.

14. Where an answer states, that the defendant is a purchaser for valuable consideration, and the plaintiff does not except, but replies to it; if at the hearing the defendant prove what he relied on in the answer, the bill as against him must be dismissed, unless the plaintiff prove that the defendant has taken a legal title under fraudulent circumstances. *Eyre* v. *Dolphin*, 2 B. & B. 303.

(*f*) *Effect of Dismission.*

1. A dismission, upon an election to proceed at law, does not preclude the plaintiff from bringing a new bill after having failed at law. *Countess of Plymouth* v. *Bladon*, 2 Vern. 32.

2. Though plaintiff's bill is dismissed on the merits, yet, if by the plaintiff's gaining the legal estate defendant is forced to be plaintiff, the cause is open, and the merits of the cause are before the Court. *Sawyer* v. *Bletsoe*, 2 Vern. 328.

3. Praying relief where a mortgagee is a party, is the same as praying to redeem; and if on a reference to a Master they do not redeem him, the Court will dismiss the bill, which is equivalent to a fore-

closure. *Cholmley* v. *Countess Dowager of Oxford*, 2 Atk. 267.

And see Bishop of Winchester v. *Paine*, 11 Ves. 199.

4. The dismission of a suit without prejudice, either in law or Equity, is no bar to a suit for the same matter in another Court. *Anon*, 1 C. C. 155.

XXVII. Distringas.

1. The form of *distringas* is regular, being to appear and answer contempt merely, (not *ad comparendum et solvendum)*, but the cause for which it issued being specified by indorsement. *Lowten* v. *The Mayor of Colchester*, 3 Mer. 543.

2. Return "Issues 40s." also regular. *Ibid.*

3. The Court will not grant a *distringas* against a defendant, who has not been served with process otherwise than by delivery of it to a person, at whose house he had recently resided, unless it appear that he then lived there. *Horton* v. *Peake*, 1 Price, 309.

And see Div. XXXII. *post.*

XXVIII. Election.

1. Where the plaintiff sues both at law and in equity for the same thing, he will be put to make his election in which Court he will proceed, but he need not make such election till the defendant has answered. *Jones* v. *Earl Stafford*, 3 P. W. 90.

Anon, 1 Vern. 103.

2. If the defendant pleads in bar, the plaintiff is not obliged to elect, till the plea is argued, for the plea denies the right to sue in Equity. *Anon*, Mos. 304.

Vaughan v. *Welsh*, Mos. 210.

3. If one takes another in execution on a *capias ad satisfaciendum*, he cannot proceed against him in Equity for the same demand. *Horn* v. *Horn*, Amb. 79.

4. To put a party to his election to sue at law or in Equity, is a motion of course. *Anon*, 1 Ves. J. 91.

5. Defendant ordered to elect, whether he would come in under the decree, or proceed at law; after electing to proceed at law, his election was discharged, and he was admitted to come in under the decree. *Dennet* v. *Coker*, 1 Dick. 144.

6. Liberty given to the plaintiff to make a special election to proceed in Equity for the two years' rent in question, which accrued due before the defendant came into possession, and at law for the rent accrued in the defendant's own time. *Joyce* v. *Barker*, 1 Dick. 182.

7. Special election to proceed at law in an ejectment for the land; and in Equity, for an account of profits. *Anon*, 1 Vern. 105.

But see upon this case, *Dormer* v. *Fortescue*, 3 Atk. 129.

8. A creditor, having come in under a decree, and prayed a commission to prove his debt, though he went no further, was held to have made his election, and not permitted to proceed at law to recover his debt. *Farnham* v. *Burroughs*, 1 Dick. 63.

9. If plaintiff elects to proceed at law, on coming in of the answer, his bill in Equity must be dismissed; but on dropping that part which prayed relief, plaintiff was allowed to proceed at law. *Fitzgerald* v. *Sucomb*, 2 Atk. 85.

10. Where a plaintiff elects to proceed at law, and his bill is thereupon dismissed, the dismission is not peremptory; but the plaintiff, after failure at law, may proceed in Equity by a new bill. *Countess of Plymouth* v. *Bladon*, 2 Vern. 32.

11. Where an order for the plaintiff to elect, is obtained upon the usual allegation that he is proceeding at law and in Equity for the same matter, and the matter for which the plaintiff proceeds at law is in fact distinct from that for which he proceeds in Equity, semble he need not apply to discharge the order, for it does not restrain him, and he hath only to prove the matters distinct when complaint is made of his breach of the order. *Bullen* v. *Butcher*, 2 Dick. 558.*

And see subsequent cases, Tit. Election V. p. 187, *ante*.

XXIX. Evidence and Proofs.

1. If the office copies of the pleadings or proofs, necessary to be read for one party, on hearing of a cause, be not signed by the proper officer, the cause must stand over, on payment of £5 costs to the other party for the day's attendance. *Attorney General* v. *Milward*, 1 Cox, 437.

2. Examination in the Admiralty Court used in the Court of Chancery. *Watkins* v. *Fursland*, Toth. 192.

3. Examination in Chancery may be used before the Delegates. *Gargrave* v. ——, 2 C. C. 250.

4. Acts of the Court as a decree, or order, in another cause between the same parties, may be read without an order. *Brooks* v. *Taylor*, Mos. 188.

5. Papers of record in another court of justice may be used at the hearing of a cause in the Court of Chancery, saving just exceptions. *Ex parte Bernall*, 11 Ves. 559.

6. Proofs in an original cause not allowed to be read on a bill of review. *Moseley* v. *Maynard*, 2 C. R. 18.

7. Evidence in the cause, though not read at the hearing, may be received by the Master. *Smith* v. *Althus*, 11 Ves. 564.

8. A decree or examination of witnesses in a former cause between the same parties may be read as evidence, though not conclusive, although thereby there is not an opportunity of examining between co-defendants. *Askew* v. *Poulterers' Company*, 2 Ves. 89.

9. All deeds, writings, and letters must be proved themselves, unless upon proof that they are in hands of the adverse party, or destroyed, and then parol evidence of their contents will be admitted. *Cole* v. *Gibson*, 1 Ves. 505. *See Villiers* v. *Villiers*, 2 Atk. 71.

10. Except in cases of perjury, the office copy of the answer is admitted as evidence upon a trial at law; and the Court will not order the original answer to be sent down to the trial of an issue, whether between the same parties or not, till after refusal of the office copy as evidence. *Anon*, 1 Ves. J. 152.

11. If defendant, by answer in another cause, has admitted that a deed in question, a release, once existed, and defendant has the lease belonging to this release, plaintiff may read the draught of the release, if well proved. *Whitfield* v. *Fausset*, 1 Ves. 367.

12 A deed mentioned in the bill, to which the defendant by answer said he believed there was such a deed as in the said bill is set forth, shall not be read without proof; for the confession does not admit more than is alleged by the bill, and does not warrant the reading of a deed with like clauses. *Anon*, 2 Vent. 361.

13. So also the probate of a will cannot be read in case of a real estate, if the defendant admits merely that he believes there is such a will: *secus*, if the admission is full. *Mullins* v. *Pratt*, Bun. 6.

14. A will admitted in the answer under which the defendant claims, and where nothing turns upon the construction, may be read from the bill, although the answer refers to the will for certainty. *Owen* v. *Jones*, 2 Anst. 505.

15. A deed proved upon a commission against one defendant only, shall not be admitted against the other defendant. *Anon*, 2 Vent. 361.

16. The proceedings under a commission of bankruptcy superseded, ordered to be produced at the hearing of a cause in the Court of Chancery in Ireland, with a view to evidence from the bankrupt's examination, but not of course. *Ex parte Bernal*, 11 Ves. 557.

17. If the defendant refuses to produce the office copy of the bill, the draft will not be evidence; the record must be produced. *Huddleston* v. *Briscoe*, 11 Ves. 583.

18. And if a mistake be insisted on in the office copy of an answer, the record itself must be produced, and taken to be correct, although it differs from the original draft. *Countess of Gainsborough* v. *Gifford*, 2 P. W. 425.

19. An order may be obtained to read in one cause the bill, answer, and the rest of the proceedings in another cause, if between the same parties, but this cannot be extended to suit one not a party to the first. *Eade* v. *Lingood*, 1 Atk. 204.

20. Where the probate differs from the original bill, application must be made to the Spiritual Court to amend. *Marsh* v. *Howe*, 2 Atk. 50.

21. The evidence of one having an interest cannot be read, though he is satisfied, unless a release is produced. *Anon*, 2 Atk. 15.

22. Letters or books of an agent or servant may be read if he is dead, otherwise not. *Peacock* v. *Monk*, 2 Ves. 193.

23. If witnesses are dead who have attested a deed, it is not sufficient to prove the hand-writing, but there must be proof that the witnesses are dead. *Henley* v. *Philips*, 2 Atk. 48.

24. A witness to hand-writing must have seen the party write, and swear to his belief of the writing produced; swear to a similarity of the writing is insufficient. *Eagleton* v. *Kingston*, 8 Ves. 473.

25. If a piece of evidence, as a receipt, must be stamped, to be produced as evidence, it may be stamped during the hearing of the cause. *Coles* v. *Trecothick*, 9 Ves 252.

26. The cause stood over to enable the plaintiff to get a letter stamped, in order to make it evidence. *Ford* v. *Compton*, 2 Br. C. C. 32.

27. The Court allowed the defendant in a suit for tithes, after publication, to prove an old paper found in the parish registry. *Clarke* v. *Jennings*, 1 Anst. 173.

28. If a will of lands be wanted to be proved on a commission, the Court of Chancery will on motion make an order upon the registrar of the Prerogative Court, to deliver out the will to the devisee, upon his giving security for its return. *Morse* v. *Roach*, 1 Atk. 628. 1 Dick. 65. 2 Str. 961.

29. Where the defendant was sole devisee of the real estate, and one of the witnesses to the will resided altogether abroad, upon a commission granted to examine such witness, the Court at the same time made an order that the original will be delivered out by the proper officer of the Prerogative Court, to a person to be named by the party praying the commission, in order to be carried out of the kingdom, he first giving security, to be approved by the Judge of the Prerogative Court, to return the same. *Frederick* v. *Aynscombe*, 1 Atk. 627.

30. Will ordered to be delivered out of the Ecclesiastical Court to the solicitor in the cause, on his giving security before a Master to return it safe and undefaced. *Forder* v. *Wade*, 4 Br. C. C. 476. *Peirce* v. *Watkin*, 2 Dick. 485.

31. Order upon the registrar of the Consistory Court of Durham, that an original will may be produced for the hearing upon giving security. *Ford* v. ——, 6 Ves. 802. *Hodson* v. ——, 6 Ves. 135. *Lake* v. *Causfield*, 3 Br. C. C. 263.

32. But the Court of Exchequer refused to make such an order as of course, and where the only ground was the saving the expense of copying the will. *Wells* v. *Corbyn*, 3 Anst. 648.

33. The order must be directed "To the Registrar of the Court," and the security for the return of the will should be approved by the Master. *Qualey* v. *Qualey*, 4 Mad. 213.

34. General rule in Ireland, that all wills to be proved are to be produced in the custody of the proper officer, and delivered to the examiner or commissioners; and by them delivered to the same officer, after examination closed. 1 S. & L. 144.

And see further. Tit. EVIDENCE, p. 197, *ante*.

XXX. EXAMINATION OF WITNESSES.

(*For Examination by Commission, see* Div. XV. p. 397, *ante*.)

(*a*) *Generally*.

1. The defendants were not served with process; and yet the plaintiff brought up divers witnesses to be examined; but ordered they should not be examined, until the defendants had answered. *Bishop of Salisbury* v. *Hinde*, Cary, 133.

2. Witnesses may be examined before replication (if the plaintiff doth); not else. *Anon*, 2 Free. 136.

3. No witness can be examined after publication, although sworn before. *Jenkinson* v. *Pepys*, 3 Anst. 835. *And see Hamond* v. ——, 1 Dick. 50.

4. On a bill for partition there is no occasion to examine witnesses previously to the hearing; the commissioners named in the commission may examine them *ore tenus*, or take their depositions in writing, as they think proper. *Meers* v. *Lord Stourton*, 1 Dick. 21.

5. Matters examined to in the original cause, and publication past, or settled by the decree, cannot be examined to in the cross cause. *Ward* v. *Eyles*, Mos. 377.

(*b*) *Viva voce*.

1. Liberty was given to examine a witness *viva voce* after publication as to a particular fact, and the defendant to cross examine him. *Gage* v. *Hunter*, 1 Dick. 49.

2. The competency of this Court in examining *viva voce*, allowed at law to ground a prosecution for perjury, and the decision affirmed by the House of Lords. *Moore* v. *Aylet*, 2 Dick. 641.

3. On contradictory affidavits of the same person, personal examination is required. *Ex parte Lord*, 2 Ves. 26.

4. The Court will examine *viva voce* upon the proving of an exhibit at the hearing, upon the suggestion of any question. *Turner* v. *Burleigh*, 17 Ves. 355.

(*c*) *By the Examiner*.

1. By general order of the Court of

Chancery of Ireland, March 1, 1806, the same examiner shall not examine and cross examine the same witness, nor act on behalf of both parties. 2 S. & L. 739.

2. Where a witness attends the examiner under a subpœna, but refuses to be sworn, an order may be obtained that he attend to be examined or stand committed. *Hennegal* v. *Evance*, 12 Ves. 201.

3. Semble the examiner has no right to take depositions in the country. *Frankland* v. *Frankland*, 1 Dick. 231.

And see Darrell v. *Stukely*, Cary, 94., *and* p. 480, *post.*

(*d*) *By the Master.*

1. The Master examined one witness three times to the matter of accounts: ordered, that the depositions be suppressed. *Anon*, 2 C. C. 79.

2. A witness was examined, whilst she was interested, before the hearing, and the cause being heard and sent to an account, she was re-examined after the hearing before the Master, on the account, having first released her interest. Her depositions before the Master allowed to be read. *Callow* v. *Mince*, 2 Vern. 472. Pre. Ch. 234.

3. Where a witness, previously to his examination in the cause, executed by mistake a partial release instead of a general one, the Court, after the hearing, gave leave generally to re-examine the witness before the Master, who was to settle the interrogatories; but if the witness had been competent at first, the second examination could only be to matters substantially different. *Sandford* v. *Paul*, 1 Ves. J. 398. 3 Br. C. C. 370. 2 Dick. 750.

4. A witness examined in chief before the hearing, cannot afterwards be examined before the Master, without a special order, and then not to any matters he has been before examined to, or in which he may be interested, and the Master is to settle interrogatories. *Browning* v. *Barton*, 2 Dick. 508.

See upon this case, Vaughan v. *Lloyd*, 1 Cox, 314.

5. Witness not to be re-examined before a Master to the same matter to which he has been examined in chief in the cause, but by order. *Sawyer* v. *Bowyer*, 2 Dick. 639. 1 Br. C. C. 388.

6. A witness examined in the cause, cannot in any case be re-examined before the Master, without leave of the Court; and the Court, though it will not refuse leave when the substantial justice of the case requires it, yet will put the parties under the terms of having the interrogatories approved and settled by the Master, in order that the witness might not be a second time examined to the same facts. *Vaughan* v. *Lloyd*, 1 Cox, 312.

7. But if the witness has been examined merely as witness to a deed, or some such matter, the interrogatories need not be settled by the Master, for then it is evident he is not to be examined to the same matter. *Birch* v. *Walker*, 2 S. & L. 518.

8. Witnesses examined in the cause cannot be examined before the Master, without leave of the Court, but persons who were not witnesses in the cause may be examined before the Master to the same points. *Smith* v. *Althus*, 11 Ves. 564.

9. Witnesses examined in the cause ordered to be re-examined before the Master upon different interrogatories; the motion was made upon notice, and was not opposed. *Greenaway* v. *Adams*, 13 Ves. 360.

10. After a decree, the Master may examine witnesses, but ought not to do so by his clerk; the same *subpœna* issues as to bring them before the examiner, which is the same as a *subpœna* to answer, but the label expresses the purpose; upon an examination in the country, the body of the writ expresses that it is to testify. *Parkinson* v. *Ingram*, 3 Ves. 603.

11. The usual order for taxation empowers the Master to examine the solicitor as to what money he has received only: but upon proper affidavits the Court will order him to be examined as to his disbursements. *Anon*, Mos. 331.

12. And where, after an order of taxation and payment, the solicitor assigned his bill to a purchaser, and absconded, the Court was inclined to think that the purchaser could not stand in place of the solicitor, until he had procured him to be examined under the order. *Wilson* v. *Williams*, Barn. 263.

See further p. 480, *post.*

(*e*) *De bene esse.*

1. Although it is an order of course to examine a defendant *de bene esse*, saving just exceptions; yet, when the cause is heard, and it appears such defendant is a party interested, it is proper to shew cause

against such an order, before the witnesses be examined. *Glover* v. *Faulkner*. 1 Vern. 452.

2. Depositions taken *de bene esse*, and before the defendant had put in his answer, or issue joined. *Southwell* v. *Lord Limrick*, 9 Mod. 133, 210.

3. A witness ordered to be examined *de bene esse*, where the thing examined into lay only in the knowledge of the witness, and was a matter of great importance, though the witness was not proved to be old or infirm. *Shirley* v. *Earl Ferrers*, Mos. 389. 3 P. W. 77.

4. Witnesses ordered to be examined *de bene esse*, where they were the only persons who knew material facts, without regard to their age. *Hankin* v. *Middleditch*, 2 Br. C. C. 641. *Lord Cholmondely* v. *Earl of Orford*, 4 Br. C. C. 157.

5. After answer, defendant may examine witnesses *de bene esse*. *Williams* v. *Williams*, 1 Dick. 92.

6. Commission for the examination of persons going abroad *de bene esse* granted. *Lee Dicher* v. *Power*, 1 Dick. 112.

7. Witness examined *de bene esse*, on affidavit that he was going to Scotland. *Botts* v. *Verelst*, 2 Dick. 454.

8. Plaintiff shall not have leave to examine witnesses *de bene esse* because they are going abroad, if they are his servants, and he might keep them at home. *East India Company* v. *Naish*, Bun. 320.

9. The reason why the Court allows the taking of depositions *de bene esse*, is either from contempt of the party in not answering, and thereby preventing the joining of issue, or else where the party is in danger of losing his witnesses; but if the witnesses live, and are examined in chief, the depositions *de bene esse* are useless. *Cann* v. *Cann*, 1 P. W. 568.

10. Depositions of witnesses *de bene esse* taken *ex parte* and without notice, suppressed. *Loveden* v. *Lord Milford*, 4 Br. C. C. 540.

11. Order, after verdict upon an issue, to examine, *de bene esse*, a witness 70 years of age, upon a suggestion of an intention to move for a new trial. *Anon*, 6 Ves. 573.

12. The motion to examine witnesses *de bene esse*, except in certain cases, as upon the ground of age, requires notice. *Bellamy* v. *Jones*, 8 Ves. 31.

13. Upon a question of legitimacy, depending upon a chain of distinct circumstances in the knowledge of different individuals, and the defendant (an infant) kept out of the way, an examination *de bene esse* would have been granted; but a proposal to have the infant brought into Court, and the Six Clerk assigned as guardian, to put in his answer, was adopted. *Shelley* v. ———, 13 Ves. 56.

14. An order to examine a witness *de bene esse* upon an affidavit that such witness is of the age of 70 and upwards, is of course; but an examination *de bene esse*, will not be granted upon the affidavit of an agent, that he is informed by the witness that he can prove the particular fact, and the belief of such agent, that no other person can prove it, without shewing the ground of such belief. *Rowe* v. ———, 13 Ves. 261.

See further p. 480, *post*.

(*f*) *Pro interesse suo*.

1. Where a party claims an interest in estates sequestrated, or in the hands of a receiver, an order is obtained upon notice of motion to come in and be examined *pro interesse suo*, wherein a time is limited for filing interrogatories. After the examination, the other side hath liberty to examine the witnesses to falsify the examination, and a commission, if necessary, issues of course, wherein the claimant may join if he thinks fit, and the commission (if any) being returned, publication passeth by order.—An order is then made to refer it to the Master, to look into the examination and depositions, and to certify whether the claimant hath made out any and what interest in the premises, or in any and what part thereof.—The report the Master makes is set down to be heard for directions, and the Court pronounces a final order. *Hunt* v. *Priest*, 2 Dick. 540.

2. Parties claiming a mortgage on estates sequestered, examined *pro interesse suo*. *Fawcett* v. *Fothergill*, 1 Dick. 19. *Hamlyn* v. *Lee*, 1 Dick. 94.

3. A. claiming a mortgage prior to the plaintiff's right, upon an estate of which a receiver had been appointed, examined *pro interesse suo*, and his claim allowed. *Cooper* v. *Thornton*, 1 Dick. 72. *Bowles* v. *Parsons*, 1 Dick. 142.

4. A person may be ordered to come in, and be examined *pro interesse suo*, as well against a receiver, as against sequestrators. *Gomme* v. *West*, 2 Dick. 472.

5. Interrogatories exhibited of course, to falsify an examination *pro interesse suo.* *Rowley* v. *Ridley,* 2 Br. C. C. 15.

(*See further* p. 481, *post.*)

(*g*) *In perpetuam*

1. Devisee shall not examine witnesses in *perpetuam rei memoriam* to prove a will against a purchaser without notice, till the will has been established by verdict at law. *Bechinall* v. *Arnold,* 1 Vern. 354.

2. Where a party pleads his title, and swears himself a purchaser for a valuable consideration, without notice of the plaintiff's title, it is contrary to the usual practice of Courts of Equity, to allow an examination of witnesses in *perpetuam rei memoriam,* in order to defeat the title of such purchaser; but the plaintiff ought to proceed to recover as he can, without the aid of a Court of Equity. *Ross* v. *Close,* 5 Br. P. C. 562.

3. The depositions of a witness who was examined in *perpetuam rei memoriam,* were suppressed on a petition, after his death; and the examiner discharged and committed for foul practice and irregularity in the taking of them, the plaintiff being suffered by the examiner to instruct him, and the witness being proved corrupted, and as he had been examined on a trial to the same points, the plaintiff might give evidence of what he swore. *Hosier* v. *Hart,* Mos. 321.

4. A witness was examined at the trial of an ejectment; a new ejectment being brought, she was examined to perpetuate the testimony, upon the same interrogatories as those, upon which the former witnesses had been examined; and her testimony was ordered to be perpetuated. *James* v. *Newman,* 1 Dick. 338

(*h*) *To Credit or Competency.*

1. After publication, you may examine to the competency as well as to the credibility of a witness. *Needham* v. *Smith,* 2 Vern. 463.

2. Though at law you can examine only to the general credit, yet it is otherwise in equity; for as the witness there cannot be prepared to defend every particular action of his life, not knowing to what they intend to examine him, yet on an examination here he may be able to answer any particular charge, as he has time enough to recollect. *Gill* v. *Watson,* 3 Atk. 522.

The reporter adds a quære as to the distinction.

3. The Court refused liberty to defendant to examine to the credit of a witness after publication passed, and the cause set down for hearing. *Ibid.*

4. The Court will not allow articles to be exhibited against the competency of a witness after publication, because this might have been objected to, and enquired into upon the examination. *Callaghan* v. *Rochfort,* 3 Atk. 643.

5. The Court will allow articles to the credit of a witness after publication, because the matters examined into in such cases were not material to the merits of the cause; but not where the commission is to go to foreign parts, because this would introduce a certain method of delay, unless no person in England can swear to the person's credit. *Ibid.*

6. The time to examine to the credit of a witness is after publication is passed, and the application for it is of course, and not founded on affidavit. *Russel* v. *Atkinson,* 2 Dick. 532.

7. After publication passed, liberty was given to exhibit articles as to the credit of a witness, who had been cross examined, by general interrogatories, and as to such particular facts only as are not material to what is in issue in the cause. *Purcell* v. *M'Namara,* 8 Ves. 324. *Wood* v. *Hammerton,* 9 Ves. 145.

8. Examination after publication must be confined to general credit, and to facts not material to what is in issue in the cause; and where the depositions appeared to be material to what was in issue, they were suppressed. *Carlos* v. *Brook,* 10 Ves. 49.

9. Not competent even at law, upon an examination to the credit of a witness, to ask the ground of the opinion, the general question only is permitted, whether he is to be believed on oath. *Ibid,* 10 Ves. 52.

10. Examination to the credit of witness can only be by order, upon special application, with notice whether it be before or after publication; therefore depositions taken to that point upon the examination in chief, were suppressed as impertinent. *Mill* v. *Mill,* 12 Ves. 406.

11. A party having called a witness cannot discredit him. *Fenton* v. *Hughes,* 7 Ves. 290. *Purcell* v. *M'Namara,* 8 Ves. 326.

See further Tit. WITNESS, p. 481, *and* Div. LXXXIV. *post.*

(i) Further or re-examination.

(*For amending depositions, see* p. 442*, *ante.*)

1. T. S. being examined as a witness, calling himself better to mind afterwards, was suffered to amend his former examinations. *Anon,* Toth. 189.

2. Witness once examined, shall not be called up to be examined upon a further point. *Lord Scroope* v. *Egerton,* Toth. 190.

3. Witnesses examined upon new interrogatories, after a commission to counterprove a man's testimony at law, upon which a verdict passed. *Tailo* v. *Tailor,* Toth. 191.

4. Examination of witnesses after hearing to prove a court roll. *Veizey* v. *Veizey.* Toth. 192.

5. Where a suit had been dismissed in the Exchequer, but without prejudice either in law or equity; upon a new suit in Chancery, the parties were at liberty to examine new witnesses, though to the same matter, and re-examine the former witnesses *de bene esse.* *Anon,* 1 C. C, 155.

6. The Court is to judge where it will allow an examination after publication; and it was allowed for the purpose of examining a witness 80 years old, not discovered till after the hearing. *Mayor of London* v. *Earl of Dorset,* 1 C. C. 228.

7. Witness examined to the damages on breach of covenant, not re-examined on the same interrogatory, although speaking in the first uncertainly. *Inglet* v. *Inglet,* 2 C. C. 217.

8. After publication passed, no new evidence admissible. *Jones* v. *Purefoy,* 1 Vern. 45.

9. After publication and examinations known, this Court will not give either side leave to examine. *Cann* v. *Cann,* 1 P. W. 727.

10. If one of the parties, after publication passed, has an order to examine upon the usual affidavit, the other party may not only cross examine, but examine at large. *Anon,* 1 Vern. 253.

11. Baron and *feme* exhibit a bill for a demand in right of the wife, defendants answer, witnesses are examined, and publication passes; *baron* dies, *feme* marries a second husband: on a new bill, they may examine again the same witnesses as were examined in the former cause. *Anon,* 2 Vern. 197.

12. Witness having been examined on his going to the West Indies, and being afterwards in Ireland; held he must be examined in chief. *Birt* v. *White,* 2 Dick. 473.

13. Order before publication for re-examining the witness, upon his affidavit, that through mistake as to time he submitted to be examined without looking at papers which enabled him to answer more fully and precisely. *Kirk* v. *Kirk,* 13 Ves. 280.

14. Re-examination of a witness after publication upon his own application and affidavit to correct mistake, but confined to that; the Court not permitting the whole deposition to be suppressed, and an entirely new examination. *Kirk* v. *Kirk,* 13 Ves. 285.

15. No witness to be examined after hearing, to the same point he was examined to before. *Anon,* 2 Free. 146.

(*See further* p. 483, *post, and for filing fresh interrogatories, see* Div. XLIII. *post.*)

(k) Cross-examination.

1. An adverse party may cross-examine a witness to the same point for which he is produced, but not to any new matter. *Dean of Ely* v. *Sir Simeon Stewart,* 2 Atk. 44.

2. Plaintiff's witness, before he was cross examined, secreted himself; his depositions ordered to be suppressed, unless the plaintiff procured him to attend in a given time. *Flowerday* v. *Collet,* 1 Dick. 288.

3. Where a party examines his own attorney as a witness, the other side may cross examine him, relative to the same matter; but not as to other points of the cause. *Vaillant* v. *Dodemead,* 2 Atk. 524.

4. The cross examining a witness in Equity, is no waver of an objection to the competency of the witness on the ground of interest. *Moorhouse* v. *De Passou,* Coop. 301. 19 Ves. 433.

See also p. 484, *post.*

(l) Of Parties to the Suit.

1. A defendant upon putting in a fourth insufficient answer, was ordered to be examined upon interrogatories; she obtained an order on motion that one of her counsel should attend in the next room to where she was examined, to advise her in any

matters of law that she might need, and that her counsel should see the interrogatories, but not have a copy. *Gower* v. *Baltinglass*, 1 C. C. 66.

2. After plea overruled, the defendant put in three insufficient answers, the Court did not think fit to commit him to be examined upon interrogatories, as if he had put in four insufficient answers.
Clotworthy v. *Mellish*, 1 C. C. 279.
Hawkins v. *Croke*, Mos. 384.

3. After a decree inrolled, in which was no order to examine the defendant upon interrogatories, the Court would not order him to be examined to the discovery of deeds. *Macklow* v. *Wilmot*, 2 C. R. 18.

4. To examine a defendant, an order must be obtained, and served upon the other defendants. *Mulvany* v. *Dillon*, 1 B. & B. 413.

5. If the answer of a defendant has been replied to, he cannot be examined without withdrawing the replication.
Winter v. *Kent*, 2 Dick. 595.

6. A co-plaintiff, though but a trustee, cannot be examined as a witness for the other plaintiff. *Phillips* v. *The Duke of Bucks*, 1 Vern. 227.
Hewatson v *Torkey*, 2 Dick. 779.

7. A defendant by order may examine the *prochein amy*, but not one of the plaintiffs. *Bird* v. *Owen*, Mos. 312.

8. But if the plaintiff consents to the order, he may be examined for defendant, to prove a deed. *Whatcley* v. *Smith*, 2 Dick. 650.
And see Walker v. *Wingfield*, 15 Ves. 178.

9. It is of course to examine a guardian *ad litem* of a defendant as a witness. *Walker* v. *Thomas*, 2 Dick. 781.

10. After decree, and a writ of execution and attachment returned, the Court refused to give leave to defendant to be examined, unless he gave security to abide the decree. *Roper* v. *Roper*, 2 Vern. 91.

11. The defendant being a weak man, and to be examined upon interrogatories, the Master was ordered to take his examination, that he might not admit unwarily any thing against himself that was not true. *Piddock* v. *Brown*, 3 P. W. 288.

12. It is a motion of course that a defendant, who is made a party for form's sake, may be examined, saving just exceptions. *Man* v. *Ward*, 2 Atk. 229.

13. A defendant, after he has been examined before the Master upon the account, was re-examined upon new interrogatories, without an order: held that the Master might regularly do it, as in the course of the cause new matter might arise, and it was in his discretion, as given by the words of the decree, that "the parties are to be examined upon interrogatories as the Master shall direct." *Cornish* v. *Acton*, 1 Dick. 149.

14. A creditor who proves before the Master, against the estate of an intestate, cannot exhibit interrogatories to the plaintiff, to discover the balance between him and the estate. *Bowen* v. *Webb*, 2 Anst. 361.

And see further, p. 479; *and, for Filing Interrogatories*, Div. XLIII. *post*.

(*m*) *Foreign Witnesses.*

1. A witness in England not understanding English, a person was appointed to interpret the interrogatories, and the depositions taken thereon, and to be sworn to the truth of such interpretation. *Smith* v. *Kirkpatrick*, 1 Dick. 103.

See further Tit. Witness, IX. p. 480.

XXXI. Exceptions.

(*a*) *To Answer.*

1. Where the answer of one defendant was reported insufficient, and the report upon exceptions confirmed, and then another of the defendants filed a similar answer insisting upon the same matter; the Court, to avoid delay, decided upon the sufficiency of the latter answer without exceptions being taken. *West* v. *Lord Delaware*, 1 Vern. 74.

2. Where there is an answer to part, and a plea to the residue, the plaintiff cannot except to the answer till the plea is argued, or an order obtained that it shall stand for an answer, with liberty to except. *Darnell* v. *Reyny*, 1 Vern. 344.

3. No exception can be taken to an answer whilst a plea is depending, for that must first be removed out of the way. *Baker* v. *Pritchard*, 2 Atk. 390.

4. If a defendant pleads to relief, and answers as to the discovery sought by the bill, it is regular to except to the answer, before the plea is argued, the plea and

answer being distinct. *Sidney* v. *Perry*, 2 Dick. 602.
Pigot v. *Stace*, 2 Dick. 496.
Anon 3 P. W. 327, (*n*)

5. The defendant pleaded to the whole bill, and on arguing the plea, it was ordered to stand for an answer, without adding leave to the plaintiff to except; the plaintiff cannot except, for the Court in saying the plea shall stand for an answer, must be intended to have meant a sufficient answer, an insufficient answer being none. *Sellon* v. *Lewen*, 3 P. W. 239.
Maitland v. *Wilson*, 3 Atk. 814.

6. If a plea is to stand for an answer without liberty to except, the plaintiff may except to the rest of the answer. *Coke* v. *Wilcocks*, Mos. 73.

7. If a demurrer be to part of the plaintiff's bill, and an insufficient answer to the residue, yet the plaintiff cannot except, until the demurrer is argued. *London Assurance* v. *East India Company*, 3 P. W. 326.

8. The effect of taking exceptions, pending a demurrer to discovery, is to admit the demurrer, but the plaintiff was permitted to withdraw the exceptions, paying the costs, without prejudice.
Boyd v. *Mills*, 13 Ves. 85.

9. If defendants answer separately, exceptions must be taken to each answer. *Sydolph* v. *Monkston*, 2 Dick 609.

10. Exceptions cannot be taken to an infant's answer, because he is not bound by it, but may amend it when he comes of age. *Studwick* v. *Pargiter*, Bun. 338.
Copeland v. *Wheeler*, 4 Br. C. C. 256.
Cousins v. *Smith*, 13 Ves. 164.

11. The general answer of the Attorney-General cannot be excepted to. *Davison* v. *The Attorney-General*, 5 Price, 398.

12. A plea or demurrer accompanied by an answer to any part of the bill, even a denial of combination merely, if the plea or demurrer be overruled, the plaintiff must except to the answer as insufficient, and defendant need not put in any further answer until the plaintiff has taken exceptions. *Cotes* v. *Turner*, Bun. 123.

13. Where a bill charges defendant with a crime, and makes him liable to a penalty, if the crime or penalty be created by the statute law, the defendant need not plead or demur to it, but upon exceptions to his answer he may insist that he is not liable. *Williams* v. *Farrington*, 3 Br. C. C. 38.

14. If in Michaelmas Term an answer comes in, and the plaintiff does not take exceptions within eight days of Hilary Term after, yet on applying to the Court he is entitled to take exceptions, provided he does it within two terms, the term in which he moves being inclusive. *Anon*, 3 Atk. 19.

15. The time allowed for filing exceptions *nunc pro tunc* is two terms and the following vacation. *Thomas* v. *Llewellyn*, 6 Ves. 823.

16. Exceptions may be filed *nunc pro tunc* of course, upon an application within two terms after answer, and after that time upon special cause. *Goodinge* v. *Woodhams*, 14 Ves. 537.

17. Where in the vacation a plea is ordered to stand for an answer with liberty to except the exceptions strictly ought to be filed within eight days of the ensuing term, but an order to file them *nunc pro tunc* is seldom refused, if applied for before the second term expires. *Diggs* v. *Coolebrook*, Barn. 52.

18. Plaintiff in a bill for discovery only, is not entitled as of course to two terms to except to the answer filed in the vacation. *Hewart* v. *Semple*, 5 Ves. 86.

19. There is no distinction as to the time for excepting, between bills for discovery and bills for relief; therefore exceptions *nunc pro tunc* may be filed to an answer to a bill for discovery. *Baring* v. *Prinsep*, 1 Mad. 526.

20. After an order to elect, whether the plaintiff will proceed in equity, or at law, the plaintiff cannot, on a motion of course, move for leave to file exceptions, *nunc pro tunc*, but ought to make a special application for that purpose, and for an order to suspend the election until the exceptions are answered. *Coupland* v. *Bradock*, 5 Mad. 14.

21. It is a motion of course to file exceptions *nunc pro tunc*, within two terms and the following vacation from the date of the Master's Report of impertinence. *Dyer* v. *Dyer*, 1 Mer. 1.

22. Amendment of the bill, merely adding a defendant, and requiring no farther answer, does not prevent the plaintiff excepting to the answer. *Taylor* v. *Wrench*, 9 Ves. 315.

23. Plaintiff, having obtained the usual

order to amend, and that the defendant shall answer amendments and exceptions together, cannot take a new exception as to any thing in the original bill, but must go before the Master upon the old exceptions, as they apply to the original bill, and upon new exceptions as to the new matter introduced by the amendments, which, however, the Master may consider with reference to such parts of the original bill as apply to them. *Partridge* v. *Haycraft*, 11 Ves. 570.

24. After answer upon exceptions, plaintiff cannot add to his exceptions, but may refer the answer back upon them. *Ibid.* 11 Ves. 575.

25. Where exceptions were taken to the joint answer of two defendants, and one of them died, the exceptions were held to refer to the answer of the survivor only. *Lord Herbert* v. *Pusey*, 1 Dick. 255.

(*b*) *Report or Certificate.*

1. Exceptions do not lie to the Master's report, certifying his opinion. *Neal* v. *Billing*, 1 Dick. 93.

Hamlyn v. *Lee*, 1 Dick. 94.

2. Exceptions may be taken to the certificate of Commissioners of Bankrupt. *Ex parte Bax*, 2 Ves. 388.

3. Exceptions will not lie to a Master's report of maintenance; and a title set up against that of the infant cannot be taken notice of, but must be established elsewhere. *Ex parte Nichols*, 1 Br. C. C. 577.

4. A Master's report on a reference to inquire, whether a suit instituted in the name of an infant by a *prochein amy* was necessary, is not a subject for exceptions; but any objection to it must be made on the motion to confirm the report. *Whittaker* v. *Marlar*, 1 Cox, 285.

5. Exceptions do not lie to reports relative to infants being trustees, within the statute of 7 Anne; such references being merely for the Master's opinion: they must be objected to by petition. *Ex parte Burton*, 1 Dick. 395.

6. Exceptions are not regularly taken to the Master's report of costs only; the mode is to state the objections in a petition, and pray leave to except. *Pitt* v. *Mackreth*, 3 Br. C. C. 321.

7. If the decree directs costs, and the Master has not taxed them, an exception will lie to the report; but if the Master has proceeded upon the costs, exceptions will not lie, for that he has disallowed several items claimed: in such case there must be a petition. *Holbecke* v. *Sylvester*, 6 Ves. 417.

8. Exceptions will not lie for items of costs, which were items properly falling within the description of those costs, which the Master was to tax. *Lucas* v. *Temple*, 9 Ves. 300.

9. Generally, no exceptions lie to a Master's report of costs, nor can there be a re-taxation in respect of a mere quantum; but on a special case made by petition, either of irregularity in the proceedings, or that the Master, in his taxation, acted upon a mistaken principle, the Court will interfere. *Fenton* v. *Crickett*, 3 Mad. 496.

10. An application to the Court on petition for leave to except to the Master's report of costs, being in the nature of appeal, the petitioner must pay the taxed costs into Court. *Ex parte Leigh*, 4 Mad. 394.

11. When the Master reports, that he cannot, for some reasons, take the accounts directed by the Court, it is matter of further direction, and not of exceptions, which if taken will be overruled. *Lupton* v. *White*, 15 Ves. 432.

12. Exceptions will lie to a Master's report appointing a receiver. *Creuze* v. *Bishop of London*, 1 Dick. 687.

13. Exceptions permitted with reference to one subject of inquiry, after exceptions to the same report, with reference to another subject, were allowed or overruled on argument. *Hawkins* v. *Day*, 1 Swan. 158, (*n*).

14. The Court gave leave to file exceptions *nunc pro tunc* to the Master's report of insufficiency of answer, though after such report, a plea and further answer were put in, and plea overruled, where the merits appeared much in favor of the defendant, and the plea had been put in by mistake. *Noel* v. *Ward*, 1 Mad. 339.

15. Exceptions must be founded on objections, save to the matter varied on objections. *Ex parte Bax*, 2 Ves. 389.

16. Though no objections were taken to the draft of a report, and it was confirmed, plaintiff was permitted to take exceptions to the report, as if he had objected to the draft. *Allen* v. *Allen*, 1 Dick. 362. 1 Swan. 158, (*n*).

17. In a special case, exceptions will be allowed to be taken to a Master's report, though no objections were made before the Master, while the report was

in the draft, and the report is confirmed *nisi*. *Pennington* v. *Lord Muncaster*, 1 Mad. 555.

18. Exceptions to a report of impertinence may be taken after an order to expunge, but before the order has been acted upon; and it is not necessary to take objections before the Master, previous to excepting to a report of impertinence. *Norway* v. *Rowe*, 1 Mer. 135.

19. If, by accident or surprise, objections are not carried in upon a warrant to settle the Master's report, the Court will allow the party to file exceptions: as where the Clerk in Court neglected to give the solicitor notice of the warrant served on him, fixing the day for the settling the draft of the Master's report: on affidavit of the fact, the Court allowed the party to except. *Bowker* v. *Nickson*, 3 Mad. 439.

20. It is of course, to except to a report that an examination or deposition is impertinent, without previously taking objections, as the Master doth not deliver a draft of such reports. *Price* v. *Shaw*, 2 Dick. 732.

21. If the plaintiff moves to confirm a report *nisi*, and the defendant shews exceptions for cause, the plaintiff may except too. *Anon*, Mos. 305.

22. Exceptions to a Master's report may be taken off the file, if filed after the report has been confirmed absolute. *Sterling* v. *Thompson*, Coop. 271.

23. On an answer's being reported not scandalous or impertinent, if the plaintiff except to the report, he must shew specially wherein it is scandalous or impertinent. *Craven* v. *Wright*, 2 P. W. 181. *But see Mackworth* v. *Briggs*, 2 Atk. 182.

24. Where a general exception is taken to a Master's report, which includes several distinct matters, if the report appears right in any one instance, the exception must be overruled. *Hodges* v. *Salomons*, 1 Cox, 249.

25. Exception to the Master's report of the sufficiency of an examination under a decree, and in the general terms "that the Master had reported the examination sufficient, whereas he ought to have reported it insufficient" is regular, but not to be encouraged; and therefore, being overruled, costs beyond the deposit were given. *Purcell* v. *M'Namara*, 12 Ves. 166.

26. Where the matter reported impertinent occupied upwards of 3000 folios, the defendant was at liberty to take a general exception, without setting out the particulars, in which he alleged the report to be erroneous. *Norway* v. *Rowe*, 1 Mer. 135.

For Exceptions to Certificate, see further, p. 394* *ante*; *and for Exceptions to an Award, see* p. 386* *ante*.

(*c*) *Amendment of.*

1. Liberty was given to amend exceptions after argument. *Northcote* v. *Northcote*, 1 Dick. 22.

2. The Court permitted amendment of exceptions upon clear mistake. *Dolder* v. *The Bank of England*, 10 Ves. 284.

(*d*) *Hearing.*

1. Whether exceptions to a decree of the commissioners of charitable uses may be heard before the Master of the Rolls by the stat. 43 Eliz. c. 4, or only before the Lord Chancellor—*Quære*. *Rockley* v. *Kelley*, Pre. Ch. 111.

2. Though the petty bag retains the proceedings under a commission of charitable uses, exceptions to the decree come before the Chancellor personally, and not in his ordinary or extraordinary character. *Corporation of Burford* v. *Lenthall*, 2 Atk. 553.

3. Three defendants put in a joint and several answer, which is reported insufficient, two of them submit to the exceptions; this will not prevent the other bringing them on to be argued. Prac. Reg. 204.

4. Exceptions ought to be set down before the Lord Chancellor; but on special reasons may be transferred to the Master of the Rolls. *Fretwell* v. *Kay*, 2 Dick. 605.

5. Exceptions to the Master's report under a decree made at the Rolls, may be set down before the Lord Chancellor. *Burdon* v. *Burdon*, 9 Ves. 499.

6. The practice in the Master's office of reporting an answer, referred to him a second time, insufficient generally, is now altered, he going through all the exceptions, and giving a judgment upon each as upon a first reference. *Rowe* v. *Gudgeon*, 1 V. & B. 331.

7. Upon exceptions taken to an answer for insufficiency, the Master may look to the materiality of them, and overrule immaterial exceptions. *Agar* v. *The Regent's Canal Company*, Coop. 212.

8. To support an exception to a Master's report, it must be shewn, that the evidence before the Master did not warrant him in making his report; and where the Master admitted a claim, but refused to hear additional evidence, such evidence cannot be produced in support of the exception; nor can the Court, on overruling the exception, order the Master to receive the evidence; but that must be the subject of a distinct motion. *Redifer* v. *O'Brien*, 3 Mad. 43.

9. The bill charged the defendant with making illicit profit, while agent to the plaintiffs, contrary to the faith of his covenants and engagements with them, and prayed that he might be charged with the amount of such profits on specific items; or in the alternative that an account might be taken of what was due to the plaintiffs, with reference to the transactions generally. The defendant by his answer admitted making a profit on certain contracts, to the amount of £20,000, and a decree was made, declaring him a trustee of the same for the plaintiffs, and answerable for that, or any profit he might be found to have made. The Master reported that by the agreement of the parties before him the account was taken as an open account, and upon certain admissions, stated in his report, he had found a balance in favor of the defendant, to the amount of £67,000, which was in direct opposition to the facts admitted and sworn to in the defendant's answer. Exceptions to the report, denying the admissions, were taken and allowed; but on appeal to the House of Lords, it was held that the Court could not allow the exceptions, without first consulting the Master as to the fact of the admissions; and that, if it became necessary that the original decree should be altered so as to have the account directed on different principles, it must be so altered by petition of rehearing, or by any other course the forms of the Court might prescribe; but that it could not be varied on exceptions. *The order made on hearing the exceptions was accordingly reversed, and the exceptions ordered to be reheard. *East India Company* v. *Keighley*, 4 Mad. 16.

10. If exceptions taken to the report of a good title are overruled, other objections to the title cannot be made; but if exceptions are allowed, and a new abstract of title is delivered, further objections may be brought in. *Brook* v. ——, 4 Mad. 212.

For hearing Exceptions in the Court of Exchequer, see General Orders. 5 Price, 607. 7 Price, 208.

XXXII. Execution.

1. After service of a writ of execution of a decree against a corporation, the next process is a *distringas*, and after that a sequestration, which, being once awarded, they can never after come and pray to enter their appearance, as they might have done on the *distringas*, which issues for the purpose of compelling them to appear; but the appearing being past, the process must go on, because the appearance being only in favor of liberty, can be of no service to a corporation, which cannot be committed. *Harvey* v. *East India Company*, 2 Vern. 395. Pre. Ch. 128.

2. A corporation, as relators in an information, were ordered to pay a sum of money: upon personal service of a subpœna, and on non-payment, a *distringas* was ordered. *Attorney General* v. *Waters*, 1 Dick. 73.

3. The Lord Chancellor for the time being will enforce the execution of decrees, though made by a prior Lord Chancellor; and though they are alleged to be unreasonable, yet will assist with the utmost process of the Court, till they come regularly before him to be reversed. *Lawrence* v. *Berney*, 2 C. R. 127.

4. The execution of a decree shall not be impeded, so long as it remains unappealed. *Selby* v *Selby*, 2 Dick. 678.

5. Where a party claiming under a decree neglects to apply to the Court for an injunction, but suffers a trial at law by which he loses the possession, he cannot sue out the ordinary process for the execution of the decree, but must file a new bill. *Lawrence* v. *Berney*, 2 C. R. 127.

6. Where a decree is once executed, the Court has no more to do in the cause. *Napper* v. *Lord Allington*, 1 Eq. Ca. Ab. 166.

7. The expense of a writ of execution of a decree is borne by the party suing it out, unless an attachment issues; for which reason the Court will on motion order a partial or short writ of execution of a decree; as to compel the defendant to obey a particular direction in favor of the party applying, and quite unconnected with

other directions concerning other parties. *Parkins* v. *Morris*, 2 Dick. 689.

8. After a writ of execution of a decree, and an attachment served on the defendant, the plaintiff may have an injunction to the defendant to deliver possession, and next a writ of assistance to the sheriff, commanding him to be aiding in putting the plaintiff in possession. *Stribley* v. *Hawkie*, 3 Atk. 275.
Dove v. *Dove*, 1 Cox, 101.
Huguenin v. *Baseley*, 15 Ves. 180.

9. No contempt for disobedience of an order, unless the party is served with a writ of execution of it. *Moyser* v. *Peacock*, 3 C. R. 22.

10. After an order upon a party in the cause for payment of money, the proper course is an attachment, and upon the return to that an order for commitment. *Bowes* v. *Lord Strathmore*, 12 Ves. 325.

11. There is no writ of execution of an order, except in the case of a party; but where a stranger is served with an order to pay money into Court by a given day, if he does not obey the order, another order must be applied for him to pay the money by another day, or stand committed. *Anon*, 14 Ves. 207.

12. The Court refused to order service of a writ of execution of an order upon the Clerk in Court to be good service. *Ellison* v. *Pickering*, 8 Ves. 319.

13. But where the party had absconded, the Court ordered service on the Clerk in Court to be good service. *Edwards* v. *Poole*, 12 Ves. 205 (*n*).
And see De Manneville v. *De Manneville*, 12 Ves. 203.

14. Affidavit that the deponent made some of the parties privy to a writ of execution, and that he left the writ with one J. S., from whom the defendant confesseth the receipt of it, this was held good service. *Leake* v. *Marrow*, Cary, 75.

15. Service of a writ of execution of the order, to join in a conveyance of lands sold under a decree, on the husband, ordered to be good service on the wife. *Clark* v. *Greenhill*, 1 Dick. 91.

XXXIII. Exhibits.

1. The refusing a party liberty to prove exhibits *viva voce* at the hearing of a cause in a Court of Equity, is irregular and unprecedented. *Edgworth* v. *Swift*, 4 Br. P. C. 658.

2. An order may be obtained to prove exhibits *viva voce* at the hearing, but the witnesses can be examined to the execution only. *Ward* v. *Eyles*, Mos. 331.

3. But no such order can be made for proving a will, because more must be proved than the execution. *Harris* v. *Ingledew*, 3 P. W. 93.
Eade v. *Lingood*, 1 Atk. 203.

4. Nothing can be proved as exhibits *viva voce* that requires more than proof of hand-writing, or that admits of cross-examination. *Lake* v. *Skinner*, 1 J. & W. 15.
Earl Pomfret v. *Lord Windsor*, 2 Ves. 479.

5. In a suit by a rector for tithes, a book in which the collector of a former rector had kept accounts of the receipts of tithes, cannot be proved *viva voce*; as, besides the hand-writing, it would be necessary to prove that it came out of the proper custody, and that the writer was the collector of the tithes. *Lake* v. *Skinner*, 1 J. & W. 9.

6. The Court will allow the proving exhibits *viva voce* at the hearing, but not to let in other examinations; and this is allowed only upon the application of the party who is to make use of the exhibits. *Graves* v. *Budgel*, 1 Atk. 444.

7. Where an order was obtained to prove a deed *viva voce* at the hearing, and all the witnesses to the deed were dead, the Court refused to allow a witness to the hand-writing of the deceased witnesses, but put off the cause, and gave the party liberty to examine in the office, to prove the deed. *Bloxton* v. *Drewit*, Pre. Ch. 64.

8. Carrier ordered to deliver exhibits, which had been examined to under a commission for the examination of witnesses in the country. *Elliot* v. *Williams*, 1 Dick. 325.

9. The Court will not grant an order to prove exhibits at the hearing of exceptions, because you can offer nothing at the hearing that was not before the Master. *Anon*, 1 Mos. 191.

XXXIV. Feme Covert.

1. When a feme covert joins in the sale of a contingent reversionary interest in money, her consent may be taken in court, and the conveyance established. *Guise* v. *Small*, 1 Anst. 277.

2. Consent of a married woman taken

in court *de bene esse*, under a bill by her and her husband, for execution of a contract for sale of her reversionary contingent interest in stock. *Woollands* v. *Crowcher*, 12 Ves. 174.

But see Pickard v. *Roberts*, 3 Mad. 384.

3. Consent not taken until the subject is ascertained. *Woollands* v. *Croucher*, 12 Ves. 174.

Sperling v. *Rochford*, 8 Ves. 164.

4. The Court cannot take the consent of the wife to the disposal of her fortune, unless the amount be ascertained. *Edmonds* v. *Townshend*, 1 Anst. 93.

5. The consent of a married woman to the payment of money out of court to the husband, is not required, where the sum does not exceed £200. 5 Ves. 742 (*n*).

And see Elworthy v. *Hickstead*. 1 J. & W. 69.

6. Articles of separation put an end to by reconciliation. *Lord St. John* v. *Lady St. John*, 11 Ves. 537.

7. If a woman married *de facto* to one whom she knows to have another wife, executes a deed as his wife jointly with him, she is bound as a feme sole, especially as to creditors. *Anstie* v. *Mason*, 3 Anst. 833.

And see p. 118, *ante*.

XXXV. Further Directions.

1. Petition to set down a cause for further directions, or such further order as the Court should think fit, dismissed, though the parties could not proceed; an inquiry before the Master being rendered useless by the event of a verdict upon an issue directed, and further directions having been reserved till after trial and report. *Dixon* v. *Olmius*, 1 Ves. J. 153.

2. Plaintiff may set down the cause for further directions at the same time that he excepts to the report.

Yeo v. *Frere*, } 5 Ves. 424.
Bowerbank v. *Collasseau*, }

3. A cause may be set down for further directions, or upon the equity reserved before the Lord Chancellor, or the Master of the Rolls, without regard to the circumstance where it was heard originally. *Pemberton* v. *Pemberton*, 11 Ves. 53.

4. A cause cannot be set down for further directions on a separate report; an order on a separate report must be sought by petition. *Van Kamp* v. *Bell*, 3 Mad. 430.

5. Where causes in the Court of Exchequer are set down for further directions, a copy of the decree and the Master's report, and the mandatory part of the decree, must be left at the Chief Baron's chambers two days before the hearing. *General Order*, 7 Price, 630.

6. On the return of the certificate of commissioners appointed to ascertain lands, it is the practice in the Court of Exchequer to set the cause down for further directions, and not to move to confirm the commissioners' return, nor to file exceptions. *The Dean of Hereford* v. *Hullett*, 6 Price, 331.

7. Upon further directions a question decided by the Master was opened, without any exception: all the circumstances appearing by the report. *Adams* v. *Claxton*, 6 Ves. 226.

8. Upon further directions the Court may give interest, though the question of interest was not reserved by the decree. *Goodyere* v. *Lake*, Amb. 584.

Creuze v. *Hunter*, 2 Ves. J. 164.
S.C. Creuze v. *Lowth*, 4 Br. C. C. 316.
Sammes v. *Rickman*, 2 Ves. J. 36.

9. Where an administratrix under the usual decree for an account attempted to support her discharge before the Master by forgery and fraud, the Court upon petition and further directions, directed an enquiry as to balances in her hands from time to time, and a computation of interest thereon. *Parnell* v. *Price*, 14 Ves. 502.

XXXVI. Guardian.

1. Commission to assign a guardian, on affidavit of the danger of bringing the infant into Court. *Duke of Marlborough* v. *Duchess of Marlborough*, 1 Dick. 74.

2. Testamentary guardian was assigned guardian for an infant abroad, to answer and defend the suit. *Lord Howard* v. *Lord Abergavenny*, 1 Dick. 31.

3. An infant defendant abroad cannot have a guardian assigned to put in his answer on motion, but a commission must issue for that purpose. *Tappen* v. *Norman*, 11 Ves. 563.

4. A guardian will not be appointed after the marriage of the infant, nor dis-

charged because of the marriage: the Court sometimes, though rarely, removes a testamentary guardian; but if he misbehaves, orders regulating his conduct are frequently made. *Roach* v. *Garvan*, 1 Ves. 160.

5. Where a married woman was appointed guardian of an illegitimate child, the Court ordered payment of money to her upon her separate receipt. *Wallis* v. *Campbell*, 13 Ves. 517.

6. Reference to the Master, to inquire whether the plaintiff's late father had appointed a guardian for the plaintiff; and if not, that the Master should approve of a proper person to be appointed guardian of the plaintiff (an infant). *Betteswórth* v. *Bettesworth*, 2 Dick. 729.

7. The Court, after doubting, granted an order to appoint a guardian of the plaintiff (an infant) on filing the bill, and before the defendant had appeared. *Pendleton* v. *Mackrory*, 2 Dick. 736.

8. Order appointing a guardian for an infant defendant, on motion of the plaintiff. *Williams* v. *Wynn*, 10 Ves. 159.

9. Order for a guardian and maintenance for infants upon ill treatment by their father. *Whitfield* v. *Hales*, 12 Ves. 492.

10. A guardian may be appointed upon petition without suit. *Ex parte Salter*, 3 Br. C. C. 500.
Ex parte Burchell, 3 Atk. 813.
Mellish v. *De Costa*, 2 Atk. 14.

11. The proper application to change a guardian is by petition. *Ex parte the Earl of Ilchester*. 7 Ves. 348.

12. Where a testamentary guardian has taken the trust upon him, and acted as guardian, he cannot be removed without filing a bill; but where such guardian declines to act, it is the same as if none had been appointed; and a new guardian may be appointed by motion on petition. *O'Keefe* v. *Casey*, 1 S. & L. 106.

13. A petition for the appointment of a guardian to consent to marriage must be pursuant to the stat. 26 Geo. 2. c. 33. (*marriage act*). *Ex parte Becher*, 1 Br. C. C. 556.
And see In re Woolscombe, 1 Mad. 213.

14. Where a father by his will names guardians for his natural children, the Court will appoint them guardians without a reference to the Master. *Ward* v. *St. Paul*, 2 Br. C. C. 583.
Peckham v. *Peckham*, 2 Cox, 46.

15. The guardianship of daughters determines by marriage, otherwise of sons. *Mendes* v. *Mendes*, 1 Ves. 91.

16. The costs of a petition for maintenance are to be allowed the guardian in his account. *Ex parte Thomas*, Amb. 146.

17. Where there was a joint guardianship, and disputes arose as to the place of residence of the infants during a vacation from school, petition by one of the guardians for leave to take the infants to Scotland was refused, as the Court would never make an order to take infants out of its jurisdiction. *Mountstuart* v. *Mountstuart*, 6 Ves. 363.

And see further, p. 219, *ante*.

XXXVII. Hearing.

(*a*) *Setting down Cause for.*

1. A cause may be referred for irregularity in the setting down, after a decree. *Page* v. *Page*, Mos. 44.

2. Application that a cause may be set down on an early day must be by petition. *Roberts* v. *Hartley*, 1 Br. C. C. 56.

3. A plaintiff cannot set down a cause until after publication is passed, unless it be enlarged at the instance of the defendant, and so as not to hinder the plaintiff's setting down the cause. *Yate* v. *Bolland*, 2 Dick. 495.

4. The plaintiff, after having obtained an order to enlarge publication, but before the time for publication had expired, set the cause down for hearing, and issued subpœnas to hear judgment. This was held to be irregular, and the subpœna ordered to be quashed, and the cause struck out of the paper. A cause cannot be regularly set down before publication without a special order. *Ellis* v. *King*, 4 Mad. 126.

5. A cause cannot be set down in the same term in which a rule to pass publication is given, unless by consent. *Lord* v. *Genslin*, 5 Mad. 83.

6. The return of the *postea* on an issue, is a setting down of the cause for hearing: and the Court will not grant an application to exclude it for a time from the paper of causes. *Mitchel* v. *Rabbetts*, 1 Price, 263.

7. Where a cause set down as a short cause, occupied a considerable time in argument, the Court ordered it to be post-

poned till after the short causes; and in future such causes will be restored to their places. *Walker* v. *Mann*,
1 J. & W. 1 (*n*).

8. No cause in the Court of Exchequer can be put into the paper of twelve till after the return of the subpœna to hear judgment. *General Order*,
7 Price, 560.

(b) Of Causes or Petitions.

1. A bill was brought to establish a will, and execute the trusts, and upon an issue directed, a verdict was found in favor of the will, the cause coming on upon the equity reserved, it appeared the trusts were all executed the Court thought such a bill should not have been brought to a hearing, and dismissed it with costs. But this was reversed upon a rehearing *Marlar* v. *Whitaker*
2 Dick. 805.

2. If the name of a party is made use of by the solicitor without his knowledge, he cannot insist upon it at the hearing, as a reason for not going into the matter of the petition. *Ex parte Stuckey*
2 Cox, 283.

3. A defendant has no right to object to a cause being heard at any time after it has been set down for hearing, it being in the discretion of the Court to direct a cause to be advanced upon sufficient allegation. *Hoyle* v. *Livesey*,
1 Mer. 382.

4. Whether in the case of an infant plaintiff, the cause can be heard on bill and answer—*Quare. Coudell* v. *Tatlock*,
3 V. & B. 19

5. Private hearings are always on the consent of both parties. *In the matter of Lord Portsmouth*, Coop. 106.

6. When defendant does not appear at the hearing of the cause, and on the usual affidavit a decree is obtained, and it is afterwards moved to set down the cause again, the Court will direct a particular day on which it is to be heard. *Margravine of Anspach* v. *Noel*, 1 Mad. 313.
19 Ves. 573.

7. A bill for discovery ought not to be brought to a hearing. *Anon*, Mos. 185.

8. Nor a bill to perpetuate testimony unless it also prays relief, and then the defendant may set it down, to have it dismissed. *Vaughan* v. *Fitzgerald*,
1 S. & L. 316.

9. A cause not in the paper was allowed to be called on for the purpose of proving a will, the proper officer having come up from York with the original for that purpose, and being detained in Town at great expense, in the expectation that the cause would have been in the paper *Anon*, 4 Mad. 271.

10. A cause cannot be heard against some of several defendants in the absence of the rest, although it is not intended to proceed against them: the bill must first be formally dismissed as to them. *Rumney* v. *Morgan*, 4 Price, 266

XXXVIII. INFANT.

(a) Maintenance for.—(1) Where allowed

1. The Court allowed maintenance out of a trust estate recovered by a decree, though no provision for maintenance was expressed in the trust. *Englefield* v. *Englefield*, 2 Vern. 230.

2. And maintenance will be allowed out of a legacy to a child, charged on real estate, and payable at twenty-one, where it is vested, and no devise over, although no direction in the will for maintenance *Harvey* v *Harvey*,
2 P. W. 21.

3. Where a legacy is given by a father to a child, though the legacy is not payable till a future time, yet the Court allows interest by way of maintenance
Green v. *Belcher*, 1 Atk. 507
Hearle v *Greenbank*, 3 Atk. 716

4. Maintenance allowed an infant out of the produce of the residue of personal estate, bequeathed by his father, where the will directed the interest to accumulate till he attained twenty-one, and if he died before twenty one, the whole given over, and the will was silent as to maintenance *Mole* v. *Mole*, 1 Dick. 310.

5. Maintenance will not be allowed out of legacies to children, given over in case of their deaths under twenty-one, without consent of the legatee over. *Fairman* v. *Green*, 10 Ves 48.

6. Testator directed maintenance for his sons during minority, and for his daughter at twenty-one, or marriage, and gave her a legacy in case she should attain twenty-one, payable at, and to carry interest from, that time: Having married at eighteen, the Court allowed her maintenance for the interval between her marriage and coming of age. *Chambers* v. *Goldwin*, 11 Ves 1.

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7. Legacy from a parent to a child, payable at a future day: maintenance allowed, though no direction in the will as to interest. *Chambers* v. *Goldwin*, 11 Ves. 2.

8. Residue bequeathed to infants with survivorship among them, in the event of death, under the age of twenty-one: maintenance, not being directed by the will, was refused by the Court, there being a limitation over, upon the death of all under twenty-one, to their sister, who took no other interest in that fund, though a distinct legatee by the same will. *Ex parte Kebble*, 11 Ves. 604.

9. The cases, in which the Court have given maintenance, have been where the fund being given to the children with survivorship among them, their interests and the chance of taking the whole as survivors were equal, and no other person interested. *Ibid.*

10. Where the Court can be satisfied that the fund is clear, maintenance will be allowed, pending the account, to residuary legatee, but not if he is an accounting party. *Warter* v. ——, 13 Ves. 92.

11. Maintenance will be allowed against a direction for accumulation, in those cases only, where it is for the benefit of the infants, and the chance by survivorship is equal, and no other interest, to take effect upon any contingency, will be defeated. *Errat* v. *Barlow*, 14 Ves. 202.

12. Maintenance was allowed in the case of children and grandchildren, though the interests were contingent, with reference to the case of survivorship, and an accumulation directed, and no express authority for any application during minority, except for the younger children surviving the eldest, in the event of his death under twenty-one, without issue. *Fairman* v. *Green*, 10 Ves. 45.

13. Devise to an infant grandson at twenty-one with accumulation in the mean time, with similar limitations, in case of his death under twenty-one, to his sisters. Their father being dead, having left all his property, which was considerable, to his wife, who married a person in low circumstances, maintenance was decreed, without an inquiry whether it was for the benefit of the infants, the Court judging of that. *Greenwell* v. *Greenwell*, 5 Ves. 194.

14. Residuary bequest to a very large amount in favor of infant grandchildren, payable at twenty-one or marriage, with survivorship, the interest to accumulate and be paid with the capital; and in case of the death of all before the time of payment, over to their mother absolutely. The father's income, though considerable, bearing no proportion to the fortune bequeathed, and there being several children, the Court directed maintenance, taking the consent of the mother. *S. C.*, 5 Ves. 195.

15. Where the testator was grandfather to the legatees, and the will contained a direction to apply so much interest as might be necessary for maintenance and education, and the residue to accumulate, and, subsequently to the death of the testator, the father had left the legatees considerable property and a provision for maintenance: the Court confined the direction in the first will to so much only as should be necessary for maintenance, after all other appropriations for that purpose had been exhausted. *Rawlins* v. *Goldfrap*, 5 Ves. 440.

16. Maintenance will not be allowed upon legacies by a grandfather to his grandchildren, if given over in the event of death under twenty-one, and although the father may not be of ability to maintain the legatees. *Errington* v. *Chapman*, 12 Ves. 20.

And see Haughton v. *Harrison*, 2 Atk. 330.

17. Maintenance decreed to grandchildren out of the fortune bequeathed to them by their grandfather, though no direction for it is in the will, and the parents living, but not of ability to maintain the infants. *Collis* v. *Blackburn*, 9 Ves. 470.

18. Maintenance out of interest of a legacy to grandchildren, "when the youngest should attain twenty-one," refused. *Lomax* v. *Lomax*, 11 Ves. 48.

19. Generally, where the father is sufficiently competent, the Court will not allow maintenance for an infant. *Jackson* v. *Jackson*, 1 Atk. 515.

Butler v. *Freeman*, 3 Atk. 60.

20. But where there is an express direction for maintenance, the Court will decree an allowance without any regard to the ability of the father. *Mundy* v. *Earl Howe*, 4 Br. C. C. 223.

Hoste v. *Pratt*, 3 Ves. 730.

21. A mother married to a second husband is not obliged to maintain the children of the first, but is entitled to an

allowance out of their fortunes. *Billingsley* v. *Critchet,* 1 Br. C. C. 268.

22. Maintenance of an infant allowed on petition without suit.

Ex parte Thomas, Amb. 146.
——— *Whitfield,* 2 Atk. 315.
——— *Kent,* 3 Br. C. C. 88.
——— *Salter,* 3 Br. C. C. 500.
——— *Myerscough,* 1 J. & W. 151.

See further p. 227, *ante.*

(2) *Amount of.*

1. The maintenance of an infant must be in regard to his absolute interest, and not to any contingency, until it actually falls in. *Chaplin* v. *Chaplin,* 3 P. W. 368.

2. Money expended for the maintenance and education of the infant shall be allowed out of a small legacy given to the infant, though it breaks into the principal. *Barlow* v. *Grant,* 1 Vern. 255.

3. Maintenance for a child can be charged only out of the interest of its fortune. *Beasley* v. *Magrath,* 2 S. & L. 35.

4. Where the Court will allow maintenance, and the infants have been maintained since the death of the testator, the present practice is to allow the maintenance for the time past. *Reeves* v. *Brymer,* 6 Ves. 425.
Sherwood v. *Smith,* 6 Ves. 455.
Lisson v. *Shaw,* 9 Ves. 285.
Collis v. *Blackburn,* 9 Ves. 470.

5. Maintenance was allowed for time past, where the trustees had power to apply dividends for maintenance with the approbation of the parents or the survivor, but by the death of the trustees, or their not having acted, their discretion had not been exercised: an inquiry was directed whether it would have been reasonable and proper in the trustees to apply any and what part of the dividends, having regard to the situation, circumstances, and ability of the father, and the fortune of the children. *Maberly* v. *Turton,* 14 Ves. 499.

6. When younger children are unprovided for, and the eldest an infant, equity will make such an allowance to the eldest as to enable him to maintain all the children. *Harvey* v. *Harvey,* 2 P. W. 22.
Lanoy v. *The Duke of Athol,* 2 Atk. 444.
Petre v. *Petre,* 3 Atk. 511.
Burnet v. *Burnet,* 2 Dick. 602.
1 Br. C. C. 179.

7. So also where a parent is in distressed circumstances, the Court exercises a liberality in the allowance to the infant, to enable him to support his parent. *Rouch* v. *Garvan,* 1 Ves. 160.

8. Increase of maintenance beyond that prescribed by the will ordered under circumstances; the infants being entitled to the fund absolutely among them, viz. a daughter to a portion at twenty-one, and the sons to the residue, with survivorship. *Aynsworth* v. *Pratchett,* 13 Ves. 321.

See further p. 227, *ante.*

(b) *Marriage of.*

1. When infants under the care of the Court are upon a treaty of marriage, the Court refers it to a Master to see whether the settlement proposed is proper, and if improper, the Court will not give the infant leave to marry. *Smith* v. *Smith,* 3 Atk. 305.

2. Application to approve of the marriage of an infant, under the statute 26 G. 2., the testamentary guardian being in parts beyond the seas. *Blake* v. *Blake,* 2 Dick. 459.

3. The form of an order giving leave to a male infant to marry, after reference to the Master, to consider if the proposed match were proper, and to approve of articles. *The Earl of Plymouth* v. *Lewis,* 2 Dick. 801.

4. A guardian appointed upon petition, to consent to the marriage of an infant orphan without property. *In re Woolscombe,* 1 Mad. 213.

And see p. 464, *and* Div. LXXXIII. *post.*

(c) *Trustee under stat. 7 Anne.*

1. Though the infant were not a trustee within the statute of 7 Queen Anne, the purchaser was ordered to hold and enjoy, till the infant attained twenty-one, and then to apply that he might convey. *Chandler* v. *Beard,* 1 Dick. 392.

2. Infant reported not to be a trustee within the statute of 7 Queen Anne; Lord Chancellor thinking he was, ordered him to convey. *Ex parte Denton,* 1 Dick. 394.

3. The mortgagee of a mortgage in fee dying intestate, and his heir being an infant, and one of his next of kin, and consequently intitled to a share of the mortgage money, the Master would not find him to be an infant mortgagee, within the statute of 7 Queen Anne, for that he was not, as he conceived, a mere

naked mortgagee; but the Lord Chancellor, upon its standing over for consideration, was clear he was a mortgagee within the act, and directed him to convey. *Ex parte Carter*, 2 Dick. 609.

4. Where a trust to be executed vests in an infant, he doth not come within the statute of 7 Queen Anne, to enable infants to convey, but he must be decreed to convey, on a suit for that purpose. *Riggs* v. *Sykes*, 1 Dick. 400.

5. An infant, the surviving life in a bishop's lease, not beneficially interested, held to be an infant trustee, within the statute of 7 Queen Anne. *Ex parte Hodgson*, 2 Dick. 737.

6. An infant trustee, within the statute, being tenant in tail, was ordered to suffer a recovery. *Ex parte Smith*, Amb. 624.

7. The statute 7 Anne, c. 19, does not extend to implied or constructive trusts.
Ex parte Vernon, 2 P. W. 549.
Goodwyn v. *Lister*, 3 P. W. 386.

8. Infant trustee will be ordered to convey under the stat. 7 Anne, c. 19, though the trust estate is abroad.
Ex parte Fennilteau, 2 Dick. 569.
——— *Bosanquet*, 2 Dick. 540.
——— *Prosser*, 2 Br. C. C. 325.
——— *Anderson*, 5 Ves. 240.
Evelyn v. *Forster*, 8 Ves. 96.

9. The conveyance under the stat. 7 Anne, c. 19, must be to the persons absolutely entitled, or as they shall appoint; but an infant trustee is never ordered to convey to a new trustee, upon trusts to be executed, without a bill. *Ex parte Anderson*, 5 Ves. 240.

10. The order under the stat. 7 Anne, for a reference to the Master, as well as for the infant to convey, must be on petition, not on motion. *Evelyn* v. *Forster*, 8 Ves. 96.

See further p. 226, *ante*.

(*d*) *Lessee under stat.* 29 *Geo.* 2, *c.* 31.

1. It was referred to the Master to enquire, whether the infant lessee was within the act of the 29th G. 2. and if he were, whether it was for his benefit to surrender the old lease, and take a new one. *Ex parte Swann*, 2 Dick. 749.

(*e*) *Suits on behalf of.*

1. Where, after decree in a suit on the behalf of an infant, the *prochein amy* died, the Court, upon petition of the defendant, ordered that the infant should, in ten days after notice, appoint a new *prochein amy* to prosecute the suit, or that defendant should be at liberty to name a proper person for that purpose. *Lancaster* v. *Thornton*, 1 Dick. 346. Amb. 398.

2. Where there was a suit in Chancery on the behalf of an infant, and another in the Ecclesiastical Court, upon a suggestion that the suit in Chancery was not for the infant's benefit, it was referred to the Master, and upon his report against the suit, it was dismissed. *Da Costa* v. *Da Costa*, 3 P. W. 140.

3. Reference to the Master to enquire which of two suits, brought in the name of an infant, was most proper to be proceeded in. *Owen* v. *Owen*, 1 Dick. 310.

4. An infant may, by *prochein amy*, call his guardian to an account even during his minority. *Eyre* v. *Countess Shaftesbury*, 2 P. W. 119.

5. A suit may be brought on the behalf of an infant in *venter sa mere*, as to stay waste. *Musgrave* v. *Parry*, 2 Vern. 711.

6. The *prochein amy* of an infant should be a person of substance, because he is liable to costs. *Anon*, 1 Atk. 570.
But see Anon, 1 Ves. J. 410.

7. After answer the plaintiff is not compelled to change the next friend, on affidavit that she is worth nothing, and could not be found till after answer, but contradicted by the next friend, swearing to £44 a year: defendant ought not to have answered, but should have said he could not find her *Anon*, 1 Ves. J. 409.

8. An infant suitor is bound by *laches* in the suit. *Lord Shipbrooke* v. *Lord Hinchingbrook*, 13 Ves. 396.

See further p. 229, *ante*.

(*f*) *Suits and Decree against.*

1. Where lands are given to A. and his heirs, for three lives, and A. dies, his heir takes as special occupant, and not by descent, and therefore shall not have his age, nor the demur of parol; but where land in fee descends, the parol shall demur, as well in equity as at law. *Chaplin* v. *Chaplin*, 3 P. W. 368.

2. Though the usual practice is for the parol to demur till the infant come of age, yet where it is for his interest that the estate should be sold, and, as in this case, there was a trust to be performed, and the Court could see to a proper application of the money, Lord Hardwicke decreed a sale, but declared at the same time he did not mean by this direction to break

in upon the rule of the parol demurring. *Uvedale* v. *Uvedale*, 3 Atk. 117.

And see p. 231, *ante*.

3. Heir at law by his answer admitted the will, but died before the cause was brought to hearing, and left an infant heir; and by a bill of revivor the infant was made a defendant, and the suit revived: it was held, that the will must be proved *per testes* against such infant heir. *Sleeman* v. *Sleeman*, 2 Dick. 787.

4. Bill by creditors of testator: after they had examined their witnesses, they discovered that the heir at law, supposed to be dead, was living; he was thereupon made a defendant, publication not having passed was enlarged, and liberty given to the heir at law, who was an infant, to cross-examine plaintiff's witnesses, and for plaintiffs to read the depositions already taken against him, and also to be at liberty to re-examine their witnesses as against the infant. *Austen* v. *Hinton*, 1 Dick. 280.

5. Upon a decree against an infant, unless cause shewn within six months after he comes of age, the infant may answer, make a new defence, and examine witnesses anew. *Sir John Napier* v. *Lady Effingham*, 2 P. W. 401. 4 Br. P. C. 340.

Fountain v. *Caine*, 1 P. W. 505.

6. It is a motion of course, for the defendant, after he comes of age, to be at liberty to put in a new answer, or amend his answer put in whilst he was an infant, if he has a day by the decree, to shew cause after he comes of age. *Anon*, Mos. 66.

7. If an infant is plaintiff in the original cause, and defendant in the cross cause, and has six months after he comes of age, to shew cause against the decree; he may amend his answer, or put in a new one, but cannot put in a new bill, or amend his former. *Ibid.*

8. The Court enlarged the time for a defendant to shew cause after he came of age, why the decree should not be made absolute, till the plaintiffs in the first cause had put in an answer to a bill of discovery he filed against them, after he came of age. *Trefusis* v. *Cotton*, Mos. 203.

9. A decree *nisi*, against an infant, is an absolute decree; and when he comes of age, he cannot set it aside by original bill, unless for fraud and collusion between the plaintiff and his guardian, but he may amend his answer, and file a bill of discovery to that end. *Ibid*, 306.

10. It is a good cause, why a decree should not be made absolute against an infant after he comes of age, that he has put in a new answer. *Ibid*, 313.

11. An infant defendant, before he comes of age, may apply to put in a better answer, where it is probable he may not be able to command the same evidence when he is of age. *Bennet* v. *Lee*, 2 Atk. 532.

See further p. 230, *ante*.

XXXIX. Information.

1. The Prince of Wales may file an English information of intrusion, by his Attorney-General, for lands parcel of the Duchy of Cornwall. *Attorney General to the Prince of Wales* v. *Sir John St. Aubyn*, Wigh. 167.

2. Any persons, though the most remote in the contemplation of the charity, may be relators in an information. *Attorney-General* v. *Bucknall*, 2 Atk. 328.

3. But there can be no decree upon an information for a charity, if the relator has no title. *Attorney General* v. *Oglender*, 1 Ves. J. 246.

4. In an information at the relation of a lunatic, the Court will order, on motion, that further proceedings in the cause be suspended till a proper relator be appointed, who will be responsible for costs of the suit. *Attorney-General* v. *Tyler*, 2 Eden, 230. 1 Dick. 378.

5. A new relator to an information, named in the room of a deceased relator. *Attorney-General* v. *Powel*, 1 Dick. 355.

6. An information cannot be amended without the sanction of the Attorney-General. An information so amended was ordered to be taken off the file with costs. *Attorney-General* v. *Fellows*, 1 J. & W. 254.

7. The Attorney-General may at any time amend a revenue information. *Attorney-General* v. *Henderson*, 3 Anst. 714.

8. Whether a case of an information, filed by the Attorney-General, where the defendant has put in his answer, and the Attorney-General has not replied, or otherwise proceeded, for three terms, the defendant may, on motion, obtain an order that he may go without day—*Quære*. A motion made for such an order was directed to stand over to abide the result of

a search for precedents. *Attorney-General* v. *Eyton*, 6 Price, 85.

9. It is a general rule, that an information on behalf of a charity shall not be dismissed, though the relief prayed is wrong, but that the Court will decree the establishment of the charity. *Attorney-General* v. *Scott*, 1 Ves. 417.

10. But the rule holds only in cases of private charities, and not where they are founded by charter. *Attorney-General* v. *Smart*, 1 Ves. 72.

11. And even in private charities, the rule holds only in those cases which the Court thinks proper for its interference at all; and where the information was altogether improper, it was dismissed with costs. *Attorney-General* v. *Middleton*; 2 Ves. 327.

12. And where the information prayed to set aside an election of a perpetual curate, and to have the general right of election established, and the evidence did not invalidate the particular election, the information was dismissed with costs; the charity funds not being in question, and no evidence as to the general right being entered into. *Attorney-General* v. *Parker*, 1 Ves. 43.

And see p. 423*, *ante*.

XL. Injunction and Prohibition.

(a) *Obtaining Injunction.*

1. The general prayer for relief will not extend to an injunction, which will not be granted unless expressly prayed for. *Davile* v. *Peacock*, Barn. 27.
Savory v. *Dyer*, Amb. 70.
And see Jesus College v. *Bloome*, 3 Atk. 262.

2. In the vacation the Court will grant an injunction upon petition and affidavits. *Smith* v. *Clarke*, 2 Dick. 455.
Nichols v. *Kearsly*, 2 Dick. 645.
Pulteney v. *Shelton*, 5 Ves. 260, (*n*).

3. In the vacation, or in very pressing cases, the Court will grant an injunction upon petition, but the order will be confined to the injunction. *Mayor of London* v. *Bolt*, 5 Ves. 130.

4. Order, in the nature of an injunction to restrain the tenant of a lunatic's estate from committing waste, made upon petition without suit. *In the matter of Creagh*, 1 B. & B. 108.

5. An injunction will never be granted upon a bill and affidavit, to stay any proceedings at law, till the defendant prays a *dedimus*, or is in contempt. An injunction upon a *dedimus* must never be granted concerning the possession, but only to stay proceedings at law. *Anon*, 2 Free. 6.

6. Upon an attachment for want of an answer, or defendant's obtaining an order for time, the plaintiff becomes entitled to the common injunction, till answer or further order. *Cousins* v. *Smith*, 13 Ves. 167.

7. But an injunction obtained pending a demurrer is irregular. *S. C.* 13 Ves. 164.

8. After a plea put in there cannot be a motion for an injunction till the plea is argued; but the plaintiff had leave, if the plea should be overruled, to move at the same time for an injunction. *Humphreys* v. *Humphreys*, 3 P. W. 396.

9. An injunction issues of course for want of an answer to an amended bill, if no injunction has been obtained upon the original bill. *Anon*, Barn. 322.
Nelthorpe v. *Law*, 13 Ves. 323.

10. After appearance, no special injunction can be moved for without notice. *Marasco* v. *Boiton*, 2 Ves. 112.

11. Except sometimes in cases of waste. *Harrison* v. *Cockerell*, 3 Mer. 1.

12. When the defendant is abroad, a motion for an injunction to stay proceedings at law must be on special grounds. *Revet* v. *Braham*, 2 Br. C. C. 639.

13. Plaintiff entitled to an injunction on affidavit, as to stay proceedings at law by a party abroad, must state the whole of his case, within his knowledge, upon the original bill; but after answer, upon which he neither moved nor excepted, he cannot have the injunction upon amendment and affidavit. This is the general rule, subject however to exceptions upon very special circumstances. *Norris* v. *Kennedy*, 11 Ves. 565.

14. A. sued at law on a policy of insurance, which he had made as agent for B.: on a motion for an injunction upon affidavit of B.'s residing abroad, *semble* A. must have notice. *Beachcroft* v. *Gordon*, 3 Anst. 686.

15. An injunction granted in the first instance to stay proceedings in the Spiritual Court. *Chandler* v. *Gascoyne*, 1 Dick. 281.

16. An injunction not granted before answer in a special case on a particular right; otherwise in a plain case of waste or nuisance. *Attorney-General* v. *Doughty*, 2 Ves. 453.

17. An injunction to stay waste granted, without positive evidence of title. *Davies* v. *Leo*, 6 Ves. 784.

18. To obtain an injunction to restrain waste, the affidavit must set out a particular title. *Whitelegg* v. *Whitelegg*, 1 Br. C. C. 57.

19. The Court refused the injunction where the title was doubtful. *Field* v. *Jackson*, 2 Dick. 599.
And see Lowther v. *Stamper*, 3 Atk. 496.

20. An injunction granted in trespass, although the title was disputed, the defendant not appearing upon notice of the motion. *Kinder* v. *Jones*, 17 Ves. 110.

21. To entitle a party to an injunction to stay waste, affidavit must state something more than mere apprehension of mischief, some act or threat of the party to be enjoined. *Hanson* v. *Gardiner*, 7 Ves. 309.
Hannay v. *M'Entire*, 11 Ves. 54.

22. As sending a surveyor to mark out trees. *Jackson* v. *Cator*, 5 Ves. 688.

23. Or if the tenant for life insists upon a right to commit waste, and it be proved he has none, the remainder-man may have an injunction. *Gibson* v. *Smith*, 2 Atk. 183.

24. Injunction to stay a tenant in possession, not a party, from committing waste. *Attorney-General* v. *Duke of Ancaster*, 1 Dick. 68.

25. The Court will grant an injunction to restrain negociation of a bill of exchange, without previous service of a *subpœna*.
Patrick v. *Harrison*, 3 Br. C. C. 475.
——— v. *Blackwood*, 3 Anst. 851.

26. An administratrix, after a decree for an account, may on motion, without filing a bill, obtain an injunction to restrain a creditor from suing at law. *Paxton* v. *Douglas*, 8 Ves. 520.
And see p. 241, *ante.*

27. The Court of Chancery will punish its own officers, and therefore will enjoin proceedings at law for any irregularity in executing the process of the Court. *Bailey* v. *Devereaux*, 1 Vern. 269.
Dove v. *Dove*, 2 Dick. 619.

28. Though an injunction be granted to restrain further proceedings on motion, yet the Court will not order the defendant to retrace his steps, and to undo what may have been done. *Ryder* v. *Bentham*, 1 Ves. 543.
Anon, 1 Ves. J. 140.
Lane v. *Newdigate*, 10 Ves. 192.

29. An injunction cannot be extended to one not a party to the suit. *Dawson* v. *Princeps*, 2 Anst. 521.
Gadd v. *Worrall*, 2 Anst. 555.

See further, p. 249, *ante*, *and* Tit. INJUNCTION, *generally*.

(b) Obtaining Prohibition.

1. If a party is sued in an inferior Court for matter out of its jurisdiction, a prohibition may be obtained from the common law courts at Westminster; but if it be in the vacation, when such courts are shut, a prohibition lies in Chancery, upon affidavit that the matter is out of the jurisdiction, and that the defendant in the Court below had tendered a foreign plea; but when, upon the face of the declaration, the matter appears to be out of the jurisdiction, then no affidavit is necessary. *Anon*, 1 P. W. 476.

2. All motions for prohibitions must be grounded on affidavit, and not suggestion. *Corporation of Worcester* v. *Bennet*, 1 Dick. 143.

3. Whether a prohibition, issued from the Court of Chancery, upon an affidavit stating merely that the cause of action arose out of the jurisdiction, without adding that foreign plea was tendered, is regular—*Quære*. *Iveson* v. *Harris*, 7 Ves. 251.

4. A writ of prohibition may be had in the Court of Chancery in the vacation, that Court being always open.
S. C. 7 Ves. 257.

(c) To stay Trial, or, specially, to stay Execution.

1. An injunction in the Court of Chancery stays all proceedings, if before declaration; but if after, it stays execution only. *Garlick* v. *Pearson*, 10 Ves. 450.

2. In the Court of Exchequer, an injunction stays trial, and in the Court of Chancery an injunction may be extended to stay trial by motion, upon a slight affidavit. *Nelthorpe* v. *Law*, 13 Ves. 323.

3. Affidavit for an injunction to stay trial, need not be particular as to the discovery expected. *Farrar* v. *Lewis*, 2 Dick. 729.

4. A common injunction for want of an answer, was by order extended to stay trial; the answer being filed, the Court

on motion discharged the order, although the plaintiff had excepted to the answer, thinking the exceptions taken merely for delay. *Royal Exchange Assurance Company* v. *Barker*, 1 Dick. 72.

5. After injunction dissolved upon the merits, motion to stay trial of ejectment till full answer to the amended bill, refused with costs. *Lady Markham* v. *Dickenson*, 1 Ves. J. 30.

6. Injunction to stay trial cannot be granted till after the common injunction to stay execution is obtained. *Wright* v. *Braine*, 3 Br. C. C. 87. 2 Cox, 232.

7. Plaintiff entitled to move for the common injunction, to stay execution, for want of answer, cannot in the first instance move for the special injunction to stay trial. *Garlick* v. *Pearson*, 10 Ves. 450.

8. Defendant having obtained judgment at law, a motion for a special injunction, to restrain his suing out execution, which he would be entitled to do before a common injunction could be obtained, refused: the Court never granting such special injunctions, but in cases where the plaintiff has had no opportunity of obtaining the common injunction. *Franklyn* v. *Thomas*, 3 Mer. 225.

9. The Court refused to extend an injunction to stay trial upon motion made during the assizes, at which the action was to be tried. *Blacoe* v. *Wilkinson*, 13 Ves. 454.

10. Where a party applying for a commission to examine witnesses abroad, appears, from the nature of the case, to be entitled to it, the granting an injunction to stay trial till the return of the commission, is no more than a necessary consequence. *Nichol* v. *Verelst*, 4 Br. P C. 416.

And see p. 242, *ante*.

(*d*) *Serving*.

1. Injunction served, and copy delivered; the party serving is not bound to deliver the injunction itself to be compared. *Woodward* v. *King*, 2 C. C. 203.

2. Injunction for want of an answer dissolved, because not served for several months after answer came in. *Morice* v. *Bank of England*, Kel. 43.

3. Where the injunction was to restrain communication with a ward of Court, after fruitless attempts to serve the order, service at the house, which appeared to be the last place of abode, though apparently shut up, was ordered to be good service. *Pearce* v. *Crutchfield*, 14 Ves. 206.

And see p. 250, *ante*; *and* Div. LI., *post*.

(*e*) *Breach of*.

1. Though an injunction be irregularly obtained, it ought to be obeyed, or the party is in contempt. *Woodward* v. *King*, 2 C. C. 203.
Partington v. *Booth*, 3 Mer. 149.

2. A proceeding against a prohibition irregularly issued, is a contempt; the party ought to apply to the Court to supersede it. *Iveson* v. *Harris*, 7 Ves. 251.

3. An injunction is not binding upon a person not a party to the suit. *Iveson* v. *Harris*, 7 Ves. 256.
Gadd v. *Worral*, 2 Anst. 555.

4. Where the plaintiff is taken on legal process, though in breach of an injunction, the Court will not discharge him: the course is to punish for the contempt. *Willis* v. *Daniel*, 1 Anst. 36.

5. Where a party is taken upon legal process, after an injunction obtained, but before notice given of it, the detaining him after notice is no contempt. *Ibid.*

6. It does not excuse a party proceeding at law after injunction, that it was not sealed; for where a party or his solicitor have been present on an order for an injunction, they will be bound, although it be not sealed. *Anon*, 3 Atk. 567.

7. Contempt, by breach of injunction, by persons who were present in Court during the motion for the injunction, though absent when the order was pronounced. *Osbórne* v. *Tennant*, 14 Ves. 136.

8. An injunction against proceeding at law extends to preventing a suit against the sheriff for not paying over money levied in the original suit, before injunction issued. *Bolt* v. *Stanway*, 2 Anst. 556.
But see Iveson v. *Harris*, 7 Ves. 257.

9. A proceeding upon a bail bond in the Marshalsea Court, assigned, according to the practice of that Court, to one of its officers, is not a proceeding against a prohibition restraining the original action, so as to incur a contempt. *Iveson* v. *Harris*, 7 Ves. 251.

10. A common injunction to stay proceedings at law does not stay proceedings in the Ecclesiastical Court; but whether the same rule holds as to proceedings in the Court of Admiralty—*Quære*. *Anon,* 1 P. W. 301.

Davile v. *Peacock,* Barn. 28.
Macnamara v. *Macguire,* 1 Dick. 223.

(*f*) *Dissolving.*

1. Irregularity in obtaining an injunction, is not waved by applying for time to answer. *Travers* v. *Lord Stafford,* 2 Ves. 20.

2. But if the defendant puts in his answer, and then moves to dissolve the injunction, this waves an irregularity in obtaining it. *Davile* v. *Peacock,* Barn. 27.

3. The Court refused to dissolve the injunction till all the defendants had answered. *Rowcroft* v. *Donaldson,* 1 Fow. Ex. Prac. 286.

4. The Court refused to dissolve the injunction, where the answer confessed the acts of waste charged. *Packington* v. *Packington,* 1 Dick. 101.
Attorney-General v. *Burrows,* 1 Dick. 128.
S. C. Anon, 3 Atk. 485.

5. Injunction cause stood over at the hearing for want of parties; the injunction not dissolved, nor receiver appointed on motion without special case of waste; but the plaintiff compelled to speed the cause. *Price* v. *Williams,* 1 Ves. J. 401.

6. The replying to an answer, the serving a *subpœna* to rejoin, and giving rules to produce witnesses, will not prevent a defendant from moving, upon his answer, to dissolve an injunction, unless cause. *Molineux* v. *Luard,* 2 Dick. 684.

7. On motion, at the last seal after Trinity Term, to make absolute an order *nisi*, to dissolve an injunction, the plaintiff cannot have time till the next day of motions, upon the usual undertaking to shew cause on the merits, but was permitted to shew cause during the petitions. *Robinson* v. *Wardell,* 5 Ves. 552.
See 2 Mad. 258.

8. In the Court of Exchequer the defendant cannot, upon exceptions being overruled, move to dissolve the injunction, without a previous order for that purpose. —— v. *Dubarry,* 1 Anst. 255.

9. Nor in the Court of Exchequer can the defendant, upon a demurrer to the prayer of injunction being allowed, move to dissolve the injunction without the previous order. *Hurst* v. *Thomas,* 2 Anst. 585.

10. Where an injunction is obtained for want of an answer, and an answer is afterwards filed, but the defendant does not move to dissolve the injunction till two terms have elapsed, and the bill has been amended, yet the injunction may be dissolved upon motion of course. *Patton* v. *Panton,* 3 Anst. 651.

11. If a defendant's answer is reported insufficient, and he is served with an order to amend the bill, and for time to answer the amendments and exceptions at the same time; he must answer both before he can apply to dissolve the injunction that had been obtained on the original bill. *Mayne* v. *Hochin,* 1 Dick. 255.

12. If a plea is ordered to stand for an answer, the defendant cannot move to dissolve the injunction absolutely, but only *nisi*. *Osborn* v. *Cooper,* Mos. 198.

13. Where, after a verdict, a common injunction is obtained for want of an answer, the defendant being out of the kingdom, an order may be obtained that the money recovered be brought into Court, or the injunction be dissolved. *Sherwood* v. *White,* 1 Br. C. C. 452.
Acton v. *Market,* 2 Br. C. C. 14.
Cotes v. *Lindsay,* 1 Dick. 352.

14. But the motion must be made upon affidavits, in answer to the material allegations of the bill. *Culley* v. *Hickling,* 2 Br. C. C. 182.

15. But where an injunction was obtained before a verdict, and till the answer of a defendant residing abroad, the plaintiff is not compellable to bring the money into Court. *Scholbred* v. *Macmaster,* 2 Anst. 366.

16. Second answer, put in pending exceptions to the first, is sufficient to obtain the usual order to dissolve an injunction. *Knox* v. *Symmonds,* 1 Ves. J. 87.

17. Exceptions filed are an answer to a motion to dissolve an injunction; and any subsequent delay must be the subject of a special application. *Goodinge* v. *Woodhams,* 14 Ves. 536.

18. Exceptions filed *nunc pro tunc* will sustain an injunction. *Ibid.*

19. No exceptions can be taken to an infant's answer, and therefore in such case cause against dissolving an injunction must be upon the merits according to the answer, and in this case, though the answer was manifestly insufficient, the in-

junction was dissolved. *Cousins* v. *Smith*, 13 Ves. 164.

20. A reference of the answer for impertinence is good cause against dissolving an injunction. *Fisher* v. *Bayley*, 12 Ves. 18.
Hurst v. *Thomas*, 2 Anst. 591.
Dancey v. *Browne*, 4 Mad. 237.

21. Motion to refer the answer for impertinence allowed as cause against dissolving an injunction, but upon the terms of procuring the report in a week. *Goodinge* v. *Woodhams*, 14 Ves. 534.

22. An order for dissolving an injunction *nisi* will be made absolute, notwithstanding the plaintiff is a bankrupt, unless he shews cause; bankruptcy being no abatement. *Anon*, 1 Atk. 263.

23. On a commission to examine witnesses in India not being returned in two years, the Court will dissolve the injunction. *Penney* v. *Edgar*, 1 Anst. 276.

24. Where the injunction is granted upon an amended bill, the defendant may before answer move to dissolve upon affidavits, in reply to those upon which the injunction was granted, *Vipan* v. *Mortlock*, 2 Mer. 479.

25. In the Court of Chancery in Ireland, where an injunction is obtained for want of an answer, defendant may dissolve it by giving the rule to dissolve, and the second rule in six days after, which shall be absolute without further order, unless plaintiff files exceptions in four days, or moves, on equity confessed, in eight days, or on the first day of motions afterwards, notice of such motion having been entered with the registrar; and all such motions shall be listed, and called on at the sitting of the Court on such motion-day. *General Rule*, 1 S. & L. 9.

26. Injunction raised pending notice of a motion for a *dedimus* is dissolved of course on the *dedimus* being granted. *M'Mahon* v. *O'Brien*, 1 S. & L. 237.

27. It is irregular to file an amended bill without leave, after an order to continue an injunction, on the terms of speeding the cause; but in this case the amendment being material, and such as the Court would have allowed, and the plaintiff offering terms which tended to prevent delay, the injunction was continued, plaintiff paying the costs of defendant's motion to dissolve it. *Welsh* v. *Hannan*, 2 S. & L. 516.

See further p. 244, *ante*.

(*g*) *Reviving.*

1. Where the injunction has been dissolved upon the merits, or for want of shewing cause, and the plaintiff amends, and defendant obtains a *dedimus* to take his answer, this will not entitle the plaintiff to another injunction; but, on coming in of the answer, he must move upon the merits. *Anon*, 3 Atk. 494.

2. If an injunction has been dissolved upon the merits, the plaintiff cannot, on amending the bill, have another injunction, as of course. *Lingham* v. *Toule*, 1 Anst. 188.
Travers v. *Lord Strafford*, 2 Ves. 19. Amb. 104.

3. Nor upon filing a supplemental bill. *Travers* v. *Lord Strafford*, *Ibid.*

4. In the Court of Exchequer, the common injunction having been dissolved upon coming in of the answer, the plaintiff filed a supplemental bill. The Court refused a motion, as of course, for an injunction, the defendant not being in contempt, though the time for answering was expired. *Gauld* v. *Worral*, 2 Anst. 553.

5. An indictment, for perjury in the answer, being found by the grand jury, is not a ground for reviving an injunction. *Clapham* v. *White*, 8 Ves. 35.

See further p. 247, *ante*.

XLI. Interest.

(*a*) *Where Payable*—(1) *On Debts:*

1. Simple contract debts, though liquidated by the Master's report, do not carry interest. *Bedford* v. *Coke*, 1 Dick. 179. 2 Ves. 116.
Creuze v. *Hunter*, 2 Ves. J. 157. 4 Br. C. C. 316.

2. Under a trust term created for payment of debts, simple contract debts do not carry interest. *Barwell* v. *Parker*, 2 Ves. 363.
Earl Bath v. *Earl Bradford*, 2 Ves. 587.
Lloyd v. *Williams*, 2 Atk. 108. Barn. 224.
Shirley v. *Earl Ferrers*, 1 Br. C. C. 41.

3. But otherwise if a trust term for the payment of debts is created by deed, from which an intention to pay interest can be inferred; as if the debts be annexed by way of schedule. *Barwell* v. *Parker*, 2 Ves. 363.

4. A provision by will for payment of interest of debts, held not to extend to a

debt by simple contract. *Tait* v. *Lord Northwick*, 4 Ves. 816.

5. Devise in trust to sell and apply the money to and among such persons as the trustees in their discretion should think had or have any just or indisputable demand upon A. at his death, to each in equal degree and proportion, according to the principal sum, so far as the money would extend, the securities to be delivered up, but the money to be given and received in no other manner than as voluntary bounty: the fund being more than sufficient, is liable to interest of bonds to the extent of the penalties. *Aston* v. *Gregory*, 6 Ves. 151.

6. Interest given in equity for a simple contract debt, as at law, for every debt detained, either by the contract or in damages. *Craven* v. *Tickell*, 1 Ves. J. 63.

7. If interest would be given at law in the shape of damages, the party claiming against the assets in equity shall have the sum he could have recovered at law. *Dornford* v. *Dornford*, 12 Ves. 129.

8. Where there is a written instrument promising to pay at a given day, interest is given from such day; and where the instrument is payable on demand, as a promissory note, interest is given from the day of demand. *Upton* v. *Lord Ferrers*, 5 Ves 803.

9. So also in the case of a written undertaking to pay a sum ascertained, by instalments, the instalments in arrear bear interest. *Parker* v. *Hutchinson*, 3 Ves. 133.

Countess Kildare v. *Hopson*, 4 Br. P. C. 550.

10. But interest will not be given upon notes payable at an uncertain day or upon shop debts. *Parker* v. *Hutchinson*, 3 Ves. 135.

11. At law no interest subsequent to the judgment can be recovered without a fresh action, which may be brought for it. *Creuze* v. *Hunter*, 2 Ves. J. 162.

And see Bedford v. *Coke*, 1 Dick. 181.

12. No interest is to be allowed upon a judgment on assets *quando acciderint*. *Deschamps* v. *Vanneck*. 2 Ves. J. 716.

13. No interest is allowed upon a judgment in an account before a Master; nor is interest computed upon a judgment in an action upon a judgment at law. *Deschamps* v. *Vanneck*, 2 Ves. J. 719.

Creuze v. *Hunter*, 2 Ves. J. 162. 4 Br. C. C. 318.

See Thomas v. *Edwards*, 3 Anst. 804.

14. In case of a bond and judgment assigned, interest must be calculated to the date of the report, so as not to exceed the penalty. *Sharpe* v. *Earl Scarborough*, 3 Ves. 557.

15. No interest is given upon a bond beyond the penalty. *Gibson* v. *Egerton*, 1 Dick. 408.

Tew v. *Earl Winterton*, 3 Br. C. C. 489. 1 Ves. J. 451.

Knight v. *Maclean*, 3 Br. C. C. 496.

Lloyd v. *Hatchet*, 2 Anst. 525.

16. Except under special circumstances. *Clarke* v. *Seton*, 6 Ves. 411.

17. In bankruptcy, interest upon a bond stops at the date of the commission, unless there is a surplus; in which case, debts bearing interest receive subsequent interest. *Butcher* v. *Churchill*, 14 Ves. 573.

18. Lessee, being evicted, recovers judgment against executors of lessor, upon covenants for quiet enjoyment, and the judgment is assigned. This is a debt by specialty, and the assignees are entitled to interest. *Earl of Bath* v. *Earl of Bradford*, 2 Ves. 587.

19. Equity will allow interest upon a gross sum laid out by one merchant for another, though there was an account current between them. *Omichund* v. *Barker*, Ridg. Ca. T. Hardw. 285.

20. In a long unsettled partnership account, rendered intricate by the neglect of a party, he shall have no interest on the balance when settled. *Boddam* v. *Ryley*, 1 Br. C. C. 239.

Affirmed on Appeal, 4 Br. P. C. 561.

21. The balance of a stated account shall carry interest; it will do so between merchant's accounts. *Barwell* v. *Barker*, 2 Ves. 365.

22. The balance of a mutual account being merely a simple contract debt, does not carry interest. *Borret* v. *Goodere*, 1 Dick. 428.

23. It has been the constant rule of Courts of Equity in Ireland, that where, by a general and national calamity, as a rebellion, nothing is made out of lands, which are a fund for the payment of interest, no interest shall run during the continuance of such calamity. *Basil* v. *Atcheson*, 4 Br. P. C. 502.

And see pp. 80, 252, *ante; and for Interest in Mortgage Accounts*, p. 316, *ante*.

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(2) *On Legacies.*

1. A legacy payable at a future day,

shall carry interest from the day of payment only. *Lloyd* v. *Williams*,
2 Atk. 108. Barn. 224.

2. And where no particular time of payment is directed, unless the legacy be specific, interest will be given only from the end of a year after the testator's death, which is the time of payment, and a direction to pay as soon as possible makes no difference. *Webster* v. *Hale*,
8 Ves. 410.

But see Spurway v. *Glynn*, 9 Ves. 483.

3. And although the legacy is given to infants. The exceptions to the rule are, where the infant is the child of the testator, and therefore has a right to demand maintenance, and where it clearly appears to have been the testator's intention to give interest in the meantime. *Heath* v. *Perry*, 3 Atk. 109.

Tyrrell v. *Tyrrell*, 4 Ves. 1.

4. So a legacy from a parent to a child bears interest from the death of the testator, without regard to the time of payment. *Crickett* v. *Dolby*, 3 Ves. 13.

5. But the rule for giving interest before the day of payment will not apply, where there is otherwise a provision equal to the proper maintenance of the child. *Long* v. *Long*, 3 Ves. 286 (*n*).

And see Mitchell v. *Bower*,
3 Ves. 283.

6. A legacy from an uncle to a niece to be paid at twenty-one, or marriage, does not carry interest before the time of payment. *Crickett* v. *Dolby*, 3 Ves. 10.

7. There is no exception in favor of a wife as for a child, to the rule, that a legacy does not bear interest before it is payable. *Stent* v. *Robinson*, 12 Ves. 461.

Lowndes v. *Lowndes*, 15 Ves. 301.

8. And if the legacy be given by a parent to his child, at twenty-one or marriage, and the child has no other provision, the Court will give interest by way of maintenance, though the legacy is not vested. *Heath* v. *Perry*, 3 Atk. 102.

9. Whether a legacy to a grandchild, payable upon a contingency or at a future day, shall carry interest as in the case of a child—*Quære*. *Errington* v. *Chapman*,
12 Ves. 23.

10. Legacy from a parent to his child, payable *in futuro*; if maintenance is given generally, it shall carry interest, but if an annual sum less than the interest is given for maintenance, the infant shall have no more. *Crickett* v. *Dolby*, 3 Ves. 17.

11. Construction of a will: Interest of legacy from death of testator, on the manifest intent as to maintenance. *Beckford* v. *Tobin*, 1 Ves. 308.

12. Where a legacy depends upon a contingency, the intermediate interest between the death of the tenant for life, and the contingency happening, does not follow the principal, but falls into the residue. *Shawe* v. *Cunliffe*,
4 Br. C. C. 144.

13. Where the legacy is payable at twenty-one, and the legatee dies an infant, his executor shall not have interest, although he may have to wait till the legatee would have been twenty-one. *Cricket* v. *Dolby*, 3 Ves. 13.

14. Testator directed the residue of his personal estate, subject to the payment of legacies, annuities, debts, and funeral expenses, with all convenient speed to be laid out in real estates, to be settled in strict settlement; and that the interest of such residue should accumulate and be laid out in lands, to be settled in like manner. Various circumstances having delayed the collection and investment of the personal estate, the tenant for life was held entitled to the interest from the end of a year after the death of the testator. *Sitwell* v. *Bernard*, 6 Ves. 520.

And see, as to the time when the interest of tenant for life shall commence, p. 419, *ante*.

15. Devise upon trust, by demise, sale, or mortgage, or by rents and profits, to raise and pay with all convenient speed after the decease of the devisor, a sum, and subject thereto upon other trusts: interest decreed at 4 per cent. from the death. *Spurway* v. *Glynn*, 9 Ves. 483.

16. Interest for the rents and profits of an estate is never decreed. *Countess Ferrers* v. *Earl Ferrers*, For. 2.

See further p. 283, *ante*.

(3) *On Annuities*.

1. Where, for the payment of an annuity or rent charge, there is a clause of entry or some penalty upon the grantor, which he must undergo if sued at law, the Court, in giving relief will decree the grantor to pay the arrears and interest for the time during which payment was withheld. *Countess Ferrers* v. *Earl Ferrers*,
For. 2.

2. A right of entry is not sufficient to entitle the annuitant to interest upon the arrears of his annuity, unless he has actually entered, and is in possession of the

estate, charged with the annuity; in that case the Court will not oblige him to quit the possession, till the grantor allows him interest for the arrears due. *Robinson* v. *Cumming*, 2 Atk. 411.

3. Interest will be allowed on the arrears of an annuity secured by recognisance. *Legatt* v. *Shewell*, Gilb. E. R. 142.

4. Interest will not be given upon the arrears of an annuity, though secured by bond, and in bar of dower. *Tew* v. *Earl Winterton*. 3 Br. C. C. 489. 1 Ves. J. 451.

5. For interest upon arrears of annuity, in bar of dower, some contract for interest upon forbearance is necessary: distress of the annuitant, or that she borrowed money, are not sufficient. *Ibid.*

6. The Court refused to give interest upon the arrears of a jointure, although the funds were sufficient, and the jointress put to great distress by the delay of payment. *Duke of Bedford* v. *Coke*, 1 Dick. 178. 2 Ves. 116. (*Cited*), 2 Ves. J. 166.

7. Where a jointress was prevented by an injunction from obtaining payment of the annuity, she was decreed interest at 4 per cent. from the filing the bill. *Morgan* v. *Morgan*, 2 Dick. 643.

And see O'Donel v. *Browne*, 1 B. & B. 262.

8. The arrears of annuities held not to bear interest, although charged upon land, and were not paid out of the rents and profits, because possession was taken by mortgagees, and although one of the annuities was given in lieu of dower. *Creuze* v. *Hunter*, 2 Ves. J. 157. 4 Br. C. C. 316.

Bignal v. *Brereton*, 1 Dick. 278.

S. C. Anon, 2 Ves. 661.

9. Interest is not given upon arrears of maintenance, any more than upon arrears of a jointure. *Mellish* v. *Mellish*, 14 Ves. 516.

(4) *Upon Purchase-Money.*

1. The advantage a purchaser receives from the extinction of lives has never been considered in equity, as a reason for his paying interest on his purchase-money. The Court, in awarding interest, never regards the execution of articles for the purchase, but the time of executing the conveyance; and even then the purchaser shall pay interest only from the time the possession is delivered. *Blount* v. *Blount*, 3 Atk. 636.

2. A purchaser delaying payment of his purchase-money shall pay interest. *Child* v. *Lord Abingdon*, 1 Ves. J. 94.

Davy v. *Barber*, 2 Atk. 490.

3. It is a general rule that a purchaser, let into possession of the rents and profits, shall pay interest for the purchase-money; there may be an exception, but it must be a strong case, and clearly made out; and where, during the delay occasioned by difficulties as to the title, the purchase-money was appropriated and unproductive, but without express notice thereof to the vendor, the purchaser was, notwithstanding, held liable to interest. *Powell* v. *Martyr*, 8 Ves. 146.

4. A purchaser taking possession without a conveyance shall pay interest, though the money was to be paid on a particular day of the execution of the conveyance. *Fludyer* v. *Cocker*, 12 Ves. 25.

5. Purchase-money remaining in the purchaser's hands to pay off incumbrances shall bear interest. *Hughes* v. *Kearney*, 1 S. & L. 134.

6. Where a party, upon opening biddings of a sale before the Master, makes a deposit which is invested in the public funds, he will not be entitled to the dividends between the times of making the deposit, and completing the purchase; but he will be allowed interest upon the deposit, at 4 per cent. *Doyley* v. *Countess Powis*, 2 Br. C. C. 33. 1 Cox, 206.

7. Where the premises sold consisted of a leasehold farm, and three years of the term expired pending the dispute, the Court allowed the vendor interest on the purchase-money. *Dyer* v. *Hargrave*, 10 Ves. 505.

8. A purchaser of a future interest after a term, shall not pay interest or an increased price for a part of the term elapsing before the purchase is completed, unless the delay be by his fault. *Growcock* v. *Smith*, 3 Anst. 677.

And see further, p. 460, *post.*

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(5) *By Accounting Parties.*

1. Where a contract is set aside upon equitable grounds, it is decreed as the redemption of a mortgage, and therefore interest is given upon the purchase-money. *Gwynne* v. *Heaton*, 1 Br. C. C. 1.

Bromley v. *Holland*, 5 Ves. 610. 7 Ves. 3.

2. Where a purchase was set aside as fraudulent, an account of the rents and profits was decreed with interest, and annual rests. *Gould* v. *Okeden*, 4 Br. P. C. 202.

And see p. 223, *ante*.

3. Where trustees or executors keep money in their hands in breach of trust, they shall pay interest. *Tew* v. *Earl Winterton*, 1 Ves. J. 452.

Newton v. *Bennet*, 1 Br. C. C. 359.

4. Agents or trustees, if they neglect to account properly, or if they violate their duty, will be charged with interest. *Pearse* v. *Green*, 1 J. & W. 135.

5. Attorney or scrivener receiving money, and giving a note to place it out at interest, is bound to do so, and he will not be discharged from paying interest for such money, unless, having placed it out on security, he delivers the security over to his client or customer, and such security, and interest due thereon, is accepted. *Barwell* v. *Parker*, 2 Ves. 364.

6. In an account decreed against an agent, the Court refused to give interest further back than the time of filing the bill, upon the ground of long acquiescence. *Beaumont* v. *Boultbee*, 11 Ves. 360.

7. And where the agent, by desire of his principal, kept large sums in his hands, for which he was to be responsible from time to time, and duly accounting, he was held not to be liable to interest, although he employed the money. *Lord Chedworth* v. *Edwards*, 8 Ves. 48.

And see Earl Hardwicke v. *Vernon*. 14 Ves. 509.

8. But where a steward or receiver, being called upon for his accounts, wilfully conceals money received by him, it shall bear interest, and notwithstanding length of time, and death of the accounting party. *Earl Hardwicke* v. *Vernon*, 14 Ves. 504.

9. There is no difference between the implied contract of trustees, assignees, and executors, and that of a receiver or agent, who is bound faithfully, diligently, and accurately, to account, at least when called upon, and not to suppress, conceal, or overcharge: and a receiver, for breach of such duty, will be liable to interest. *S. C.* 14 Ves. 510.

10. Where the testator gave a legacy to each of his executors, and directed that they should not derive any advantage from keeping money in their hands without accounting for legal interest, the executor was decreed to pay interest upon all sums received by him, while in his hands, and the Master to make half-yearly rests. *Raphael* v. *Boehm*, 11 Ves. 92.

11. Where there was a direction for accumulation, and the executor, with money in his hands, became bankrupt, his estate was charged with interest at 5 per cent. and half-yearly rests. *Dornford* v. *Dornford*, 12 Ves. 127.

12. The brother of a lunatic and committee of the estate had managed it during nine years before the commission, and made considerable savings: he was ordered to pay interest upon the sums retained, although, as he alleged, he had made no use of them. *Ex parte Chumley*, 1 Ves. 156.

And see further as to the Liability of Executors, pp. 209, 210, *ante*; *of Receivers*, p. 401, *and* Div. LXVI, *post*; *and of Assignees in Bankruptcy*, p. 65, *ante*.

(*b*) *At what Rate payable.*

1. The general rule of the Court of Chancery is to give interest at 4 per cent. and that because money is generally to be had at that rate, but the rule is not invariable. *Lewis* v. *Freke*, 2 Ves. J. 511.

Treves v. *Townsend*, 1 Br. C. C. 386. 1 Cox, 53.

2. A power to charge a sum in gross implies a power to give any rate of interest; and the rule of the Court to give 4 per cent. interest applies only where no rate is specified by the party having the power to fix it. *Lewis* v. *Freke*, 2 Ves. J. 507.

3. Where no interest is given by the will, the general rule is to compute interest upon legacies at 4 per cent. and from the end of one year after the testator's death; except where interest is given by way of maintenance. *Sitwell* v. *Bernard*, 6 Ves. 520.

Bourke v. *Ricketts*, 10 Ves. 333.

4. And the rule holds notwithstanding the fund out of which the legacies are paid produces more than 4 per cent.; and the interest will not be increased by the effect of appropriation. *Sitwell* v. *Bernard*, 6 Ves. 520.

5. A legacy payable at twenty-one, with 5 per cent. interest, was assigned after the legatee attained his age. The assignee recovered the legacy, with 4 per cent. interest from the time it became payable. *Davies* v. *Austen*, 1 Ves. J. 247.

6. Where by marriage settlement a sum was set apart, as portions for younger children, and 2 per cent. allowed for maintenance, and such portions were increased by the will, the Court refused to allow more than 2 per cent. interest upon the additional portions. *Long* v. *Long*, 3 Ves. 286, (*n*).

7. Where interest was given for a ship and cargo, wrongfully taken by the defendant in the Indies, Indian interest was allowed, deducting the charge of the return. *Ekins* v. *East India Company*, 1 P.W. 107.

Affirmed on appeal, 2 Br. P. C. 382.

And see, as to Indian interest, *Boddam* v. *Riley*, 2 Br. C. C. 2.

Lowe v. *East India Company*, 4 Ves. 824.

8. An agent at *Nevis* was commissioned to receive sugars there, and transmit them to this country; the agent received the sugars, but failed to transmit them, and died. His executors were decreed to account with interest at 10 per cent. the common interest of that place. *Ellis* v. *Loyd*, 1 Eq. Ca. Ab. 289.

9. The plaintiff's wife's fortune was secured on estates in Ireland, but the settlement, and a will, under which she took a legacy, were executed in England, and all parties lived here; the money was decreed to be paid into Court with English interest only. *Phipps* v. *Earl Anglesea*, 1 P. W. 696.

10. A debt, contracted in England, but secured by a bond executed in Ireland, shall bear Irish interest. *Connor* v. *Earl Bellamont*, 2 Atk. 382.

11. Where the testator lived in the West Indies, but described the legacies to be sterling, interest at 4 per cent. only was given. *Malcolm* v. *Martin*, 3 Br. C. C. 50.

12. Where the legacies were to children of the testator, in Jamaica currency, and the fund had been kept in Jamaica, carrying Jamaica interest, and then remitted upon terms, giving a profit at least equal to Jamaica interest, Jamaica interest was allowed from the death of the testator. *Raymond* v *Broadbelt*, 5 Ves. 199.

13 The testator residing in Jamaica, and possessing property both there and in this country, gave legacies to grandchildren in the currency of Jamaica, and appointed executors in both countries; the legatees were not entitled to Jamaica interest. *Bourke* v. *Ricketts*, 10 Ves. 330.

14. An administrator having retained money of the intestate in his hands, and mixed it with his own, ordered to pay interest at 4 per cent. *Perkins* v. *Baynton*, 1 Br. C. C. 375.

15. An executor keeping the fund, and using it for his own benefit contrary to his trust, shall account with interest at 5 per cent. *Piety* v. *Stace*, 4 Ves. 620.

16. Where the executor committed a breach of trust by selling out stock and dealing with the money, he was charged in his account with the sums received by the sale of the stock from time to time, with interest at 5 per cent. from the times they were respectively received. *Pocock* v. *Reddington*, 5 Ves. 794.

17. Where an executor, through negligence keeps money in his hands, he shall be charged interest, but not beyond the general rate of the Court, viz. 4 per cent. but in a special case beyond mere negligence, as where he employs the money in trade, he shall pay 5 per cent. interest, it being taken for granted that the trade produces 5 per cent. at the least. *Rocke* v. *Hart*, 11 Ves. 58.

18. An executor in trust for infants, calling in the money out upon good security, at 5 per cent., and keeping large balances in his hands, and using it as his own, shall pay interest at 5 per cent. *Mosley* v. *Ward*, 11 Ves. 581.

19. Under an agreement to take off a discount of more than 5 per cent. for prompt payment, the creditor cannot, upon delay of payment and failure of the debtor, charge more than 5 per cent. *Ex parte Aynsworth*, 4 Ves. 678.

20. Interest upon a promissory note shall be at 5 per cent. that being the rate given by way of damages at law. *Upton* v. *Earl Ferrers*, 8 Ves. 803.

21. Upon a bill for specific performance, which the purchaser resisted upon a fair objection to the title, interest was decreed upon the purchase-money unpaid, at 4½ per cent. *Cox* v. *Chamberlain*, 4 Ves. 638.

See further pp. 65, 210, *ante*, & p. 461, *post*.

(c) *Compound Interest, or Interest after Report.*

1. Compound interest is allowed where there are regular accounts settled from time to time, in all cases except that of a mortgage; in merchant's accounts it is always admitted on the ground of an original contract, of which the settling accounts in that way is evidence. *Ex parte Campion*, 3 Br. C. C. 410.

2. It is contrary to the course of the Court to give interest upon interest. *Waring* v. *Cunliffe*, 1 Ves. J. 99.

3. Compound interest may be allowed in case of a contract for it, either expressed or to be inferred from the nature of the dealings between the parties, as if it is according to the usage of their trade. *Morgan* v. *Mather*, 2 Ves. J. 15.

4. Though compound interest cannot be taken under an antecedent contract, yet accounts may be settled even half-yearly upon that principle; but there is an exception as to real securities. *Ex parte Bevan*, 9 Ves. 223.

5. Compound interest allowed by the Court, on sums paid by the tenant for life, on renewal of leases. *Nightingale* v. *Lawson*, 1 Br. C. C. 440.

6. Where the mortgagor signed an account, whereby so much is admitted to be due for interest, this will not carry interest, unless the mortgagor by some letter or writing under his hand, agrees to make it principal: to make interest on a mortgage principal, there must be a writing signed by the parties. *Brown* v. *Barkham*, 1 P. W. 653.

7. An agreement made at the time of the mortgage will not be sufficient to make future interest principal: but to make interest principal, it is requisite that interest be first grown due, and then an agreement concerning it may make it principal. *Lord Ossulton* v. *Lord Yarmouth*, 1 Salk. 449.

And see Broadway v. *Moorcraft*, Mos. 247.

8. It is now quite settled, that, as between the mortgagee and those claiming under him, interest cannot be turned into principal without the privity of the mortgagor. *Matthews* v. *Wallwyn*, 4 Ves. 128.

9. Where, under a decree for redemption or foreclosure, the Master reports what is due for principal, interest, and costs, if the time for payment is enlarged, the Court directs subsequent interest to be computed upon the whole sum, including costs. In all other cases it is in the discretion of the Court, *Neal* v. *Attorney-General*, Mos. 246.

Bickham v. *Cross*, 2 Ves. 471.

10. Under very particular circumstances, interest was directed to be computed on various sums reported due, and also all arrears of interest which had become due on other sums and on the costs. *Bickham* v. *Cross*, 2 Ves. 471.

11. Interest is computed by the Master's report, upon such debts only as carry interest, according to the rate they carry; and upon farther directions subsequent interest is directed only on those upon which the report has already computed interest, but no interest is computed on simple contract debts by the report, or by order afterwards. *Creuze* v. *Hunter*, 2 Ves. J. 157. 4 Br. C. C. 316.

Bignal v. *Brereton*, 1 Dick. 279.

S. C. Anon, 2 Ves. 661.

12. The executors of a surety shall not have interest upon the interest of a bond paid by them for their principal, notwithstanding a counter bond from the principal to save them harmless from "all damages they might sustain on account of the non-payment of the principal money and interest." *Rigby* v. *M'Namara*, 2 Cox, 415.

13. Where trustees pay off incumbrances with their own money, the account shall be taken with annual rests, and each year's account to carry interest. *Bradshaw* v. *Astley*, 4 Br. P. C. 505.

14. Half-yearly rests directed to be made in taking an account against executors, who have kept money in their hands contrary to the directions in the will. *Raphael* v. *Boehm*, 11 Ves. 92.

Dornford v. *Dornford*, 12 Ves. 127.

XLII. Interpleader.

1. A bill of interpleader is where two persons claim of a third the same debt or duty. *Dungey* v. *Angove*, 2 Ves. J. 310.

2. An interpleading bill ought never to suggest a case. *Ibid*, 2 Ves. J. 311.

3. A tenant cannot sustain a bill of interpleader against his landlord on notice of ejectment by a stranger, under a title adverse to that of the landlord. *Dungey* v. *Angove*, 2 Ves. J. 304.

But see East India Company v. *Edwards*, 18 Ves. 376.

4. To support a bill of interpleader by a tenant, two persons must claim the same rent in privity of tenure and contract, as in case of mortgagor and mortgagee, trustee, and *cestui que trust*. *Dungey* v. *Angove*, 2 Ves. J. 312.

5. Demurrer allowed to an interpleading bill by tenants against their landlord, and one claiming the equitable estate by

suit in equity, to which the tenants were no parties; the landlord not having taken any legal step by distress or otherwise, and notice of the bill filed not affecting them. *Rowland* v. *Powell*,
Ridg. Ca. T. Hardw. 260.

6. The rule, that a tenant cannot file an interpleading bill against his landlord, does not hold where the question arises upon the act of the landlord, subsequent to the commencement of the relation of landlord and tenant. *Cowtan* v. *Williams*,
9 Ves. 107.
Clarke v. *Byne*, 13 Ves. 383.

7. The Court disapproved of an interpleading bill by a tenant against his landlord, for a sum which did not exceed £10. *Smith* v. *Target*, 2 Anst. 529.

8. Where one claimant seeks a certain rent from a tenant in possession, and the other, unliquidated damages for use and occupation, the tenant cannot make them interplead. *Johnson* v. *Atkinson*,
3 Anst. 798.

9. Where one rector claims a modus, and the rector of another parish claims tithes in kind of the same lands, they cannot be made to interplead. *Wooluston* v. *Wright*, 3 Anst. 801.

10. A claim is a ground of interpleader. *Langston* v. *Boylston*, 2 Ves. J. 107.

11. A bill of interpleader cannot pray an injunction to restrain proceedings in ejectment; because such a bill cannot be as to the possession, but must be as to the payment of some demand of money. *Metcalf* v. *Hervey*, 1 Ves. 248.

12. An executor cannot bring a bill of interpleader till after probate; for, till probate, he does not stand in the place of the testator, and has not made himself a debtor. *Mitchell* v. *Smart*, 3 Atk. 607.

13. A bill of interpleader, by the owner of an estate, against the grantor of a rent charge out of the estate, assigned to secure an annuity, and the annuitant, the validity of the annuity being impeached. *Duke of Bolton* v. *Williams*, 2 Ves. J. 138.
4 Br. C. C. 296.

14. A banker, with whom property was deposited for safe custody, refused to deliver it up to the owner in prison, under actions brought against him as partner in an insolvent mercantile house; the banker was then served with attachments by the plaintiffs in the actions, and held to bail in trover by the owner: held that he was entitled to relief by bill of interpleader, but need not have come into equity; as at law he would have been discharged upon common bail, upon bringing the deposit into Court; and proceedings in the action would have been staid till the attachments were disposed of by the owner of the property in the name of the banker. *Langston* v. *Boylston*, 2 Ves. J. 101.

15. To a bill of interpleader there must be an affidavit annexed. *Errington* v. *Attorney-General*, Bun. 303.
Prac. Reg. 78.

And see p. 371, *ante*.

16. In a suit of interpleader, when a trial at law is directed to settle the rights of the defendants, the suit is ended as to the plaintiff, and therefore upon his death the cause may proceed without a bill of revivor. *Anon*, 1 Vern. 351.

17. In a bill of interpleader it is not necessary that the plaintiff should bring the money into Court, unless the other side require it; but the plaintiff should by his bill offer to bring in the whole of the demand. *Earl Thanet* v. *Paterson*,
Barn. 251.

18. The Lord Chancellor thought the money ought to be brought into Court upon the motion for an injunction, and that the non-payment of the money upon such motion was a good ground for dismission of the bill. *Dungey* v. *Angove*,
3 Br. C. C. 36.

And see tit. INTERPLEADER, p. 253, *ante*.

XLIII. INTERROGATORIES.

1. Where the interrogatories suppressed as leading were such as many counsel might have drawn without an apprehension of their being leading, and the evidence was very material, the Court gave leave to file new interrogatories to be settled by the Master. *Spence* v. *Allen*,
Pre. Ch. 493.
Gilb. E. R. 150.

2. Where, in a suit for relief and to perpetuate testimony, the interrogatories on behalf of the defendant, an infant, were suppressed as leading, the Court gave leave to exhibit new interrogatories. *Lord Arundell* v. *Pitt*, Amb. 585.

3. Where, a very material interrogatory, and one without which the depositions in the cause could not be understood, was suppressed as leading, the Court granted leave to exhibit a fresh interrogatory. *Menfill* v. *Payne*, 3 Anst. 923.

4. After the depositions under a former

commission had been seen, the Court would not suffer additional interrogatories to be exhibited under a new one, but confined the defendant to the proving exhibits, and cross-examining a person already examined for the plaintiff, but not to examine any new witnesses. *Barnsley* v. *Powell*, 3 Atk. 593.

5. Notice must be given before you can move to add new interrogatories for the examination of a defendant, on the examinations before put in being reported insufficient; such an order obtained on a motion of course is irregular, and will be discharged. *Anon*, 3 Atk. 511.

6. In the examiner's office, either party may, without application to the Court, exhibit interrogatories for further examination of the same, or examination of other witnesses. *Andrews* v. *Brown*, Pre. Ch. 386. Gilb. E. R. 42.

7. But no new interrogatories can be exhibited under a commission, without an order of Court for that purpose. *Ibid*, *Cowslade* v. *Cornish*, 2 Ves. 270.

8. New interrogatories may be exhibited for the examination of new witnesses, at any time before publication, although there has been a joint commission executed. *Lewis* v. *Owen*, Toth. 112. 1 Dick. 6.
Hayward v. *Colley*, 1 Dick. 43.

9. Where parties go before the Master, upon a reference, he is bound to receive interrogatories from both, though one of them should not have gone into any proof in the former stage of the cause. *Hough* v. *Williams*, 3 Br. C. C. 190.

10. Whether after examination put in to interrogatories, under a decree for an account, the Master can admit further interrogatories upon the ground of mistake in those first exhibited—*Quære*. *Lynn* v. *Buck*, 3 Mad. 280.

11. Plaintiff examined defendant on interrogatories before the Master, pursuant to the decree: he shall not exhibit new interrogatories, but on special application. *Bromly* v. *Child*, 1 Dick. 128.

12. But where by the decree, the parties are to be examined upon interrogatories as the Master shall direct, the Master is at liberty to re-examine the defendant upon new interrogatories at his discretion, and without an order of Court. *Cornish* v. *Acton*, 1 Dick. 149.

13. The examination of an executor, under the usual decree for an account, ought to contain an interrogatory, whether he is indebted to the testator, the debt from himself being assets. Liberty was therefore given upon the suggestion of co-defendant's legatees, without affidavit, to exhibit an interrogatory for that purpose, not to go into an account which must be the subject of a distinct bill. *Simmons* v. *Gutteridge*, 13 Ves. 262.

14. A creditor who proves before the Master, against the estate of an intestate, cannot exhibit interrogatories to the plaintiff, to discover the balance between him and the estate. *Bowen* v. *Webb*, 2 Anst. 361.

15. Objections to interrogatories settled by the Master must be taken by exceptions, not by petition. *Hughes* v. *Williams*, 6 Ves. 459.

16. General rule of the Court of Chancery in Ireland, that personal interrogatories are to be settled by the Master, if the party to be examined shall require it. 1 S. & L. 178.

XLIV. Issue or Action at Law.

(a) *Where Directed.*

1. Courts of Equity have for many years past adopted a practice, which has been extremely beneficial to the suitors; for where they see the dispute between the parties is a mere question at law, and must be ultimately determined there, instead of putting the parties to a diffuse examination of witnesses in equity, they have, by interlocutory orders, either directed an issue, or given the party liberty to bring an action within a limited time, and reserved the consideration of all further directions, till after the verdict. And after a verdict has been found, it has been the uniform practice of the Court, for the party in whose favor the verdict has been obtained, to set down the cause for the further directions reserved by such interlocutory order. *The Earl of Pomfret* v. *Smith*, 4 Br. P. C. 700.

2. Where at the hearing of a cause, a matter, not in issue, appears to the Court, to go to the very right, the Court will sometimes order an issue. *Balch* v. *Tucker*, 2 C. C. 40.

3. No issue ought to be directed to try a matter not fully put in issue in the cause; and therefore, where a bill was filed to take advantage of a forfeiture, by marrying without consent, and an issue was

directed, to try whether the party was a papist or not at the time of the marriage, the order was reversed, and the plaintiff left at liberty to amend his bill, by putting an issue in the cause, the matter intended to be tried in the said issue. *Filkin* v. *Hill*, 4 Br. P. C. 640.

4. An issue at law was directed in a matter, where the plaintiff had a proper action at law, and was under no impediment in respect of bringing such action. *Gilbert* v. *Emerton*, 2 Vern. 503.

5. Upon arguing exceptions, the Court will sometimes direct an issue to try a fact. *Kemp* v. *Mackrell*, 2 Ves. 579.

6. Issue at law directed, upon a re-hearing of exceptions taken to a decree made by commissioners of charitable uses, after that decree had been twice confirmed. *Corpus Christi College* v. *The Parish of Naunton*, 2 Vern. 507.

7. Where the facts of a case are so manifestly fraudulent, that the whole transaction may be deemed a fraud apparent, a Court of Equity ought not to direct an issue or trial at law. *White* v. *Lightburne*, 4 Br. P. C. 181.

8. Where it is unlikely that any better evidence can be had before a jury, than what is already before the Court, the Court will settle a difference in damages, by way of estimate, without sending the matter to be tried by a jury. *Lannoy* v. *Werry*, 4 Br. P. C. 630.

9. Whether a party has broken any of his covenants or not, is a matter properly triable at law; as the damages, (supposing a breach) cannot be settled without such trial. *Stafford* v. *The City of London*, 4 Br. P. C. 635.

10. In the case of a charity, the most expeditious and least expensive methods should be adopted; and where no material fact is disputed, nor any point of law arises, but what a Court of Equity may determine upon, such Court ought to determine finally, without directing an issue. *Bishop of Rochester* v. *The Attorney-General*, 4 Br. P. C. 643.

11. On a bill by the lord of a manor, praying a commission to ascertain the boundaries of a copyhold estate, an issue was directed, to try what copyhold lands were in the possession of the defendant: but on an appeal, this decree was reversed, and a commission of enquiry directed, with a previous inspection of all deeds, &c. *Rous* v. *Barker*, 4 Br. P. C. 660.

12. Issue to try and settle boundaries of two manors by a special jury, and to have a view. *Letkieullier* v. *Lord Castlemain*, 1 Dick. 46. Sel. C. C. 60.

13. An issue to try a custom of a manor, was refused, where the Court thought the evidence in support of the custom insufficient to influence a jury. *Chamberlayn* v. *Symonds*, Barn. 98.

14. Where a defendant in an inferior court admits a custom alleged by the plaintiff to a certain extent, and the plaintiff insists upon a custom beyond that extent, which the defendant denies, this is a proper subject for a trial at law: and the order of the inferior Court (the duchy court of Lancaster) to proceed to a trial on an issue specified, was accordingly affirmed. *Ord* v. *Buck*, 8 Br. P. C. 106.

15. On the hearing of an information brought for the recovery of certain mine duties, the Court of Chancery proposed to the Attorney-General an issue, to try whether the Crown, or its lessee, was by custom intitled to those duties; but the issue being refused, the information was dismissed. On an appeal, the decree was reversed, and proper issues to try the custom were directed. *The Attorney-General* v. *Wall*, 4 Br. P. C. 665.

16. A will had been destroyed by the brother of the disinherited heir, the devisee was decreed to hold and enjoy, and a trial at law was refused. *Hayne* v. *Hayne*, 1 Dick. 18.

17. Upon a bill by the heir praying an issue to try the validity of the will, it is discretionary to direct the issue. The general ground of this sort of bill is to remove terms or other impediments out of the way; and it is discretionary in those cases, either to direct an issue or prevent the terms being set up, so as to give an opportunity for the plaintiff to bring an action. *Pike* v. *Hoare*, Amb. 428. 2 Eden. 182.

And see Jones v. *Jones*, 3 Mer. 161.

18. A will of real estate cannot be set aside in Equity, without an issue at law, *devisavit vel non*. *Kerrick* v. *Bransby*, 7 Br. P. C. 437.

Pemberton v. *Pemberton*, 11 Ves. 53.

19. On a bill to inquire into the reality of deeds, on suggestion of forgery, the Court will not oblige the party to discovery, but will direct an issue to try the fact of forgery. *Brownsword* v. *Edwards*, 2 Ves. 246.

20. Where the question of right, in a suit commenced in a Court of Equity, is a mere legal question, the Court does right in sending it to law to be tried, upon a proper issue, even though the whole of the evidence is written evidence, and the question depends upon the construction of that evidence. *Collins* v. *Samrey*, 4 Br. P. C. 692.

21. A trial at law directed on motion, to try the right of stopping up or obstructing lights, and a view to be had, to see if the new buildings were on old foundations. *Ryder* v. *Bentham*, 1 Ves. 543.

S. C. Attorney-General v. *Bentham*, 1 Dick. 277.

22. There being but one witness against an answer, the Court directed an issue. *Pemby* v. *Mathew*, 2 Dick. 550.

And see Evans v. *Bicknell*, 6 Ves. 174.

23. Issue ordered to discover a witness's interest. *Stokes* v. *M'Kerral*, 3 Br. C.C. 228.

24. Plaintiff prayed a discovery, injunction, and delivery of a bill of exchange: upon the answers and evidence, the right being clear, the Court refused an opportunity of trying it at law, and decreed an immediate delivery. *Newman* v. *Milner*, 2 Ves. J. 483.

25. Upon a question as to the amount of a legacy from a doubt as to a figure, an issue was directed, instead of a reference to the Master. *Norman* v. *Morrell*, 4 Ves. 769.

26. Executor having, under a misconception of a will, at the trial of an issue upon a debt, entered into an improper compromise with the creditor, expressly subject to the approbation of the Court, was permitted to try the issue, paying the costs. *Legh* v. *Holloway*, 8 Ves. 213.

27. The right of the Court to decide upon facts without an issue, is to be exercised very tenderly. *Warden of St. Paul's* v. *Morris*, 9 Ves. 166.

28. The Court of Exchequer refused to direct an issue upon motion, though consented to, thinking it irregular. *Anon*, 2 Anst. 480.

But see contra, Attorney-General v. *Lane*, 2 Anst. 589.

29. The Court in some cases will direct an action at law to be brought, as more favourable to the party than directing an issue. *Evans* v. *Bicknell*, 6 Ves. 198.

30. The intent of directing issues is only to inform the conscience of the Court, and therefore the Court is not tied down to the same strictness of verdicts, as Courts of common law. *Richards* v. *Symes*, 2 Atk. 320.

See further p. 255, ante; and as to granting Issues in Tithe causes, p. 485, post.

(b) *Form of.*

1. The form of an issue, to try who were the co-heirs of the late Duke of Bucks. *Legard* v. *Sheffield*, 1 Dick. 87.

2. Where a party claims under marriage-articles, and settlements made in pursuance thereof, it is not sufficient to direct an issue, to try the validity of the articles only; but the issue should be extended to try the execution of the subsequent settlements. *Edgworth* v. *Swift*, 4 Br. P. C. 654.

3. An issue, to try whether a particular manor was intailed by a particular deed, is not proper, being rather a point of law than a matter of fact; or, at least, so complicated, as not to be fit for the inquiry of a jury. *Lord Blany* v. *Mahon*, 4 Br. P. C. 76.

4. Where the Court of Chancery directed a party to bring an ejectment at law, and it appeared he was only *cestui que trust*, the legal estate being in trustees, he was, for that reason, non-suited. But the Court of Chancery made the party raising the objection pay the costs of the non-suit. *Bayley* v. *Morris*, 4 Ves. 793.

(c) *Trial of.*

1. A trial at law directed to be in Easter Term then next, or the issue to be taken *pro confesso*. *Oliver* v. *Le[illegible]*, 2 C. R. 1[illegible]4.

2. A defendant neglecting to ap[illegible] an attorney for the purpose of trying an issue out of the Court of Chancery, was directed to do it in four days, or the issue to be taken as tried, and a verdict for the plaintiff. *Wilson* v. *Ginger*, 2 Dick. 521.

3. Upon an issue out of Chancery, after such issue made up, it is proper to move the Court of Chancery for costs for not going on to trial, or for a special jury, if the case requires it. *Anon*, 2 P. W. 68.

4. Plaintiff a jointress; the defendant claimed, under an intail, and had recovered part of the jointure in *Cheshire* and *Lancashire*: bill to have recompense on the eviction, on the statute of 27 H. 8. c. 10.: it stood over to consider, whether a trial at law should be directed to be tried out of the County Palatine, and all impediments to such trial removed, for that it could not be tried in the proper county, against the Earl of Derby. *The Countess of Derby* v. *The Earl of Derby*, 2 Vern. 666.

5. Where customs, sought to be established, concerned tenant-right estates, and were general through the county where the cause of suit arose, as well as the neighbouring counties, the Court directed the issue to be tried by a jury from Middlesex. *Earl Thanet* v. *Paterson*. Barn. 252.

6. Where an order directing an issue to be tried in a particular county, is affirmed upon an appeal, the Court below have afterwards no authority to direct the issue to be tried in any other county. *Lord Milton* v. *Edgworth*, 1 Br. P. C. 464.

7. A trial at bar has great weight with the Court, from the solemnity and length of examination. *The Attorney-General* v. *Montgomery*, 2 Atk. 378.

8. After two trials of an issue at the assizes, a third trial being directed, was ordered, upon application of the plaintiff, to be tried at the bar of the King's Bench, instead of the assizes; the party who applied for the trial at bar agreeing to accept of *nisi prius* costs in the event of the verdict being in his favor. *Baker* v. *Hart*, 3 Atk. 546.
Hite v. *Salter*, 2 Dick. 495.

9. Upon an ejectment by an heir in tail, the defendants cannot rest upon the judgment in the recovery, but all the proceedings must appear upon the record, at the time of trial. *Lady Shaftsbury* v. *Arrowsmith*, 4 Ves. 71.

10. Where a formal objection is taken at the trial of an action at law, directed by the Court of Chancery, and by which the trial is defeated, the Court of Chancery will make the party taking the objection pay the costs. *Bayley* v. *Morris*, 4 Ves. 793.
Wray v. *Barnis*, Peake, 69.

And see p. 256, *ante*.

XLV. LUNATIC AND IDIOT.

(a) Commission.

(1) *Issuing, Execution, and Return of.*

1. Commission of lunacy ordered against a person who was in France, but the commission to be executed in Essex, where his mansion house, and a great part of his estate, were situated. *Ex parte Southcote*, Amb. 109. 2 Ves. 401.

2. The commission of lunacy is not confined to strict insanity, but is applied to cases of imbecility of mind, to the extent of incapacity, from any cause, as disease, age, or habitual intoxication.
Ridgeway v. *Darwin*, 8 Ves. 65.
Ex parte Cranmer, 12 Ves. 445.

3. Any fair and reasonable provident application, as to the execution of a commission of lunacy, is not discouraged; but in this instance the petition, being wholly groundless, was dismissed with costs. *Ex parte Ward*, 6 Ves. 579.

4. If a commission is improperly executed, the Court will grant a new commission, as a *melius inquirendum* does not issue in lunacy.
Ex parte Roberts, 3 Atk. 6.
——— *Cranmer*, 12 Ves. 454.

5. The commissioners and jury, upon an inquisition of lunacy, have a right to inspect the person of a lunatic without an order of Court; though such inspection is seldom required, unless in cases of considerable doubt, upon the evidence of sanity: but if persons, having the custody, refuse to produce the lunatic when required, they would be made to pay costs. *Ex parte Southcote*, Amb. 111. 2 Ves. 404.

6. An Irish Peeress committed for not producing her husband, the subject of the commission, to the commissioners. *Lord Wenman's case*, 1 P. W. 702.

7. The party who is the subject of the commission, has the privilege of being present at the execution. *Ex parte Cranmer*, 12 Ves. 445.

8. The Lord Chancellor was inclined to quash the inquisition: the commission not having been executed near the place of abode, and an order, that the lunatic should have due notice, having been disobeyed. *Ex parte Hall*, 7 Ves. 261.

9. Commissioners of lunacy have a power of summoning witnesses, as incident to their office. *Ex parte Lund*, 6 Ves. 784.

10. The return to a commission of lunacy, if not in the words of the commission, must be in words equivalent: and where the incapacity does not amount to lunacy, the proper return is "of unsound mind, so that he is not sufficient for the government of himself," &c.
Ex parte Cranmer, 12 Ves. 445.
——— *Barnsley,* 3 Atk. 168, 184.

11. No special verdict ought to be returned upon a commission of lunacy. *Ex parte Cranmer,* 12 Ves. 450.

12. It is no objection to the return, that it does not state that the lunatic has or has not lucid intervals. *Ex parte Wragg,* 5 Ves. 450.

See further p. 294, *ante.*

(2) *Traverse to the Inquisition.*

1. The party against whom a commission of lunacy issued, on the different appearance he made upon a second inspection, was allowed to traverse the inquisition. *Ex parte Roberts,* 3 Atk. 7.

2. The Lord Chancellor refused to allow a party, who had been found lunatic under two inquisitions, to traverse the second. *Ex parte Barnsley,* 3 Atk. 184.

3. The pleading a traverse is exceedingly short: the party is merely to state the inquisition, take the common traverse, and the attorney joins issue. *Ex parte Wragg,* 5 Ves. 452.

4. A traverse to the return to an inquisition, finding a person lunatic, is a right by law, though the Lord Chancellor is not dissatisfied with the return upon the evidence. The order was therefore suspended for the purpose of taking the traverse. *Ex parte Wragg,* 5 Ves. 450.

5. Traverse to an inquisition finding a person lunatic, is *de jure,* not matter of favor. *Ex parte Ferne,* 5 Ves. 833.

6. Whether a mere stranger, having no interest, would be permitted to traverse an inquisition of lunacy—*Quære. Ex parte Ward,* 6 Ves. 579.

7. A person having interest under a contract with the lunatic, permitted to traverse. *Ex parte Hall,* 7 Ves. 261.

8. Not only the lunatic, but his heir also is bound upon the traverse of the inquisition. *In the matter of Roberts,* 3 Atk. 308.

See further p. 295, *ante.*

(3) *Discharge or Supersedeas.*

1. The keeping back a commission of lunacy for several years, without putting it in execution, is a contempt of the Court, and in such case the commission will be discharged with costs. *Anon,* 2 Atk. 52.

2. A petition to supersede a commission of lunacy, should always be in the name of the late lunatic. *Ex parte Stanley,* 2 Ves. 25.

3. To supersede a commission, it is not necessary that the mind should be restored to its original state, competence to common purposes, as to make a will of personal estate, is sufficient: but the absence of the disorder, especially if of a dangerous tendency, must be satisfactorily proved by the evidence of persons having competent knowledge of the whole subject, not only as to the present state of the party, but with reference to all the former evidence. *Ex parte Holyland,* 11 Ves. 10.

4. Upon the return of the traverse to the inquisition of lunacy, finding that the party was a lunatic at the time of her marriage, and at the time of taking the inquisition, but at the time of the verdict was not a lunatic, the commission was superseded; but the Lord Chancellor doubted the propriety of such a double issue. *Ex parte Ferne,* 5 Ves. 832.

(*b*) *Committee.*

(1) *Appointment and Removal.*

1. The old rule that the next of kin of a lunatic, if entitled to his estate upon his death, was not to be committee of his person, is not now adhered to. *Ex parte Cockayne,* 7 Ves. 591.

2. The brother of the lunatic was appointed committee of the person and estate, but with restriction not to receive any part of the estate; and a reference was ordered to the Master to appoint a receiver. *Ex parte Billinghurst,* Amb. 104.

3. The Court will not appoint the next heir as the committee of his person. *Ex parte Ludlow,* 2 P. W. 638.

4. A feme covert may be appointed committee of the person. *Ex parte Kingsmill,* 3 P. W. 111 (*u*).

5. Where the lunatic was a female, an applicant of the same sex was preferred as a committee, *Ex parte Ludlow,* 2 P. W. 638.

6. If the lunatic be a married man, his

wife will be appointed committee. *Lord Wenman's Case*, 1 P. W. 702.

7. The Court will not appoint a Master in Chancery to be committee of a lunatic's estate. *Ex parte Fletcher*, 6 Ves. 427.

8. And the Court refused to appoint as committee a person who had agreed to give part of the savings of the profits to another person. *Ibid.*

9. Bankruptcy of the committee of the person of a lunatic is a sufficient cause for removing him on account of the fund for maintenance; but the custody of the person will not be changed, if the Master finds it proper, with regard to the comfort of the lunatic, that it should continue. *Ex parte Mildmay*, 3 Ves. 2.

10. One of the defendants was a lunatic, and the committee of his estate, being also a defendant, refused to answer for the lunatic; application should be made to the Great Seal, to appoint a new committee of the estate. *Lloyd* v. ——, 2 Dick. 460.

11. Upon an application that defendant might procure a new grant of a committeeship, or the Master appoint a guardian, the Court directed the party to apply to the Great Seal to appoint a committee; observing there was no instance of the Court interfering, where a party had been found lunatic under a commission of inquiry. *Murray* v. *Frank*, 2 Dick. 555.

See further, p. 295, *ante*.

(2) *Security of.*

1. The Lord Chancellor will, under circumstances, order the bond of a committee to be delivered up, and a less security executed. *Ex parte Northleigh*, 2 Ves. 673.

2. Or order the security to be changed by giving a greater; but such an application is not to be encouraged, as if the lunatic recovers he may have no remedy on a concealment of property. *Ex parte Pereria*, 2 Ves. 674.

(3) *Accounts and Allowances.*

1. The Court will not allow a committee to pass his accounts, without inquiry as to what money he kept in his hands from time to time; but upon suggestion that the committee had expended more than the allowance, the Master was to be at liberty to state special circumstances. *Ex parte Catton*, 1 Ves. J. 156.

2. The brother of the lunatic, the committee of the estate, had managed it nine years previous to the commission: he was ordered to pay interest upon savings out of the estate, although he had made no use of them. *Ex parte Chumley*, 1 Ves. J. 156.

3. The committee of a lunatic will not be allowed any thing out of the estate for his care and trouble. *Anon*, 10 Ves. 103.
In the matter of Annesley, Amb. 78.

4. But where there was great trouble in the management of the estate, the Court increased the allowance for maintenance of the lunatic, with a view to answer the allowance for trouble. *In the matter of Annesley*, *Ibid.*

5. Where no one could be procured to act as committee, a receiver was appointed with a salary; but to be considered and give security as a committee. *Ex parte Warren*, 10 Ves. 622.

6. But where the committee had not passed his accounts regularly, the Court refused him costs, although there was no fraud. *Ex parte Clarke*, 1 Ves. J. 296.

7. The Court refused to allow the committee money which he had expended, without a previous order, in repairs, although the repairs were reported necessary. *Anon*, 10 Ves. 104.
Ex parte Marton, 11 Ves. 397.
——— *Hilbert*, *Ibid.*

8. In pasing the accounts of a lunatic's estate, notice should be given to the parties next entitled, to attend the Master, to check the accounts; but if they attend, they will not be allowed their costs. *Ex parte Wright*, 2 Ves. 25.

(c) *Custody of.*

1. Vagrants only, and not persons of rank or condition, are within the act that empowers justices of peace to take care of lunatics. *Anon*, 2 Atk. 52.

2. Where a lunatic was entitled to a jointure out of her husband's estate in Scotland, and the nearest relation of the husband was carrying her to Scotland, the Court sent a messenger to stop the lunatic, and then ordered a commission against her. *Lady Marr's case*, Amb. 82.

3. Where, after a verdict, a committee is appointed, but the custody of the lunatic is withheld from him, it is not necessary to issue a *habeas corpus*, but the Court will make an order upon the person in whose custody he may be, to deliver up

the person of the lunatic to the committee. *Ex parte Cranmer*, [illegible] Ves. 445.

4. Marriage of a lunatic does not supersede the commitment, so as to take the custody out of the committee. *Mrs. Ashe's case*, Pre. Ch. 203.

5. A devise by a father, of the custody of his lunatic son, who is of age, is void. *Ex parte Ludlow*, 2 P. W. 638.

(*d*) *Maintenance.*

1. The Court may, at its discretion grant an allowance out of a lunatic's estate, though it amounts to the whole yearly value. *Sheldon* v. *Fortescue Aland*, 3 P. W. 110.

2. A lunatic is to have every comfort his situation and fortune will admit of, without any regard to the next of kin or expectants. *Ex parte Chumley*, 1 Ves. J. 296.
Dormer's Case, 2 P. W. 262.
Ex parte Baker, [illegible] Ves. 8.

3. Reference to the Master to ascertain what maintenance was reasonable for the lunatic's son. *Foster* v. *Marchant*, 1 Vern. 263.

4. Reference to a Master, to see what was proper to be allowed for the maintenance of a person of insane mind, no commission of lunacy having issued, was granted after consideration. *Machin* v. *Salkeld*, 2 Dick. 634.

5. Upon a petition, praying a reference to the Master as to the state of the plaintiff and her fortune, and directions for her maintenance, the property being too small to bear a commission of lunacy, an order was made upon affidavits, without reference, for payment of the dividends for the two ensuing quarters; the Court refused to carry the order further, but intimated that the parties might apply again by petition. *Eyre* v. *Wake*, 4 Ves. 795.

(*e*) *Management and Disposition of his Property.*

1. Where the lunacy of a person is in question, the Court will make a provisional order as to his effects, till the point of the lunacy is determined. *In the matter of Heli*, 3 Atk. 635.

2. The Lord Chancellor may make an order as to the lunatic's affairs, after the death of the lunatic. *Ex parte Grimstone*, Amb. 706.

3. The Lord Chancellor sometimes exercises authority over the estates of lunatics in Scotland, when the lunatics themselves are in England. *Ex parte Marchioness of Annandale*, Amb. 80.

4. A committee of a lunatic's estate may cut down timber for repairs. *Ex parte Ludlow*, 2 Atk. 407.

5. The Court will allow part of the personal estate of a lunatic to be laid out in repairs, and even upon improvements of his real estate. *Sergeson* v. *Sealey*. 2 Atk. 414.
And see Oxenden v. *Lord Compton*, 2 Ves. J. 69.

6. The Lord Chancellor cannot by an order in lunacy make an absolute title to the lunatic's leasehold property. *Ex parte Dikes*, 8 Ves. 79.

7. The Lord Chancellor cannot, upon a petition in lunacy, order part of the lunatic's real estate to be sold for payment of his debts, to prevent a bill by the creditors. *Ex parte Smith*, 5 Ves. 556.

8. The Court will not order the payment of the debts of a lunatic, out of funds not within the reach of creditors, except it is for his accommodation, and where he will have sufficient left for his maintenance. *Ex parte Hastings*, 14 Ves. 182.

9. Order may be obtained, after the death of a lunatic, for payment of a debt, viz. an attorney's bill upon a retainer overreached by the lunacy, and no report of debts, if the petition is presented in the life of the lunatic. But the debt must be established at law. *Ex parte M'Dougal*, 12 Ves. 384.

10. On a question between the real and personal representative respecting the produce of timber, cut by order of Court, and produce paid into the Bank, the Court, on account of its importance, and the difficulty of reversing an order, made upon petition in lunacy, ordered a bill to be filed, *Ex parte Bromfield*, 1 Ves. J. 453. 2 Dick. 762. 3 Br. C. C. 510.
And see Wigg v. *Tiler*, 2 Dick. 552.

11. But if on the death of a lunatic, there is no dispute as to who is the heir and as such entitled to the lands of the lunatic, the Court will, on petition, order the committee to give up the possession, and not put the heir to his ejectment. *In the matter of Fitzgerald*, 2 S. & L. 439.

See further, p. 296, *ante*.

(*f*) *Trustee.*

1. A trustee found a lunatic by the

Master's report cannot be ordered to convey under the statute 4 G. 2. c. 10. unless a commission of lunacy has issued. *Ex parte Gillam,* 2 Ves. J. 587.

2. But a person found a lunatic by a competent jurisdiction abroad, where he resides, will be considered a lunatic here. In this case the party had been found *non compos* by the Senate at Hamburgh, where a curator or guardian was assigned him, and no commission was taken out in this country; but he was declared a mortgagee within the stat. 4 Geo. 2. c. 10, and he and the curator were ordered to convey. *Ex parte Otto Lewis,* Amb. 80. 1 Ves. 298.

3. Whether stat. 4 G. 2. c. 10. extends to lunatics at large, or confined to such only of whom the custody has been granted under the Great Seal—*Quære. Ex parte Marchioness of Annandale,* Amb. 80.

4. Stock ordered to be transferred under the statute 36 G. 3. c. 90, the trustee being of unsound mind, though no commission had issued, and the Master had actually refused to transfer; the refusal proceeding from mere weakness of mind. *Simms* v. *Naylor,* 4 Ves. 360.

5. But a lunatic abroad, under a judicial proceeding, in nature of a commission of lunacy, is not within the statute 36 G. 3. c. 90. *Sylva* v. *Da Costa,* 8 Ves. 316.

See further p. 297, *ante.*

XLVI. Master.

(*a*) *Reference to.*

(1) *Where directed, generally.*

1. An inquiry before the Master will not be directed at the hearing of the cause, unless a ground for it is laid in the pleadings. *Holloway* v. *Millard,* 1 Mad. 414.

2. Master to inquire if a party had attained the age of twenty-one. *Dinely* v. *Foot,* 1 Dick. 401.

3. The date and general purport of wills, &c. under which the plaintiff claimed, being only stated in the bill by way of reference, it was referred to the Master to state a case of the rights claimed by the plaintiff, under the several instruments. *Pauncefort* v. *The Earl of Lincoln,* 1 Dick. 362.

4. Reference to the Master to inquire whether the plaintiffs were natural children of the testator, refused; there having been a former reference sufficiently large to admit that circumstance to have been stated. *Grave* v. *Earl of Salisbury,* 1 Br. C. C. 425.

5. On a question whether an interest in a heritable bond charged on lands in Scotland will pass by will, referred to the Master to report the law of Scotland. *Glover* v. *Strothoff,* 2 Br. C. C. 33.

6. Questions of intention to be determined by the Court, but not proper for the Master. *Pitt* v. *Lord Camelford,* 1 Ves. J. 83.

7. Devise of stock for life, with absolute power of appointment, if no children: reference to the Master to inquire respecting a child on ground of suspicion. *Sculthorp* v. *Burgess,* 1 Ves. J. 91.

8. A work alleged to be a piracy, referred to the Master. ——— v. *Leadbetter,* 4 Ves. 681.

9. It has never been reduced to a general rule, that only one bill shall be depending where a number of creditors are concerned; and therefore where two bills were brought by different sets of creditors, to carry into execution a trust term created for payment of debts, an order to refer them to a Master to certify which would be most for the creditor's benefit, was discharged. *Anon,* 3 Atk. 602.

10. Where there are two suits brought by different *prochein amies,* the Court will refer them to see which is the most proper; because the Court, as guardian of infants, will take care what is done shall be for their benefit. *Anon,* 3 Atk. 603. *Gage* v. *Lord Stafford,* 1 Ves. 445.

11. But except in the case of infants, the Court will not grant a reference to a Master, whether two bills are for the same matter, if the bills are in different persons' names. *Gage* v. *Lord Stafford,* 1 Ves. 544.

12. Where the defendant pleads a former suit depending, for the same matter, it may be referred to the Master, without being set down to be argued. *Daniel* v. *Mitchell,* 3 Br. C. C. 544. *S. C. Anon,* 1 Ves. J. 484.

13. A reference, whether two suits are for the same matter, is obtained by plea in Chancery, as in the Exchequer; and not by motion. *Murray* v. *Shadwell,* 17 Ves. 353.

14. Mortgagor, defendant to a bill of foreclosure, being in contempt, cannot obtain the reference on motion, under the

statute 7 Geo. 2, c. 20. *Hewitt* v. *M'Cartney,* 13 Ves. 560.

15. The defendant to a bill for an account, cannot, upon motion immediately after answer, have a reference to the Master by analogy to the case of a mortgage by statute 7 Geo. 2. c. 20, and the case of a specific performance according to the present settled practice. *Eldridge* v. *Porter,* 14 Ves. 139.

16. The bill praying an inquiry into the title, and a specific performance; on the defendant's motion, after answer, an inquiry was directed as to the title, at what time the abstract was delivered, and whether it was sufficient; but the Court would not decide upon any matter of relief. *Moss* v. *Matthews,* 3 Ves. 279.

17. After answer submitting to perform the contract, if a good title can be made, a reference may be directed on motion whether a good title can be made, and whether it appears upon the abstract. *Wright* v. *Bond,* 11 Ves. 39.

18. But this rule is limited to the cases in which the title only is disputed. *Gompertz* v. ———, 12 Ves. 17.

And see p. 461, *post.*

19. It is a general rule that the Court will not decide upon a title, without a reference to the Master, unless unequivocally and without fraud or surprise waved; a plaintiff seeking a specific performance of a contract, being entitled to the opportunity of making out a better title before the Master, and the defendant having a right to further inquiry beyond the objections arising on the abstract; upon the principle, that the bill seeks relief beyond the law. *Jenkins* v. *Hiles,* 6 Ves. 646.

(2) *For Scandal, Impertinence, or Insufficiency.*

1. A defendant, not served with process, may appear gratis, and refer the bill for impertinence. *Fell* v. *Christ College,* 2 Br. C. C. 279.

2. After answer, the Court refused to allow a bill to be referred for scandal. *Lady Abergavenny* v. *Lady Dowager Abergavenny,* 2 P. W. 312.

3. After an order for time to answer, the defendant cannot refer the bill for impertinence; but a bill may be referred for scandal at any time. *Ferrar* v. *Ferrar,* 1 Dick. 173.

Anon, 2 Ves. 631.

Anon, 5 Ves. 656.

4. The defendant obtained an order to refer the bill for impertinence, after he had twice prayed time to answer; the Chancellor ordered, that he should procure a report within four days, or the order be discharged. *Anon,* Mos. 71.

5. A stranger to the record cannot move to refer a bill for scandal. *Anon,* 4 Mad. 252.

But see Coffin v. *Cooper,* 6 Ves. 514.

6. It is a motion of course to refer a bill or answer for impertinence or scandal. *Ex parte Le Heup,* 18 Ves. 223.

7. An answer of one defendant may be referred for scandal, on the motion of another defendant. *Coffin* v. *Cooper,* 6 Ves. 514.

8. There may be a difference between a plaintiff and defendant referring for impertinence, but the ground of the difference does not apply to scandal. *Ibid.*

9. Motion to discharge an order, to refer an answer for impertinence, obtained after notice of motion to dismiss the bill, refused. *Kinworthy* v. *Allen,* 1 Br. C. C. 400.

10. An answer cannot be referred for impertinence, after a reference for insufficiency. *Pellew* v. ———, 6 Ves. 458.

11. An answer cannot be referred for insufficiency, pending a reference for impertinence. *Goodinge* v. *Woodhams,* 14 Ves. 535.

Thomas v. ———, 14 Ves. 537 (*n*).

Lacy v. *Homby,* 2 V. & B. 293.

12. Exceptions to a joint answer of two defendants, one of whom dies; exceptions referred, as to the answer of the survivor only. *Lord Herbert* v. *Pusey,* 1 Dick. 255.

13. Motion, as of course, to refer it to the Master, to see whether the answers put in to three former amended bills, were not sufficient answers to a fourth amended bill, refused. *Taylor* v. *Rhiddec,* 2 Dick. 582.

14. With the exception of the cases, in which it is settled as general law, that the party is not to answer a particular circumstance, as that he is not to criminate himself, or the case of purchaser for a valuable consideration, the Court does not generally trust the Master with the determination of how much of an answer, considered as a plea, is a good defence. *Rowe* v. *Teed,* 15 Ves. 378.

15. All references of answers for in-

sufficiency, or for scandal and impertinence, or for impertinence, made in the same cause, shall be made to the same Master. *General Order, 10th March,* 1818, 1 Wil. 309. 1 Swan. 128. 3 Mad. 317.

16. Where answers of defendants have been referred for scandal and impertinence, or for impertinence, and the Court shall afterwards refer the same for insufficiency, the latter reference shall be made to the same Master as the former. *Ibid.*

17. A discharge carried in before a Master, may be referred for impertinence; and a motion for that purpose is as much of course as for a reference of a bill or answer. *Price* v. *Shaw,* 2 Cox. 184.

18. Order to refer back to the Master an examination taken under the direction in a decree for the examination of the parties, to see whether it was sufficient. *Purcell* v. *M'Namara,* 12 Ves. 166.

19. Any proceeding may be referred for scandal and impertinence, as a state of facts before the Master, and affidavits in bankruptcy. *Erskine* v. *Garthshore,* 18 Ves. 114.

20. Affidavit referred for scandal. *Jobson* v. *Leighton,* 1 Dick. 112.

21. Upon motion of the defendant, the Court referred the affidavit of her own solicitor for impertinence. *Philips* v. *Philips,* 2 Atk. 391.
S. C. Philips v. *Muilman,* 1 Dick. 113.

22. Where interrogatories are impertinent to the matter, they ought to be suppressed. *Sandford* v. *Paul,* 1 Ves. J. 400.
S. C. 2 Dick. 750.

23. Depositions of witnesses, examined to the credit of other witnesses, referred for scandal and impertinence. *Bray* v. *Bulkby,* 1 Dick. 288.

24. Depositions may be referred for scandal, upon motion of course, without notice. *Eastham* v. *Liddell,* 12 Ves. 201.

25. Interrogatories and depositions may be referred for scandal and impertinence. *Cocks* v. *Worthington,* 2 Atk. 235.

26. But not for impertinence alone without scandal. *White* v. *Fussell,* 19 Ves. 113.
And see Pyncent v. *Pyncent,* 3 Atk. 557.

(3) *Removal of.*

1. Reference removed from one Master to another, on the allegation of counsel, that he found the former in such a state from his advanced age and infirmity, that it was not proper to go into the business before him. *Anon,* 9 Ves. 341.

(4) *Proceedings upon.*

1. Where parties go before a Master on a reference, he must receive interrogatories from both, though one may not have gone into proof before. *Hough* v. *Williams,* 3 Br. C. C. 190.

2. Evidence not to be received by the Master, after he has settled his report. *Thompson* v. *Lambe,* 7 Ves. 587.

3. Evidence in the cause, though not read at the hearing, may be received by the Master. *Smith* v. *Althus,* 11 Ves. 564.

4. Upon a question of title in a suit for specific performance, further evidence may be produced on both sides before the Master. *Vancouver* v. *Bliss,* 11 Ves. 458.

5. Though a judgment creditor cannot stir at law without a *scire facias,* before the Master it is sufficient to produce the record of the judgment, and swear the debt is due. *Burroughs* v. *Elton,* 11 Ves. 36.

6. In some cases an answer may, on application to the Court of Chancery, be reformed, and in some instances be taken off the file; but that can only be done by special application to the Court. It is not competent to any Master to do that, but it must be done by the authority of the Court itself. *East India Company* v. *Keighley,* 4 Mad. 27.

7. An order may be obtained that the Master should proceed *de die in diem. Fox* v. *Mackreth,* 3 Br. C. C. 45. 1 Ves. J. 72.

8. To enable a Master to proceed *de die in diem,* there should be an order for him to be at liberty so to do; and the order, when made, is not imperative upon the Master, but subject to his discretion. *Purcell* v. *M'Namara,* 11 Ves. 362.

For Proceedings before the Master upon matter of account, See Div. II. *ante; and for Examination of Witnesses before the Master,* Div. XXX. *ante.*

(5) *Waver of.*

1. By excepting to an answer, a reference for impertinence is waved; also the setting a plea down for argument is a waver of a previous reference of the same plea for impertinence, notwithstanding the defendant has attended the Master upon it. *Dixon* v. *Olmius*,
1 Cox, 412.

2. A reference of an answer for impertinence, is waved by a subsequent reference for insufficiency. *Pellew* v. ——,
6 Ves. 456.

3. Party may wave an inquiry directed for his benefit. *Willan* v. *Willan*,
19 Ves. 594.

(*b*) *Master's Report.*—(1) *Form of.*

1. Schedules of accounts, referred to in the Master's report, must be annexed to, and filed with the report, and not entered in a book, and kept in the Master's office, as was attempted in this case. *Smith* v. *Smith*, 2 Dick. 789.

2. The reports of the Masters in Chancery, are only to state bare matters of fact. *Duchess of Marlborough* v. *Sir Thomas Wheat*, 1 Atk. 454.

3. The Master, in taking an account, may state special matter, without an express direction in the decree so to do. *Anon*,
2 Atk. 621.

4. Where the Master stated, in his report, that he had disallowed a certain sum, not upon the merits, but because the complex nature of the claim demanded a different mode of investigation from that which could be had before him; the Court held the Master was right in stating his reason for the disallowance, although not called upon by the decree to state any special matter. *Champernowne* v. *Scott*,
4 Mad. 209.

5. Motion may be made for a separate report, and proceedings *de die in diem*. *Fox* v. *Macreth*, 3 Br. C. C. 45.
1 Ves. J. 69.

6. A separate report directed of what was due to a doweress, without entangling her in a general account of incumbrances. *Eccleston* v. *Berkley*,
Ridg. Rep. T. Hard. 253.

7. When a surplus, to be distributed, is an uncertain sum, the Master ought to report the shares in aliquot parts, not in money. *Attorney-General* v. *Haberdashers' Company*, 1 Ves. J. 295.

8. Upon a reference to the Master as to the fact of a person's death, the report only stating the circumstances, viz. absence abroad fourteen years, without any account of him, but not drawing the conclusion. It was referred back to the Master to state whether he was dead at the time, when administration was granted; especially as two years more had elapsed since the report. *Lee* v. *Willock*,
6 Ves. 605.

9. Where some tenants entered into an agreement to stand by others of the tenants, who are made defendants to a suit, brought against them by the lord; upon consent, the Court will direct, that the agreement shall be annexed by way of schedule to the Master's report. *The Earl of Thanet* v. *Paterson*,
Barn. 255.

10. A motion cannot be made for the opinion of the Court, to obviate difficulties of the Master as to the form of his report. *Agar* v. *Gurney*, 2 Mad. 389.

11. When some exceptions to an answer are overruled, and others allowed, the Master should report as to which exceptions are allowed, and which disallowed. *Agar* v. *Gurney*, 2 Mad. 389.

12. The practice of the Master's office to report an answer insufficient, generally, upon establishing one exception, is altered, and the Master must now give his judgment on each exception. *Rowe* v. *Gudgeon*, 1 V. & B. 331.

13. The Master in reporting an examination impertinent must specify in what particulars. *Anon*, 3 Mad. 246.

(2) *Making.*

1. The Court directed the Master forthwith to make his certificate or report of his approbation of the draft of a conveyance which he was to settle in order that the party might except thereto. *Lloyd* v. *Griffith*, 1 Dick. 103.

2. Upon a motion, where a party would not attend the Master, for an order upon the Master to make his report, the Lord Chancellor refused to make that order; inferring, that the Master had some reason for it: and his Lordship referring to the case of *Thompson* v. *Lambe*, expressed a wish, that the Masters would be strict upon those who would not attend them; and make reports *ex parte;* adding, that the Court would always support them in such cases.
7 Ves. 588, (*n*).

3. Where there is a reference to the Master in lunacy, he may make his report though the lunatic be dead. *Ex parte Armstrong,* 3 Br. C. C. 238.

4. Where the reference was to tax costs, and the party in whose favor they were given died, the Court ordered the Master to sign his report. *Anon,* (*cited*) 3 Ves. 197.

5. The Court of Exchequer will not direct the Deputy Remembrancer to proceed to make a general report, until the previous orders for separate reports are regularly disposed of; although he have before him a full state of facts. *Sir Watkin Lewes* v. *Morgan,* 3 Price, 175.

(3) *Filing.*

1. It is sufficient if a Master's report be filed before any proceedings had thereon; though not within four days after it is made. *Sir John Eyles* v. *Ward,* 2 P. W. 517.

(4) *Confirming.*

1. A party cannot move upon a Master's report, or bring the cause on for further directions till the report is confirmed. *Smith* v. *Reynolds,* Mos. 71.

2. Where the last seal continued three days, and computing the third day according to the day of the month, the time would be expired for making a report absolute; yet the Court held it but a continuance of the first day, and therefore refused the motion. *Anon,* 1 P. W. 522.

3. Motion to confirm a report *nisi,* held regular, though made on the same day the report was filed. *Eyles* v. *Ward,* 2 P. W. 518.

4. Filing exceptions, without setting them down to be argued, is no cause against confirming a report. *Hall* v. *Mulliner,* 2 Dick. 604.
Abel v. *Nodes,* 2 Cox, 169.
2 Dick. 730.

5. After an order for confirming the report *nisi,* filing exceptions, and making the deposit with the register, are no cause to prevent that order being made absolute; unless an order for setting down the exceptions to be argued is obtained, which may be done either by the plaintiff or defendant. In this case the order confirming the report was discharged on payment of costs. *Gildart* v. *Moss,* 4 Ves. 617.

6. A Master's report of what was due to a mortgagee for principal, interest, and costs, was confirmed *nisi,* and by the register's minutes, at a subsequent seal in the same cause, taken down order absolute, but never entered; on the register's refusing to do it, an application for an order *de novo.* *Anon,* 3 Atk. 521.

7. After final reports of costs &c. nothing remaining but application of the fund, ordered, that service on the Clerks in Court of the defendants, should be good service, in order to confirm the report, on motion and affidavits that some lived in the East and West Indies, and others in different parts of this country, though there were only five defendants. *Jackson* v. ——, 2 Ves. J. 417.

8. It is irregular to confirm reports, as to maintenance, on motion. *Greenwell* v. *Greenwell,* 5 Ves. 199.

9. It is not usual to confirm reports of receiver's accounts. *Cowper* v. *Earl Cowper,* 2 P. W. 729.

10. Report of the Master, concerning trustees, approved of by him, does not require confirmation. *Latimer* v. *Clare,* 1 Anst. 57.

11. It is the established practice of the Court of Exchequer, that if a defendant conceives himself aggrieved by a report, he must file exceptions thereto, and such exceptions must be set down to be argued in Court. But if no exceptions are taken, the Court confirms the report of course, and thereupon gives the proper directions. *Kaye* v. *Bruere,* 2 Br. P. C. 420.

12. Leave must be moved for, to file exceptions to the Deputy Remembrancer's report of title; and if that be not done, the motion to confirm the report is made absolute in the first instance. *Eyton* v. *Dicken,* 4 Price, 303.

13. But when the order to confirm the report is moved for, the purchaser may shew exceptions *instanter* against the motion. *Ibid.*

14. Where the Master's report exceeded his authority, by going out of the subject of reference, *semble* that parties will not be bound by the confirmation of the report. *Lewis* v. *Loxam,* 1 Mer. 179.

15. On a petition, praying to confirm a report and consequential directions, a party cannot, without presenting a counter petition, shew cause against the confirmation, except upon grounds appearing

on the face of the report. *Brodie* v. *Barry*, 1 J. & W. 470.

(5) *Reviewing and Amending.*

1. Part of the decretal order, directing an allowance to the defendant, was omitted in the register's book, and the Master in consequence refused the defendant's claim; but on exceptions the allowance was made. *Tredcroft* v. *White*, 3 C. R. 72.

2. A mistake in a report, made seven years before, and inrolled, ordered, upon certificate of the Master as to the mistake, to be amended, and the docketting of the inrolment to be altered accordingly. *Yow* v. *Townsend*, 1 Dick. 59.

3. Where the error in a Master's report is owing to a party's not laying a material piece of evidence before him, the Court will not direct him to review his report, but upon the exceptant's giving up his deposit. *Hedges* v. *Cardonnell*, 2 Atk. 408.

4. Petition, that the Master should review his report, after exceptions, taken thereto, argued, and the report confirmed by the judgment of the Court, refused. *Hawkins* v. *Day*, 1 Ves. 189. 1 Swan. 158, (*n*).

5. The Master was ordered to review his report after confirmation. *Turner* v. *Turner*, 1 Dick. 313. 1 Swan. 157, (*n*).

6. It is not competent to the Lord Chancellor to order the Master to review a report, confirmed and followed by a decree of the Master of the Rolls, containing consequential directions, so long as that decree stands. *Turner* v. *Turner*, 1 Wil. 471. 1 Swan. 154.

7. After the confirmation of a report, a review will not be ordered, unless on a very strong case, and objections affecting the substance of it will not be permitted; but mere mistakes may be rectified. *Turner* v. *Turner*, 1 J. & W. 39.

8. Reference to the Master to review his report, in order to give liberty to take objections, for the purpose of grounding exceptions. *Vallence* v. *Weldon*, 1 Dick. 290.

9. After the inrolment of a decree, errors appearing upon the face of schedules to the Master's report were corrected, upon motion, without a bill of review. *Weston* v. *Haggerston*, Coop. 134.

XLVII. Messenger.

1. A motion for a messenger, is now a motion of course, though formerly the Court allowed messengers to those particular jurisdictions only where the sheriff had the amercements themselves, but the rule now is to send a messenger into every county, generally, without any restriction. *Anon*, 2 Atk. 507.

And see as to the former practice,
Anon, 1 Vern. 116.
Gibbs v. *Cotton*, 1 Vern. 154.
Anon, 2 P. W. 301.

2. Upon the return of *cepi corpus* upon an attachment for non payment of costs, a messenger was ordered. *Anon*, Gilb. E. R. 84.

3. After *cepi corpus* returned, the plaintiff cannot move that the sheriff may bring in the body; but for a messenger, and afterwards a serjeant at arms. *Wilkinson* v. *Belsher*, 2 Br. C. C. 181.

4. Order for a messenger against a defendant in contempt for want of an answer. Defendant put in an answer, which was reported insufficient: this being as no answer, the messenger must proceed to execute the former order. *East India Company* v. *Dacres*, 1 Cox, 343.

5. Return to an attachment for want of an appearance "*cepi corpus*," but from illness and infirmity she could not be removed; a messenger ordered. *Miles* v. *Lingham*, 7 Ves. 231.

6. After an attachment against an infant for want of an appearance, the proper course is a messenger to bring the infant into Court to have a guardian assigned. *Eyles* v. *Legros*, 9 Ves. 12.

7. When a defendant, residing in the county palatine of Lancaster, is attached for want of an answer, and *cepi corpus* returned by the sheriff, the next proceeding is to move for a messenger, upon the return of *cepi corpus* to the attachment, and afterwards for a sequestration; but it is irregular to move for a *habeas corpus*. *Holme* v. *Cardwell*, 3 Mad. 114.

8. Where an order for a messenger has been issued against a sheriff for contempt, in not returning an attachment against a defendant for want of an answer, (other attachments having been issued before), it is peremptory, and the Court will not stay the order, although it go to affect a sheriff not in office at the time of the alleged original neglect, nor will they consent to enlarge the time allowed by the order. *Thomas* v. *Matthias*, 2 Price, 32.

9. Where a defendant has been held to bail on an attachment for contempt, in

not appearing to a subpœna *ad respondendum*, the Court will not grant a messenger, if bail have been given to the sheriff; because the plaintiff has a remedy on the bail bond, although the penalty (£40) be, in almost all instances, very inadequate to the occasion, if the condition should be broken. *Birdwood* v. *Hart*, 6 Price, 32.

And see p. 388*, *ante*.

XLVIII. Motion.

(*a*) *Notice of.*

1. A motion, founded on an affidavit of facts, cannot be made without previous notice to the other side. *Harrison* v. *Delmont*, 1 Price, 117.

2. But under special circumstances, the Court will, in an advanced period of the term, require short notice to be accepted for the next day. *S. C.* 1 Price, 118.

3. Motion to sell furniture, under a sequestration for not performing a decree, must be on notice. *Mitchell* v. *Draper*, 9 Ves. 208.

4. Motion not to be postponed, so as to affect the right to notice. *Coffin* v. *Cooper*, 11 Ves. 600.

5. Notices of motion, on behalf of one suing *in formâ pauperis*, must be signed by the Clerk in Court. *Gardiner* v. ———, 17 Ves. 387.

6. Service of defendant's Clerk in Court with notice of motion, that he might stand committed for breach of an injunction, ordered to be good service. *Rugg* v. *Floyer*, 2 Dick. 478.

7. Notice of motion, given by one not allowed to act as a solicitor, not good.—*Ex parte Sir Richard Grosvenor*, 3 P. W. 103.

8. Notice of motion on Saturday must be given for Tuesday, not Monday. *Maxwell* v. *Phillips*, 6 Ves. 146.

9. A notice of motion for Monday, the 12th January, "being the first seal before Hilary term," is good notice for the first seal, though held on Thursday, the 15th January. *Smith* v. ———, 1 Swan. 10.

10. Every notice of motion, intended to be made before his honor the Vice Chancellor, upon matters relative to which he is authorised to make any order or orders, shall express that the motion is intended to be made before his honor the Vice Chancellor, and such motions shall be made before his honor the Vice Chancellor accordingly; but this without prejudice to any motions relative to such matters made by consent, the notice of which shall not express such intention; and without prejudice to any motion being made before his honor the Vice Chancellor, by direction of the Lord Chancellor; and without prejudice to the Lord Chancellor making any orders upon motions, which the Lord Chancellor may think fit to permit to be made before him, although the notice of motion shall have expressed that it was intended to be made before his honor the Vice Chancellor. *General Order.* 13*th December*, 1814. 2 V. & B. 419.

(*b*) *Where and how made.*

1. A motion cannot be made upon a Master's report, till it is confirmed. *Smith* v. *Reynolds*, Mos. 69.

2. A motion cannot be made on a decretal order, till it is passed with the register. *Ibid.*

3. The Court will not determine matters in a summary way, upon motion, that have been reserved between parties, till after the Master has made his report. *Cooke* v. *Gwyn*, 3 Atk. 689.

4. The Court will not upon motion make an order which will decide the merits of the cause. *Like* v. *Beresford*, 3 Br. C. C. 366.

5. In a suit instituted for the dissolution of a partnership, it being clear on the bill and answer that some party is entitled to a dissolution, a sale of the partnership property may be directed on motion. *Crawshay* v. *Maule*, 1 Wil. 181. 1 Swan. 506.

6. It is in equity very common to decide a question on motion, where all the facts appear upon the bill and answer, and there is nothing in dispute but the law of the Court. *Revel* v. *Hussey*, 2 B. & B. 286.

7. Point argued, by leave of the Court, on motion to vary minutes, though irregular. *Perry* v. *Philips*, 1 Ves. J. 251.

8. Where the bill seeks relief, as well as discovery, the Court will not upon motion aid the plaintiff in proceeding at law without the authority of the Court. Therefore in such cases, the Court refused to order the defendant to produce deeds, &c. at the trial of an ejectment. *Aston* v. *Lord Exeter*, 6 Ves. 288.

9. And in such case, the Court on mo-

tion also refused to order that an outstanding term should not be set up by the defendant against an ejectment by plaintiff. *Hylton* v. *Morgan*, 6 Ves. 293.

10. The Court will not, on motion, order temporary bars to be waved on a trial of ejectment. *Byrne* v. *Byrne*, 2 S. & L. 537.

11. There are no precise boundaries between motions or petitions, as they are applied to carry into effect decrees or orders, so as to exclude the discretion of the Court to grant or refuse them. In general, such motions should be confined to cases where the order sought arises out of recent proceedings, concerning which there is no doubt, so as that the adverse party may be supposed perfectly conusant of all the steps and proceedings in the cause, without their being recited in a petition. *Lord Shipbrooke* v. *Lord Hinchingbrook*, 1 Ves. 393.

12. Money will not be paid out of Court upon motion. *Ibid.*

13. Terms of compromise of a suit, and an action agreed upon out of Court, and not made a rule of Court, cannot be enforced by a motion in the suit. *Forsyth* v. *Manton*, 5 Mad. 78.

14. Though the next day after the last day of the term be not in strictness part of the term, and therefore no motion can then be made on the petty bag side, yet as to other purposes it is part of the term, for which reason a motion made at that time to dismiss a bill for want of prosecution, on a certificate that there had been no prosecution within three terms, of which the last term was one, was refused. *Anon*, 1 P. W. 522.

15. When the Court is moved for the payment of costs under the General Order of the 5th of August, 1818, on account of a notice of motion which has been abandoned, such notice of the motion must be mentioned to the Court, and also be produced to the registrar before he draws up the order. *Withey* v. *Haigh*, 3 Mad. 437.

16. Motion cannot be renewed unless the costs of the former notice of motion are paid as directed by the General Order, 5th August, 1818. *Bellchamber* v. *Giani*. 3 Mad. 550.

17. Strictly, no motion can be made at a seal, the brief for which was not put into the counsel's hands at least on the first day of the seal. *Sharp* v. *Ashton*, 2 V. & B. 4 2.

18. In the Court of Exchequer, counsel can only make two motions, each, successively. *Anonymous*, 4 Price, 345.

19. Motions to be made in causes pending before the Lord Chief Baron of the Court of Exchequer, in the exercise of his sole and exclusive jurisdiction, must be made before his Lordship when sitting alone only. *Thomson* v. *Gorwan*, Dan. 135. *Anonymous*, 4 Price, 309.

20. By general rule of the Court of Chancery of Ireland, in all cases where conditional orders are granted, if cause be not shewn on the motion day next after the expiration of the time limited by such order, or a notice of shewing cause served, which is to be entered with the register, the register shall give a certificate of no cause; notices so entered to have precedence of all other motions, save injunction motions. 1. S. & L. 178.

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*Where the Court will on motion direct a Reference. See p. *489, ante.*

XLIX. Ne Exeat Regno.

(a) *Where Granted.*

1. The writ of *ne exeat regno* is a high prerogative writ, and applied to cases of private right, with great caution and delicacy. *Tomlinson* v. *Harrison*, 8 Ves. 33.

2. The Court, upon an application for a writ of *ne exeat regno*, will act promptly, to a degree almost amounting to surprise; but the application should be made as promptly as possible. *Jackson* v. *Petrie*, 10 Ves. 166.

3. The writ of *ne exeat regno* will be granted upon an equitable demand only. *Atkinson* v. *Leonard*, 3 Br. C.C. 218. *Pearne* v. *Lisle*, Amb. 75. *Jackson* v. *Petrie*, 10 Ves. 164.

4. And where the plaintiff had recovered a verdict for damages at law, and the defendant threatened to leave the kingdom before final judgment, the writ was refused, as the plaintiff might have had bail at law. *Anon*, 2 Atk. 210.

5. Where the demand is purely legal, the Court will not grant the writ upon the ground that some of the parties will not join in an action. *Ex parte Duncombe*, 2 Dick. 503.

6. And where judgment was obtained against two, on a penal statute, not bailable, but which could not be entered up till the following term, before which, one of the defendants threatened to go abroad; a writ of *ne exeat regno* was refused, as judgment could be executed upon the other defendant. *Crosley* v. *Marriot*, 2 Dick. 609.

7. But where the demand was an admitted balance of an account, the writ was granted, although a legal debt; upon the ground that if bail were given, the plaintiff, disputing the balance, would be entitled to an account, which is equitable relief, and the defendant could not put him to his election to sue at law or in equity, but upon terms. *Jones* v. *Sampson*, 8 Ves. 593.

8. In account, the writ *ne exeat regno* is granted, though bail might be had at law. *Hannay* v. *M'Entire*, 11 Ves. 55.

9. A writ of *ne exeat regno* refused upon an undertaking for an indemnity. To obtain it, there must be an equitable demand in the nature of a debt actually due. *Cock* v. *Ravie*, 6 Ves. 283.
And see Haffey v. *Haffey*, 14 Ves. 261.

10. The writ of *ne exeat regno* was formerly confined to state affairs, though now applied to civil cases; but to entitle any one to the writ, the debt demanded must be certain and not contingent. So the Court refused the application of a wife for such writ against her husband, upon a demand under a marriage agreement to settle a sum of money as a provision for her in case she survived him. *Anon*, 1 Atk. 521.

11. Where the case did not shew a positive present right in the plaintiff, and the document, under which he claimed, was not in his possession, the Court refused an application for the writ. *Gardiner* v. *Edwards*, 5 Ves. 591.

12. The writ lies at the suit of a wife against her husband, upon a sentence for alimony in the Spiritual Court. *Read* v. *Read*, 1 C. C. 115.
Ex parte Whitmore, 1 Dick. 143.

13. But not before a sentence for alimony is obtained. *Coglar* v. *Coglar*, 1 Ves. J. 94.
Shaftoe v. *Shaftoe*, 7 Ves. 171.

14. After sentence in the Ecclesiastical Court for alimony, the writ may be obtained, for the arrears actually due and costs. *Shaftoe* v. *Shaftoe*, 7 Ves. 171.
Dawson v. *Dawson*, 7 Ves. 173.
Oldham v. *Oldham*, 7 Ves. 410.

15. In such case, the writ will be marked only for the arrears of alimony actually due; and the Court will not carry it farther by analogy to the case of a judge holding to bail for uncertain damages upon a personal tort. *Haffey* v. *Haffey*. 14 Ves. 261.

16. The writ was granted against a married woman, executrix of her former husband, her second husband having gone out of the kingdom with all his property.
Jerningham v. *Glass*, 3 Atk. 409.
S. C. Ternegan v. *Glass*, Amb. 62. 1 Dick. 107.

17. And in a similar case, where the wife and her second husband resided at Antigua, and she had come to England to get in the testator's property, the writ was granted. *Moore* v. *Meynell*, 1 Dick. 30.

18. Where a creditor of a bankrupt had arrested and received part of bankrupt's effects in Scotland, a writ of *ne exeat regno* was granted against him on application of the assignees. *Mackintosh* v. *Ogilvie*, 1 Dick. 119.

19. A writ of *ne exeat regno* lies to prevent a party going to Scotland. *Dones' Case*, 1 P. W. 263.
Wilson v. *Boswell*, 2 Dick. 535.
Brocker v. *Hamilton*, 1 Dick. 154.
King v. *Smith*, 1 Dick. 82.

20. The original object of the writ of *ne exeat regno*, was to prevent a subject going to the king's enemies; and as the writ existed when Scotland was to all intents and purposes foreign parts, it is still granted to restrain going to Scotland: but the Court refused to grant a *ne exeat regno* to restrain a Member of Parliament from going to Ireland. *Bernal* v. *Marquis of Donegal*, 11 Ves. 43.

21. A writ of *ne exeat regno* issued against the defendant, whose place of residence was at Port Mahon, with whom the plaintiff's testator was in partnership; and to be marked £2000, the amount of what he believed the defendant to be indebted on a balance of accounts. *Robertson* v. *Wilkie*, 2 Dick. 786.

22. But on motion to discharge, the Court held it to be a rule not to grant the writ against a party living out of the kingdom, where the transactions took

place, upon the faith of having justice where such party resided. *S. C.* Amb. 177.

23. Where the bill was for an account, the writ was granted upon the application of a co-defendant; the money being sworn due from the defendant against whom the writ was prayed. *Done's Case,* 1 P. W. 263.

24. Where the plaintiff has two demands upon the defendant, the one liquidated, and the other matter of account, the writ shall be marked for the former demand only. *Parker* v. *Appleton,* 3 Br. C. C. 427.

25. The writ was granted against the defendant to a bill for a specific performance upon the demand, under the agreement, for the purchase-money. *Goodwin* v. *Clarke,* 2 Dick. 497.

26. But an application for the writ under similar circumstances was subsequently refused. *Anon,* 2 Dick. 497, (*n*).

27. Nothing is clearer than that the Court of Exchequer cannot grant a writ of *ne exeat regno;* but the Court having become what it is, grants an order, in the nature of a *ne exeat regno,* that the party shall give security. *Ex parte Bellett,* 1 Cox, 300.

28. The Court of Exchequer grants orders in nature of the writ of *ne exeat regno,* applying them only to cases, to which the Court of Chancery would apply the writ. *Bernal* v. *Marquis of Donegal,* 11 Ves. 46.

29. The Court of Exchequer will grant an order in the nature of the writ *ne exeat regno,* against an accountant of the Crown, sworn to be about to leave the kingdom, without having rendered his accounts; and the Court will exercise a discretion as to the amount for which they will exact sureties, and will require notice of the order to be given before the attachment shall issue. *Attorney-General* v. *Mucklow,* 1 Price, 289.

See further p. 319, *ante.*

(*b*) *Affidavit in Support of.*

1. To obtain a writ of *ne exeat regno,* the affidavit must be positive as to the intention to quit the kingdom, or declarations, by the defendant himself, to that effect. *Oldham* v. *Oldham,* 7 Ves. 410. *Etches* v. *Lance,* 7 Ves. 417.

2. It is not necessary to allege in the affidavit, that defendant's intention by going abroad is to avoid the demand; it is sufficient to state that the debt will be endangered. *Etches* v. *Lance,* 7 Ves. 417. *Tomlinson* v. *Harrison,* 8 Ves. 32.

3. Where the defendant's intention to leave the kingdom was after bill filed for the demand, the Court thought the implication, that it was for the purpose of avoiding the demand, was sufficiently strong, without requiring the affidavit to state that the demand would thereby be endangered. *Baker* v. *Haily,* 2 Dick. 632.

4. And the affidavit must state positively that the defendant is indebted to the plaintiff in a sum certain, except it be a bill for an account, and then belief as to the amount of the balance is sufficient. *Rico* v. *Gaultier,* 3 Atk. 501. *And see Roddam* v. *Hetherington,* 5 Ves. 92.

5. The writ was refused where the affidavit stated only suspicion of the party's intention of going abroad, and no precise sum being positively sworn to. *Sherman* v. *Sherman,* 3 Br. C. C. 370.

6. And the affidavit must not only state that the defendant is equitably indebted in a specific sum, but must mention the facts on which it arises. *Anon,* 2 Ves. 489. *And see Amsinck* v. *Barklay,* 8 Ves. 597.

7. The affidavit must be as positive as an affidavit to hold to bail; information and belief admitted only upon matter of pure account, as between partners and executors. *Jackson* v. *Petrie,* 10 Ves. 164.

8. To obtain an order in the nature of a writ *ne exeat regno,* in the court of Exchequer, against an accountant of the crown, about to go abroad without rendering his accounts, the Court does not require the affidavit to state a precise sum due, if it is the amount in value of stores unaccounted for. *Attorney-General* v. *Mucklow,* 1 Price, 289.

9. To obtain a writ of *ne exeat regno,* an affidavit to information and belief of an intention to quit the kingdom, or circumstances making it necessary, as an order for military officers to join their regiments abroad, is not sufficient. *Hannay* v. *M'Entire,* 11 Ves. 54.

10. Affidavit sworn in Ireland before a Master to ground a writ of *ne exeat*

regno admitted, after doubt and conference with judges. *Johnson* v. *Smith*, 2 Dick. 592.

11. The writ will not be granted upon affidavit of a wife against her husband. *Sedgwick* v. *Walkins*, 1 Ves. J. 49. 3 Br. C. C. 11.

(*c*) *Prosecuting the Bond.*

1. The sheriff having taken a bail-bond on a writ of *ne exeat regno*, the defendant, after appearing and putting in two insufficient answers, left the kingdom; the Court discharged an order obtained for leave to put the bail-bond in suit, as the Court has nothing to do with prosecuting the bond. *Collinridge* v. *Mount*, 2 Dick. 688.

(*d*) *Discharge of.*

1. Upon an application for the writ of *ne exeat regno*, no subpœna is served; but upon personal service of the writ, the party is bound to appear and to put in his answer, and then he may apply to supersede the writ, but not upon his affidavit. *Russell* v. *Asby*, 5 Ves. 96.

2. Where the demand arose in Antigua, an order for a *ne exeat regno*, to prevent the defendant going thither, was discharged, as he would be amenable there. *Pearne* v. *Lisle*, Amb. 75.

3. A writ of *ne exeat regno*, obtained by an inhabitant of Antigua against another casually in this country, upon a bond stated in the bill t be lost, was discharged, upon giving security to abide by the decree. *Atkinson* v. *Leonard*, 3 Br. C. C. 218.

4. Where a writ of *ne exeat regno* issued against a feme covert, her husband residing abroad, after answer the Court discharged the writ, upon her giving security to abide the event of the suit. *Moore* v. *Meynell*, 1 Dick. 30.

5. After decree against defendant for the same matter as the writ issued, and the defendant in contempt, and in custody for non-performance of the decree, the sureties were ordered to be discharged, and the bond as to them cancelled. *Debazin* v. *Debazin*, 1 Dick. 95.

6. The writ will not be discharged on the putting in of the answer, where there appear things which the defendant will be decreed to do at the hearing. *Atkinson* v. *Bedell*, 1 Dick. 98.

7. *Ne exeat regno* till answer and further order. The defendant having put in his answer, applied to discharge the writ, which was ordered on his giving security to abide the event of the cause. *Boon* v. *Collingwood*, 1 Dick. 115.

8. Writ of *ne exeat regno* obtained by one French emigrant against another was discharged, upon circumstances appearing upon the affidavits in support of the bill, and upon the answer, which in such case may be read, the application not being in the nature of an affidavit to hold to bail, but to the discretion of the Court applying a remedy not in its origin distinctly applicable to private transactions between subject and subject. It is very delicate to apply it as against foreigners; and it would be a necessary condition, that it shall be simply a case of equity. *De Carriere* v. *De Calonne*, 4 Ves. 577.

9. Writ of *ne exeat regno*, obtained by a resident in the West Indies upon a demand arising there, was discharged when the answer came in, and under the circumstances, with costs, against the *prochein amy* of the infant plaintiff; but upon the admission in the answer, the defendant was ordered to give security to abide the decree. *Roddam* v. *Hetherington*, 5 Ves. 91.

10. Plaintiff, having twice held the defendant to bail, obtained a writ of *ne exeat regno*, he discontinuing the action. The writ discharged. *Amsinck* v. *Barclay*, 8 Ves. 594.

11. Writ of *ne exeat regno* upon declarations or facts as evidence of the intention to go abroad, not discharged upon affidavit denying the intention. *Amsinck* v. *Barklay*, 8 Ves. 594.

And see p. 320, *ante*.

L. New Trial.

(*a*) *Application for, how made.*

1. If, in the course of an action brought under the direction of the Court, the mode is misconceived, the party should apply by petition to enable the Court to do perfect justice. *Holworthy* v. *Mortlock*, 1 Cox, 143.

2. An original motion must be made for a new trial; and the Court will not answer a petition for it, where the cause comes on upon the equity reserved. *Attorney General* v. *Montgomery*, 2 Atk. 378.

3. When a bill is retained, with liberty for the plaintiff to bring an action to establish his right, and there is a verdict against him, it not being to satisfy the

conscience of the Court, the party must apply to the Court where it was tried, for a new trial. *Fowkes* v. *Chadd*, 2 Dick. 576.

4. Bill retained for a year with liberty to bring ejectment; verdict for the defendant. Leave must be obtained of the Court, before a new ejectment can be brought. *Sands* v. *Sands*, 1 Ves. 495.

5. Issue directed at the Rolls; a motion for a new trial may be made before the Lord Chancellor. *Pemberton* v. *Pemberton*, 11 Ves. 50.

(*b*) *In what Cases granted.*

1. Nothing is allowed as a ground for a new trial, after judgment, that is not ground for a bill of review. *Curtess* v. *Smallridge*, 1 C. C. 43. 2 Free. 178.

2. Misdemeanours of coroners, in returning a jury, no ground, in equity, for a new trial. *Barker* v. *East*, 3 C. R. 42.

3. The mistake of a juror's name in a panel, or the discovery of new witnesses to impeach the testimony of a witness examined on the former trial, are not circumstances sufficient to induce the Court to grant a new trial. *Dickenson* v. *Blake*, 7 Br. P. C. 177.

4. Where it appeared the points had not been distinctly before the jury, a new trial was granted. *O'Connor* v. *Cook*, 8 Ves. 535.

5. Verdicts being recovered in Suffolk by the factors against the London cheesemongers, they brought their bill for a new trial in an indifferent county, but the bill was dismissed. *Tovey* v. *Young*, 2 Vern. 437. Pre. Ch. 193.

6. Where a party had obtained verdicts in two several issues, directed to try the validity of her marriage, the House of Lords, upon appeal, directed a new trial. *Ashe* v. *Ashe*, 7 Br. P. C. 149.

7. A new trial granted on an issue directed to try a custom; the matter in question being of value, and concerning all the copyholds in the manor. *Edwin* v. *Thomas*, 2 Vern. 75.

8. New trial of issues directed by the Court of Chancery, five years and a half having elapsed since the trial, refused. *Legard* v. *Daly*, 1 Ves. 194.

9. Three trials frequent, and a fourth has been granted. *Matthews* v. *Warner*, 4 Ves. 206.

10. There is no question of civil right which, in the ordinary course of the jurisdiction of this country, may not go through three inquiries. *Ibid*, 4 Ves. 207.

11. In criminal cases a repeated inquiry is not matter of right but of discretion, and can only be had with the consent of the Attorney-General. *Ibid.*

12. An issue was directed to try the fact of lunacy, although it had been established by two verdicts, where there was considerable evidence that the party had recovered. *Ex parte Holyland*, 11 Ves. 10.

13. Where the Judge himself is dissatisfied with the verdict, it is a good ground for directing a new trial. *Faulconberg* v. *Pierce*, Amb. 210. *Chaplin* v. *Bree*, 7 Br. P. C. 204. *See also Lucas* v. *Lucas*, 7 Br. P. C. 160.

14. An issue was directed to try the validity and operation of a deed; the verdict was against the deed, and the Judge, who tried the cause at Chester, certified that he was satisfied with the verdict; yet there being a remainder limited to infants, and the estate being £300 a year, the Lord Chancellor granted a new trial, though he said Lord Cowper had often bound the inheritance by one trial. *Arderne* v. *Crew*, 2 Eq. Ca. Ab. 737.

15. New trial ordered for misdirection of the Judge. *Cleeve* v. *Gascoigne*, Amb. 323.

16. A new trial of an issue, directed to try a vicar's right to tithes, refused; the greatest and most material part of the evidence being in writing, of which the Court, directing the issue, was a proper judge, and there being no reason to suppose, that any further light could be thrown upon it by another reference to a jury. *Lord Brownlow* v. *Devie*, 7 Br. P. C. 83.

17. After two trials of an issue, the Court directed a new trial at bar. *Baker* v. *Hart*, 3 Atk. 546. 1 Ves. 30.

18. After the trial of an action directed to try the right to mines, the House of Lords upon appeal directed a new trial at bar. *Earl of Pomfret* v. *Smith*, 7 Br. P. C. 169.

19. Where the jury bring in their verdict contrary to the direction of the Court, a new trial may be granted even after a trial at bar. *The Queen* v. *Bailiffs of Bewdley*, 1 P. W. 212. *And see Richard* v. *Symes*, 2 Atk. 320.

20. Two issues, to ascertain who was

the heir of an intestate, were directed to be tried at bar, but at the desire of plaintiff were tried at *nisi prius*, and verdicts found for the defendant; a new trial at bar granted, the plaintiff consenting to accept of *nisi prius* costs in case he prevailed. *Baker* v. *Hart*, 1 Ves. 28. 3 Atk. 542.

21. A new trial of an issue to try the validity of a will was directed, after a trial at bar, where the verdict was contrary to the weight of evidence; but upon payment of the costs of the last trial. *Lucas* v. *Lucas*, 7 Br. P. C. 160.

22. No doubt of the Court's right to grant a new trial after a trial at bar; for the conscience of the Court must be satisfied. *Minor Canons of St. Paul's* v. *Morris*, 9 Ves. 165.

23. New trials after trials at bar are granted in Chancery, when courts of law would not grant them. *Ibid.* 169.

24. Where the defendant obtained a verdict upon an issue directed to try the validity of a rent-charge; upon evidence that the rent had not been paid for fifty years, and other circumstances rendering the grant suspicious, the Court ordered a new trial, the plaintiff paying the costs of the former. *Anon*, 2 Vent. 351.

25. Bill for a new trial, plaintiff suggesting that the mark to the bond was forged, and all the pretended witnesses to the bond were dead, and that the verdict was recovered by surprise; a new trial ordered. *Codrington* v. *Webb*, 2 Vern. 240.

26. Upon appeal, the House of Lords granted a new trial to try the question of forgery of a bond, although a verdict for the bond had been obtained at law on *non est factum* pleaded, and although the Court of Chancery had refused a new trial. *Tilly* v. *Wharton*, 2 Vern. 378. *Wharton* v. *Tilley*, 2 Vern. 419. *And see Brownsword* v. *Edwards*, 2 Ves. 246.

27. If a witness be convicted of perjury, or the party of forgery; good cause for a new trial. *Tilly* v. *Wharton*, 2 Vern. 378.

28. New trials are granted in Chancery in cases of inheritance or of value, or where the Court is not satisfied, and particularly in cases of forgery. *Stace* v. *Mabbot*, 2 Ves. 553.

29. Courts of Equity may direct new trials in suspicious cases, and especially where fraud or forgery is imputed to a will. Where there were two trials upon the validity of a will, and the verdicts opposite, yet an order of the Court of Chancery for a new trial (at bar) was, upon the circumstances of the evidence, reversed. *Salter* v. *Hite*, 7 Br. P. C. 189.

30. New trial refused after two verdicts against deeds and a will for fraud. *Bates* v. *Graves*, 2 Ves. J. 287.

31. A new trial of an issue *devisavit vel non*, the heir at law paying the costs of the former trial. *Mountain* v. *Bennet*, 2 Dick. 683.

32. Two new trials of an issue *devisavit vel non*, granted at the instance of the heir at law upon terms. *Blount* v. *Swinnerton*, 2 Dick. 500.

33. Issue *devisavit vel non*, and three verdicts in favour of the will; the Court being satisfied with the result of the third trial, refused a motion for a new trial. *Pemberton* v. *Pemberton*, 13 Ves. 290.

34. New trial of an ejectment granted, on payment of the costs of the former. *Birt* v. *Pitt*, 1 Dick. 87.

35. After three ejectments tried in Ireland, an issue was directed out of Chancery between the same parties upon the same points. A new trial was afterwards granted upon appeal to the House of Lords, and after that another ejectment was tried. *Lord Sherborne* v. *Naper*, 4 Ves. 206, (*n*).

36. If there is evidence a plaintiff is not apprized of, he may suffer a nonsuit; and on his coming back to this Court, the Lord Chancellor will order another issue at law notwithstanding the nonsuit. *Richard* v. *Symes*, 2 Atk. 320. Barn. 90.

37. Where the Court thought the evidence newly discovered ought not to be the foundation for a different verdict, a new trial was refused. *Colgrave* v. *Juson*, 3 Atk. 197.

38. A new trial was granted upon reading some letters of the defendant, wherein he had put a greater value upon the premises in question, than what had been found by the jury upon the former trial; although these letters were in the plaintiff's power previous to the former trial, and might have been then produced, if he had thought fit. *Floyer* v. *Johnson*, 7 Br. P. C. 156.

39. After a verdict against an executor on a *plene administravit*, a voucher being discovered, for want of which the verdict

passed, a new trial was granted. *Hennell* v. *Kelland*, 1 Eq. Ca. Ab. 377.

40. The absence of a witness, whose testimony would corroborate that of others to a particular fact, is not of itself sufficient to obtain a new trial. *Cleeve* v. *Gascoigne*, Amb. 323.

41. New trial was granted, upon new evidence, in a case of forgery and where the conscience of the Court was not satisfied; although the Judge certified in favour of the verdict, and it would not have been granted in a Court of law: as there a new trial will not be granted to introduce new evidence or answers to it. *Stace* v. *Mabbot*, 2 Ves. 553.

42. The Court will not grant a new trial, upon a suggestion that the party was not apprized of a particular evidence, and therefore not prepared to give an answer. *Richards* v. *Symes*, 2 Atk. 319. Barn. 90.

43. After verdict upon an issue, a new trial, on account of having further evidence to produce, was refused, there being no fraud or surprise, but the evidence having been kept back by the party applying, though the Court was much dissatisfied with the verdict. *Standen* v. *Edwards*, 1 Ves. J. 133.

44. The Court, for the more solemn determination in some cases, directs a second trial without setting aside the first verdict, for otherwise the party in whose favour the first verdict was given would lose the benefit of urging it in his favour. *Baker* v. *Hart*, 1 Ves. 29. 3 Atk. 542.

And see further p. 321, *ante*.

LI. ORDER.

(a) *Amending.*

1. A mistake in the title of an order amended, though to charge a surety, who gave a recognizance to abide the order of hearing. *Spearing* v. *Lynn*, 2 Vern. 376. Pre. Ch. 115.

2. Plaintiff obtained an order for sequestration, which was issued and put in execution; a mistake in the title of such order by the omission of the words "and others" was allowed to be rectified by amendment, inserting the words omitted. *Lowten* v. *Colchester*, 2 Mer. 395.

3. If, by a clerical misprision, any thing is inserted in an order, by consent, upon further directions, it may perhaps be rectified by bill of review, but cannot by motion. *Anon*, 1 Ves. J. 93.

4. A mistake, in the title of an order for the serjeant at arms, ordered to be corrected, after a sequestration founded upon the return; the defendant having put in his answer, and thereby acquiesced. *Bennet* v. *Burton*, 1 Dick. 135.

(b) *Drawing up, and Entering.*

1. Orders must be drawn up and entered by the register, before they bear authority, for the register's minutes are only a warrant for an order. *Anon*, 2 Free. 46.

2. But an order to dismiss a bill for want of prosecution operates from the time of its being pronounced. *Lorimer* v. *Lorimer*, 1 J. & W. 284.

3. As the manner of drawing up orders is of long standing, Lord Hardwicke said he would not alter them, but wished they were framed with the same simplicity as orders made by the Courts of Law. *Baker* v. *Hart*, 2 Atk. 488.

4. To enter an order *nunc pro tunc* is a motion of course, where the party entitled to it comes recently, but, after a length of time, there ought to be notice of such motion. *Anon*, 3 Atk. 521.

5. Order lost, was redrawn, and entered *nunc pro tunc*. *Williamson* v. *Henshaw*, 1 Dick. 129.

6. To ground a motion upon a decretal order, it must be passed with the register. *Smith* v. *Reynolds*, Mos. 71.

7. The order of a preceding Lord Chancellor cannot be reheard upon minutes, but must first be drawn up. *Taylor* v. *Popham*, 15 Ves. 72.

(c) *Service of.*

1. An order which is made on hearing counsel of both sides, need not be served. *Bambridge* v. *Castel*, Mos. 199.

2 Service of an order *nisi*, for a sequestration, on the Clerk in Court of the defendant is sufficient; the absolute order alone requiring personal service. *Smallbrooke* v. *Lord Donnegal*, 3 Anst. 647.

3. Where there were five defendants, some of whom lived in the East Indies, and some in the West Indies, the Court, on motion, upon affidavits, ordered service upon the Clerk in Court, of an order to confirm a report, to be good service upon the defendants. *Jackson* v. ——, 2 Ves. J. 417.

4. Where a party is avoiding service of an order, and the Clerk in Court is dead, the course is to move, first that service of a *subpœna* to name a Clerk in Court on the solicitor, may be good service: and, if none is named, then, that service of the order on the solicitor may be good service. *Francklyn* v. *Colhoun*, 12 Ves. 2.

5. The practice of requiring personal service of an order to found process of contempt, will be dispensed with where the party must have notice; as upon a short order for the execution of a decree, made while the party was present in Court. *Rider* v. *Kidder*, 12 Ves. 202.

6. Or, where the party, declaring he would not execute the order, absconded to avoid it. *De Manneville* v. *De Manneville*, 12 Ves. 203.

7. Where the party, upon whom an order for commitment was made, was of a singularly ferocious disposition, service at his dwelling house was ordered to be good service. *Williams* v. *Jones*, 2 Dick. 477.

8. Service of copy of an order, without producing the original, not good, unless the production is waved. *Wallis* v. *Glynn*, 19 Ves. 380. Coop. 282.

9. Right to tender will be waved, by the party's declaration that he will not accept it. *Ibid.*

10. Where the defendant had been called upon seven times, but could not be found, so as to be personally served with an order for the payment of money, the Court ordered that service on the defendant's Clerk in Court should be deemed good service. *Anon*, 4 Mad. 462.

11. Service of an order of Court on a servant of the party, not at his dwelling-house, insufficient. *Anon*, 2 Price, 4.

12. Where an order for a messenger has been issued against a sheriff, for contempt in not returning an attachment against a defendant in contempt, for not putting in his answer, the previous order to the high sheriff to return the process may be served on his under-sheriff, and such service will be good. *Thomas* v. *Matthias*, 2 Price, 32.

13. Nor will the Court enlarge the time limited by the order in such a case. *Ibid.*

14. Where a party absents himself to avoid personal service of an order to pay money, or a *subpœna* for costs, the Court will substitute service at his dwelling-house, and on his Clerk in Court; but an order for service at the dwelling-house only is irregular. *Farrow* v. *White*, 1 J. & W. 643.

15. Some orders made on motions of course, *e. g.* that to answer amendments and exceptions together, operate from the time of service only. *Lorimer* v. *Lorimer*, 1 J. & W. 284.

For serving Order for Injunction, see pp. 250, 472*, *ante.*

(*d*) *Discharge of.*

1. The Master of the Rolls may discharge an order made by the Chancellor *ex parte*, or on a motion of course. *Davy* v. *Seys*, Mos. 71.

2. A party may move to discharge an order, though he is in contempt for not obeying it. *Hill* v. *Bissel*, Mos. 258.

3. Order on petition not discharged on motion, unless *ex parte*. *Bishop* v. *Willis*, 2 Ves. 113.

4. An order by consent cannot be got rid of but by consent; but if a party to such an order take proceedings inconsistent with it, he thereby waves his right to insist on the rule. *Bernal* v. *Marquis of Donegal*, 3 Dow, 146.

5. An order made upon further directions is a decretal order, and cannot be discharged upon motion, although it was obtained by consent, and was a surprise upon the other party. *Anon*, 1 Ves. J. 93.

For Discharge of Order to dismiss, see Div. LXX, *post.*

LII. Outlawry.

1. Outlawry is at this day the common process in Ireland. *Simmonds* v. *Lord Kinnaird*, 4 Ves. 738.

2. A plaintiff cannot proceed to outlawry in the Exchequer; the Court has no process on which to found such a proceeding. *Horton* v. *Peake*, 1 Price, 309.

LIII. Parties.

(*a*) *Objection for want of.*

1. Where the bill seeks to discover who are the necessary parties, no objection for want of their being parties can be taken. *Bowyer* v. *Covert*, 1 Vern. 95.

2. Where some parties are out of the jurisdiction, and the fact is so charged in the bill, an objection for want of those

parties will not be allowed. *Cowslad* v. *Cely*, Pre. Ch. 83.

Darwent v. *Walton*, 2 Atk. 510.

Smith v. *Hibernian Wine Company*, 1 S. & L. 240.

Williams v. *Whinyates*, 2 Br. C. C. 399.

3. But where the absent parties are material, the Court will not proceed to a decree without them. *Fell* v. *Brown*, 2 Br. C. C. 276.

And see Palk v. *Clinton*, 12 Ves. 58.

4. If at the hearing a plaintiff waves the relief he prays against a particular person, the objection for want of his being a party will have no weight. *Pawlet* v. *The Bishop of Lincoln*, 2 Atk. 296.

5. In equity you may take exceptions for want of parties at the hearing of the cause, or demur; but you cannot plead it in abatement at law after you have gone upon the merits. *Darwent* v. *Walton*, 2 Atk. 510.

6. An objection for want of parties should be taken upon opening the proceedings and before the merits are disclosed. *Jones* v. *Jones*, 3 Atk. 111.

7. If the objection by the defendants in the original cause, for want of parties to the supplemental bill, is not made in the first instance, it is too late to do it when the cause comes on again, where it was put off only for want of formal parties, in order that the decree might be complete. *Jones* v. *Jones*, 3 Atk. 217.

8. Where a party submits to answer, he cannot object that he ought not to have been made a party. *Cookson* v. *Ellison*, 2 Br. C. C. 252.

9. Where a bill wants proper parties, it is in the power of the Court to dismiss the bill *sans* prejudice, or to give leave to amend, paying costs. *Stafford* v. *City of London*, 1 P. W. 428.

10. When at the hearing of the cause, an objection is taken for want of parties, the Court ought not for that reason to dismiss the bill with costs, but should order the cause to stand over, with liberty for the plaintiff, on payment of costs, to amend his bill by adding proper parties.

Green v. *Poole*, 5 Br. P. C. 504.

Anon, 2 Atk. 15.

Jones v. *Jones*, 3 Atk. 111.

11. Parties appeared to be wanting, it was ordered to stand over, with liberty for the plaintiff to file a supplemental bill, merely to add parties. *Holdsworth* v. *Holdsworth*, 2 Dick. 799.

Jones v. *Jones*, 3 Atk. 110. 1 Dick. 96.

12. Upon an objection for want of parties, it is not necessary to point them out by name, if described so as to enable the plaintiff to make them parties. *Attorney General* v. *Jackson*, 11 Ves. 369.

(*b*) *What Parties are or are not Necessary.*

(1) *Generally.*

1. Naming a party in the bill as a defendant, does not make him a party, unless process is prayed against him.

Fawkes v. *Pratt*, 1 P. W. 592.

Windsor v. *Windsor*, 2 Dick. 707.

And see Reilly v. *Ward*, 5 Br. P. C. 495.

2. If a party interested cannot be served with process, the cause may proceed without him. *Quintine* v. *Yard*, 1 Eq. Ca. Ab. 74.

3. To a bill for relief, all persons necessary to the relief must be made parties, or defendant may plead to such a bill; *secus* where a discovery only is wanted. *Sangosa* v. *The East India Company*, 2 Eq. Ca. Ab. 170.

4. As far as possible the Court endeavours to make a complete decree, embracing the whole subject, and determining the rights of all parties interested in the estate. *Palk* v. *Clinton*, 12 Ves. 58.

5. Where the suit draws the jurisdiction out of a court of law, all the parties must be before the Court, who are necessary to make the determination complete, and to quiet the question. *Poore* v. *Clarke*, 2 Atk. 515.

Powlet v. *Bishop of Lincoln*, 2 Atk. 296.

6. It is a general rule that no one need be made a defendant, against whom, at the hearing, the plaintiff cannot obtain a decree. *De Golls* v. *Ward*, 3 P. W. 310, (*n*).

7. The general rule requiring all persons interested to be parties will be dispensed with, where it is impracticable, or extremely inconvenient to justice. *Adair* v. *New River Company*, 11 Ves. 429.

And see p. 342, *ante*, *and* p. *513, *post*.

8. All the parties to the original suit must be parties to a bill of review. *Hartwell* v. *Townsend*, 2 Br. P. C. 107.

9. A person interested must be a party to the original suit; it is not sufficient

that he is a party to a cross bill. *Hooper* v. *Lethbridge,* Bun. 291.

(2) *Agent.*

1. It is improper to make a person who acts ministerially only sole party. *Vernon* v. *Blackerby,* 2 Atk. 147.

2. Agents must sue in the name of their principals. *Leigh* v. *Thomas,* 2 Ves. 313.

3. To a bill against a vendor for a specific performance, his stewards and receivers, having possession of the conveyances and title deeds, ought not to be parties, and a specific performance being decreed, the bill was dismissed, as against them, with costs. *M'Namara* v. *Williams,* 6 Ves. 143.

4. An agent implicated in a fraud may be made party to a bill seeking relief against it, and that he may be examined as a witness is no objection. *Bulkeley* v. *Dunbar,* 1 Anst. 37.
And see King v. *Martin,* 2 Ves. J. 641.

(3) *Arbitrators*

1. A bill for relief against a palpable mistake or miscalculation in an award, must be against the person in whose favor the award is made, and not against the arbitrator. *Anon.,* 3 Atk. 644.
Lingood v. *Croucher,* 2 Atk. 395.
And see Steward v. *East India Company,* 2 Vern. 380.

(4) *Assignor or Assignee.*

1. Bill to be relieved against bonds which were assigned by commissioners of bankrupts, the assignee must be a party. *Foord* v. *Lear,* Barn. 265. Rep. T. Finch, 265.

2. Bill against the executor and assignees of a certificated bankrupt deceased, for an account; the assignees demurred, demurrer allowed, the executor only being liable to the creditor, and the assignees to the executor only. *Utterson* v. *Mair,* 2 Br. C. C. 270. 2 Ves. J. 95.

3. To a bill by an assignee of a judgment, assignor is a necessary party. *Cathcart* v. *Lewis,* 3 Br. C. C. 516. *S. C.* 1 Ves. J. 463.

4. Bill against a trustee, who has assigned his trust, the assignee ought to be made a party; as the decree should be first against him, and the trustee to stand as a security. *Burt* v. *Dennet,* 2 Br. C. C. 225.

5. Persons claiming under a mortgagee must be parties to a suit by the mortgagor to redeem. *Wetherell* v. *Collins,* 3 Mad. 255.

6. Where there are mesne assignments of a mortgage, without the authority or privity of the mortgagor, such mesne assignees are not necessary parties to a bill for redemption, except the last, who has contracted to stand in the place of the original mortgagee and all the assignees. *Chambers* v. *Goldwin,* 9 Ves. 268.

7. If a mortgagor, pending a suit to redeem, assigns his mortgage, the assignee need not be made a party, as he will be bound by the decree. *Garth* v. *Ward,* 2 Atk. 175.

See further, p. 342, *ante.*

(5) *Attorney or Solicitor.*

1. A solicitor assisting his client in obtaining a fraudulent deed, is properly made a party to a suit to be relieved against it, as he may be liable to costs. *Bowles* v. *Stewart,* 1 S. & L. 227.
Bennet v. *Vade,* 2 Atk. 324.

See further p. 342, *ante.*

(6) *Attorney-General.*

1. Bill to avoid a lease, for that the lessor was a lunatic: the Attorney-General must be a party. *Leigh* v. *Wood,* Rep. T. Finch, 135.

2. A. having outlawed B. his debtor, brings a bill against B., and C., a trustee of an annuity for B., to subject the annuity to the plaintiff's debt: the Attorney-General must be made a party. *Balch* v. *Wastall,* 1 P. W. 445.

3. Where A., having outlawed B. his debtor, brings a bill against C. to discover what goods are in his possession belonging to B.: the Attorney-General must be a party. ——— v. *Bromley,* 2 P. W. 269.

4. An inquisition of attainder is only to inform, and does not entitle the crown to any right; therefore the Attorney-General is not a necessary party to a bill for an account of the estate of the subject of the inquisition. *Burk* v. *Brown,* 2 Atk. 399.

5. Where there is a legacy to a charity, to a bill for an account, it is not necessary to make the Attorney-General a party. *Chitty* v. *Parker,* 4 Br. C. C. 38.

6. The Attorney-General need not be a

party to a bill relating to a private charity, such as a voluntary society to provide for the members and their widows by weekly contributions. *Anon,* 3 Atk. 277.

7. The Court refused to order dividends, received before the bill filed, of stock purchased by the old government of Switzerland, to be paid into Court by the trustees on the application of the new government, not acknowledged by the government of this country, without having the Attorney-General a party. *Dolder* v. *Bank of England,* 10 Ves. 352.

8. In a suit to establish a *modus* where the rector is an eleemosynary foundation, of which the King is visitor, the Attorney-General need not be made a party. *Scarr* v. *Trinity College,* 3 Anst. 768.

9. The testatrix bequeathed her personal estate to her executor, in trust for her bastard child, who dies intestate, and without wife or issue. The executor brings suit against one possessing the portion of the bastard, a demurrer, because the Attorney-General and administrator of the bastard were not parties, was disallowed; for the executor having the legal title, could give a good discharge to the defendant. *Jones* v. *Goodchild,* 3 P. W. 33.

And see p. 342, *ante.*

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(7) *Bank of England.*

1. Notwithstanding the act of parliament, 39 and 40 Geo. 3. c. 36. the Bank of England may still be made parties to a bill to restrain a transfer of stock. *Temple* v. *The Bank of England,* 6 Ves. 770.

2. But unless for a particular object, as a discovery, it is not necessary or proper to make them parties, if the relief is obtainable under the stat. 39 & 40 Geo. 3. c. 36. *Edridge* v. *Edridge,* 3 Mad. 386.

3. Though it may be necessary to make the Bank parties for discovery, yet it is improper to keep them before the Court to the hearing. *Williams* v. *Williams,* 2 Br. C. C. 87.

(8) *Bankrupt.*

1. In a bill brought by the creditors of a bankrupt against the assignees under the commission, the bankrupt need not be made a party. *De Golls* v. *Ward,* 3 P. W, 311, (*n*).

2. A bankrupt is not a necessary party to a suit against his assignees, to establish a lien upon the estate. *Yeates* v. *Groves,* 1 Ves J. 280.

3. A bankrupt cannot be made a defendant to a bill for discovery, in defence to an action at law by the assignees, he being a competent witness. *Griffin* v. *Archer,* 2 Anst. 478.

4. But where the bill charged a fraudulent bankruptcy, a demurrer by the bankrupt was overruled, as there might be relief against the bankrupt upon the fraud. *King* v. *Martin,* 2 Ves. J, 641.

See further p. 343, *ante.*

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(9) *Baron and Feme.*

1. Regularly, husband and wife ought to join in suit; but if a feme covert demands relief for a separate maintenance, settled by the husband, she may sue alone. *Regnes* v. *Lewis,* 1 C C. 35.

2. A wife, by her *prochein amy,* may sue her husband. *Oxendon* v. *Oxendon,* 2 Vern. 493. Pre. Ch. 239.

3. A feme covert suing for a legacy, bequeathed to her separate use, must make her husband a party, although she is divorced *causâ sævitiæ.* *Anon,* 2 Free. 22.

4. A married woman may sue by her next friend, and making the husband defendant. *Lady Elibank* v. *Montolieu,* 5 Ves. 737.

5. A bill for the wife's separate estate ought to be brought by her *prochein amy.* *Griffith* v. *Hood,* 2 Ves 452.

6. The husband is a formal party to a bill against the wife, in respect of her separate estate. *Lillia* v. *Airey,* 1 Ves. J. 278.

7. If a husband sue for things in action belonging to the wife, as for a bond or legacy, she must be a party to the suit; but otherwise, if suing for a rent accruing in the wife's right after marriage. *Clark* v. *Lord Angier,* 1 C. C. 41. *S. C.* Nel. 78.

8. A man, as plaintiff, may sue his wife. *Brooks* v. *Brooks,* Pre. Ch. 24.

9. Lands were settled in strict settlement with a power to the husband to sell, upon settling other lands to the same uses. In a bill by the husband to compel performance of a contract to purchase the lands settled, the wife and issue are proper parties. *Lamplugh* v. *Hebden,* Barn. 371. 1 Dick. 79.

10. Husband tenant for life, remainder to his wife for life; he brings a bill alone for the opinion of the Court upon the settlement; objection, that the wife was not a party, allowed. *Herring* v. *Yoe*, 1 Atk. 290.

11. To a bill by the husband to be relieved against a bond, given by him in fraud of his marriage, it is not usual or necessary to make the wife a party. *Roberts* v. *Roberts*, 3 P. W. 74.

And see p. 125, *ante*.

(10) *Bishop*.

1. Bill by a vicar against a sequestrator for an account of profits during the vacancy; the bishop must be a party. *Jones* v. *Barrett*, Bun. 192.

(11) *Brokers*.

1. J. S. of K. caused a sum in South Sea Stock, belonging to another person of the same name, to be transferred into his own name, and then into the name of a broker for sale, and who accordingly sold it for him. In a bill against the representatives of J. S. of K. and the South Sea Company for satisfaction, the broker is not a necessary party, *Harrison* v. *Pryse*, Barn. 324.

(12) *Commissioners*.

1. While the judgment against the charter of London was in force, a bill was brought, for a debt due from the Chamber of London, against the old Lord Mayor, Aldermen, and the Commissioners to whom the King had granted the lands in trust to pay the city debts: a demurrer by the Commissioners was overruled. *Naylor* v. *Cornish*, 1 Vern. 311.

2. A bill against the treasurer under the commissioners for building the new churches is improper, the commissioners ought to be parties. *Vernon* v. *Blackerby*, 2 Atk. 144. Barn. 377.

3. A bill, by the surety of an officer of the commissioners of excise, after being sued upon his bond, for an account, alleging the officer had overpaid, the commissioners must be parties. *Makepeace* v. *Needler*, Bun. 291.

4. The acting commissioners, under an act of parliament for making a brook navigable, with power to borrow-money, employed the plaintiff in different parts of their works. In a bill for payment it is sufficient to make the acting commissioners defendants, they being personally liable in case of a deficiency of funds. *Horsley* v. *Bell*, Amb. 769. 1 Br. C. C. 101, (*n*).

And see p. 343, *ante*.

(13) *Corporation*.

1. It was objected against the plaintiff, that he had not brought proper parties to hearing, the bill being to be relieved for a debt owing from the old African Company, and he had brought to hearing the new African Company only; objection disallowed. *Curson* v. *The African Company*, 1 Vern. 121.

2. A corporation may join in a suit to establish a claim on behalf of its individual members. *Corp. of London* v. *Corp. of Liverpool*, 3 Anstr. 738.

3. A bill by a lessee for 21 years under the dean and chapter of Winchester, against a lord of a manor and the tenant of a particular house, which obstructed plaintiff's way, praying that the house might be pulled down, and that plaintiff be quieted in the possession of the way: held that the dean and chapter of Winchester, who were the owners of the inheritance, were necessary parties. *Poore* v. *Clark*, 2 Atk. 515.

4. Officers and servants of a corporation may be made parties to a suit against the corporation. *Wych* v. *Meal*, 3 P. W. 310. *Fenton* v. *Hughes*, 7 Ves. 289. *Dummer* v. *Corp. of Chippenham*, 14 Ves. 252.

5. Where the corporation are trustees for a charity, individual members may be made parties to a bill charging them as acting, in the execution of the trust, from a corrupt motive, and to the detriment of the charity. *Dummer* v. *The Corp. of Chippenham*, 14 Ves. 245.

(14) *Debtors or Creditors*.

1. The general rule is, that, where a debt is joint and several, the plaintiff must bring each of the debtors before the Court. *Madox* v. *Jackson*, 3 Atk. 406.

2. A creditor of the testator or intestate need not make any body but the personal representative a party; but if any persons have possessed the estate, or there be any debtors of the deceased, and any collusion between them and the represen

tative, he may in equity follow the assets, make them parties, and demand an account against them. *Newland* v. *Champion*, 1 Ves. 105.

And see Elmslie v. *M'Aulay*, 3 Br. C. C. 624.

3. But to constitute a person possessing assets a necessary party, the plaintiff must shew he either denies such assets, or applies them improperly. *Simpson* v. *Vaughan*, 2 Atk. 33.

4. A creditor filing a bill against the executor cannot make a debtor to the testator a party, upon the ground of the executor being insolvent. *Utterson* v. *Mair*, 2 Ves. J. 95. 4 Br. C. C. 270.

5. But otherwise in a special case, as where the representatives cannot or will not act. *Burroughs* v. *Elton*, 11 Ves. 29.

6. And if assignees of a bankrupt refuse to bring a bill that is for the benefit of the bankrupt's estate, any creditor has a right to bring such bill under peril of costs. *Franklyn* v. *Ferne*, Barn. 30.

7. The general principle on which a debtor to the estate cannot be made a defendant to a bill by a creditor or residuary legatee against the executor, unless collusion, insolvency, or some special case, applies equally to the case of a creditor overpaid by the executor. *Alsager* v. *Rowley*, 6 Ves. 748.

8. A few creditors may sue for themselves and the rest. *Leigh* v. *Thomas*, 2 Ves. 313.

9. It is not necessary to make creditors parties to a suit relative to the personal estate, it is sufficient that the executor is a party, as he represents the testator, creditors, and legatees. *Peacock* v. *Monk*, 1 Ves. 127.

10. Where a bond creditor brings a bill against an executor for an account of assets and satisfaction, it is no objection for want of parties that he has not brought other bond creditors or creditors of a superior nature before the Court, for the Court only decrees an account, with a direction for the executor to pay in a course of administration. *Anon*, 3 Atk. 572.

11. Though generally a bill by those interested in the personal estate as creditors or next of kin, will not lie against a debtor to the estate, it will, under circumstances, as in this case, upon collusion with the representative. *Doran* v. *Simpson*, 4 Ves. 651.

(15) *Defendant.*

1. It is not necessary to make the defendants to an original bill parties to a supplemental bill, in nature of a bill of revivor. *Jones* v. *Jones*, 3 Atk. 217.

2. No one ought to be made a defendant merely to pray costs. *Taylour* v. *Rochford*, 2 Ves. 284.

(16) *Devise.*

1. Bill by some of the residuary devisees, all must be parties. *Parsons* v. *Neville*, 3 Br. C. C. 365.

And see Morse v. *Sadler*, 1 Cox, 352.

2. Devise for seven years on condition that devisee should, within that time, pay devisor's debts, remainder to plaintiff at twenty-one: on a bill to compel payment of debts or be let into possession, other parties, to whom the estate is devised until plaintiff attained twenty-one, are necessary parties. *Pigg* v. *Cordwell*, Rep. T. Finch, 278.

(17) *Executor or Administrator.*

1. All executors must sue and be sued, though one be an infant. *Offley* v. *Jenney*, 3 C. R. 92. Nel. 42.

Scurry v. *Morse*, 9 Mod. 89.

2. Although an executor does actually release, yet he must be made a party to the suit. *Smithby* v. *Hinton*, 1 Vern. 31.

3. It is sufficient to make those executors parties who have proved the will; and the other executors, if they have demands out of the estate, may come in as creditors, before the Master. *Brown* v. *Pitman*, Gilb. E. R. 75.

And see Wankford v. *Wankford*, 1 Salk. 307.

4. An administrator, though insolvent, must be a party to a bill for discovery of assets. *Ashurst* v. *Eyres*, 2 Atk. 51. 3 Atk. 341.

5. One executor renouncing in the lifetime of another is a nullity, and therefore if A. and B. are executors, and B. renounces, and A. dies, the representation is continued in B. and not in A.'s executors; and therefore B. is a proper party to a suit respecting the assets. *Arnold* v. *Blancowe*, 1 Cox, 426.

6. Where an administration is granted to two, and one dies; held that the administration survived, and therefore the representatives of the deceased administrator are not necessary parties to a suit by the survivor, *Hudson* v. *Hudson*, For. 127.

7. Testator gave his real estate to trustees, to sell sufficient for payment of debts, and the residue over; the residuary devisee died; and on a bill by the heir of devisor and devisee, against the trustees, and the personal representatives of devisor, claiming the property as real estate, held that the personal representative of the devisee was a mere formal party, and in case of a decree might be brought in before the Master. *Fletcher* v. *Ashburner*, 1 Br. C. C. 498.

8. Objection that the administrator of the husband was not a party; but the wife being called administratrix in the bill, and having by her answer confessed that she had possessed the personal estate, and disposed of it, (and being the person by law entitled to administration) though she denied by answer that she had taken administration, the objection was overruled. *Cleland* v. *Cleland*, Pre. Ch. 64.

9. In a bill for an account of the personal estate of J. S. though the person who has a right to administer to J S. be a party, yet this is not sufficient without administration actually taken out. *Humphreys* v. *Humphreys*, 3 P. W. 348.

10. An administration granted in a foreign country, will not enable the party to sustain a suit as personal representative, *Tourton* v. *Flower*, 3 P. W. 37[?].

11. Though the person is come of age, during whose minority the will appointed an executor *durante minore ætate*, yet if he has not collected in the whole estate, he must be brought before the Court. *Glass* v. *Oxenham*, 2 Atk. 121. Barn. 332.

And see Atwood v. *Hawkins*, Rep. T. Finch, 113.

12. Where a suit is instituted against an administrator appointed under stat. 38 Geo. 3, c. 87, the executor being abroad: if the executor, or the executor's executor return within the jurisdiction, he must be made a party. *Rainsford* v. *Taynton*, 7 Ves. 460.

13. Though at law a specialty creditor may sue either the heir or executor, yet in equity he must make both parties. *Madox* v. *Jackson*, 3 Atk. 406.

And see Plunket v. *Penson*, 2 Atk. 51.

14. A bill by a residuary legatee against one executor only, the other being beyond sea, to have an account of his own receipts and payments; an objection for want of parties was disallowed, unless in the progress of the cause, the presence of the other should appear necessary. *Cowslad* v. *Cely*, Pre. Ch. 83.

15. One devises that his executors should sell his land, and leaves two executors, one of whom dies, and the other renounces, and administration is granted to A. who brings a bill against the heir to compel a sale; whether the renouncing executor, in whom this power of sale collateral to the executorship vested, ought not to be a party—*Quære*. *Yates* v. *Compton*, 2 P. W. 308.

16. Account being waved against a co-trustee's representatives, the objection of their not being parties to a bill filed against the surviving trustees overruled. *Lady Selyard* v. *The Executors of Harris*, 1 Eq. Ca. Ab. 74.

17. Where an executor in trust was outlawed, and a witness proved he had enquired after, and could not find him, it was held not necessary to make him a party. *Heath* v. *Percival*, 1 P. W. 684.

18. Where the representation is being contested in the Spiritual Court, a bill may be brought for discovery of assets against the heir, without making an administrator a party. *Plunket* v. *Penson*, 2 Atk. 51.

19. No good cause of demurrer that an executor is not a party, when plaintiff alleges in his bill he knows not who is executor, and prays defendant may discover him *Bowyer* v. *Covert*, 1 Vern. 95.

20. The heir of the obligor demurs, because his administrator was not made a party, and the demurrer was overruled, because he would not administer himself, and had opposed the plaintiff in taking out administration as principal creditor. *D'Aranda* v. *Whittingham*, Mos. 84.

21. A plea, for not bringing the representatives of the personal estate before the Court, allowed, even though suspected to be for delay merely. *Plunket* v. *Penson*, 2 Atk. 51.

22. Suit by one surety against another, for contribution, the representatives of another surety, who died insolvent, ought to be parties *Hole* v. *Harrison*, Rep. T. Finch, 15.

23. If a bill be brought against principal and one surety. and it is admitted

that the other is dead, insolvent, and there are no personal assets, his representatives need not be made parties.
Madox v. *Jackson*, 3 Atk. 406.
And see Angerstein v. *Clark*, 2 Dick. 738.

24. A person who has a legal interest need not in every case be a party, where the whole equitable interest is assigned over: but where a bond is assigned over by the obligee, and a presumption of its being satisfied arises from length of time, the representative of the obligee must be a party, in order to answer as to whether the bond has been satisfied *Brace* v. *Harrington*, 2 Atk. 235.

25. The assignee of a bond must make the representatives of the original obligee a party to a suit against the obligor. *Ray* v. *Fenwick*, 3 Br. C. C. 25.

26. One of two joint executors and residuary legatees assigned his interest and died, the assignee filed a bill to have half the residue transferred to him; the representative of the assignor need not be a party, unless there appear any doubt of the validity of the assignment. *Blake* v. *Jones*, 3 Anst. 651.

27. Bill by a parson claiming an apportionment of rent, under a lease of glebe land, made by his predecessor, the executor of such predecessor must be a party. *Bentham* v. *Alston*, 2 Vern. 136.

28. Where some of the undertakers, under the act of 4 Anne, c. 14, in regard to briefs are dead; in a bill for an account their representatives need not be brought before the Court, for they are each answerable the one for the other. *Ex parte Angel*, 2 Atk. 162. Barn. 423.

29. Feme covert, by leave of her husband, took a bond in the name of her servant, but in trust for herself; her husband died, and the obligor paid the money to his administrator: to a bill of interpleader, against the servant and the feme, the administrator must be a party. *Farrell* v. *Ball*, Rep. T. Finch, 330.

30. Bill stated that an estate, purchased in defendant's name, was so purchased in trust for plaintiff's ancestor, who paid the purchase-money, and prayed a reconveyance: demurrer, for that the executor of the ancestor was not a party, overruled. *Astley* v. *Fountain*, Rep. T. Finch, 4.

31. A suit by the heir, against the widow, to compel her to abide by her election to take a legacy in lieu of dower; an account of the personal estate was decreed, and the plaintiff had leave to amend by making the executor a party. *Lesquire* v. *Lesquire*, Rep. T. Finch, 134.

32. Administrator of an executor who was likewise a legatee by the will of the testator, exhibited his bill against the other executor; a demurrer for that the defendant's brothers, also legatees, and charged by the bill as combining with the defendant, were not parties, was allowed. *Galle* v. *Greenhill*, Rep. T. Finch, 202.

33. If the legatee of a term sue for it, he must make the executor a party: it is not sufficient to charge that he assents to the legacy. *Moor* v. *Blagrave*, 1 C. C. 277.

34. To an information, on the behalf of a charity, to discover the profits of lands for the satisfaction of a legacy charged thereon, the executor must be a party. *Attorney General* v. *Twisden*, Rep. T. Finch, 336.

35. A creditor cannot in any case sue a debtor to the testator's estate, without making the executor a party. *Rumney* v. *Mead*, Rep. T. Finch, 303.
Griffith v. *Bateman*, Rep. T. Finch, 334.

36. In a creditor's bill against the executor, the representatives of a debtor to the testator's estate cannot be parties. *Elmslie* v. *M'Aulay*, 3 Br. C. C. 624.

37. A creditor or legatee may bring a bill against a legatee or debtor, if he make the executor a party, and charges collusion. *The Attorney General* v. *Wynne*, Mos. 126.

38. A demurrer allowed to a bill brought against plaintiff, who was supposed to have some of the deceased's effects in his hands, because there was no executor or administrator party; for if none administer, plaintiff, as creditor, may. *Conway* v. *Stroude*, 2 Free. 188.

39. A. being seized of lands and indebted on judgment, died intestate, leaving a wife and son, the wife took out administration, and entered upon the land as guardian, and dies, leaving B. her executrix, who possesses her personal estate; the son dies and his heir, the plaintiff, pays the judgment; to a bill for an account of the profits of the land, the administrator *de bonis non* of A. is a proper party. *Bressenden* v. *Decreets*, 2 C. C. 197.

40. A. covenants for himself and his heirs that a jointure house shall remain to the uses in the settlement; the jointress brings a bill against the heir for a performance. The defendant demurs for that the executor ought to be a party; resolved, that though at law the creditor may sue the heir only, where the heir is expressly bound, yet as the personal estate is the natural fund to pay all debts, and as the executor may make it appear that he has performed the covenant, the executor must be made a party in equity. *Knight* v. *Knight*, 3 P. W. 331.

41. On a bill against the heir of a mortgagee to redeem, the executor or administrator must be made a party. *Anon*, 2 Free. 52.

42. Where the heir of the mortgagee brings a bill to compel the mortgagor to redeem or be foreclosed, the executor must be a party. *Freak* v. *Hearsey*, 1 C. C. 51. 2 Free. 180. Nel. 93. *Clerkson* v. *Bowyer*, 2 Vern. 66.

43 To a bill against the heir of the mortgagor to have payment, or hold without redemption, the personal representative of the mortgagor must be made a party. *Mecker* v. *Tanton*, 2 C. C. 29.

44. It is not necessary to make the executor of a mortgagor a party to a bill against the heir for a foreclosure; for the suit being only to foreclose the equity, it is sufficient that the party having the equity is before the Court. The mortgagee is not bound to intermeddle with the personal estate; and if the heir would have the benefit of any payment made by the mortgagor or his executor, he must prove it. *Duncombe* v. *Hansley*, 3 P. W. 333, (*n*).

And see Fell v. *Brown*, 2 Br. C. C. 279.

45. If there be a mortgage by tenant in fee, by creating a term, the personal representative ought not to be a party to a bill of foreclosure. *Bradshaw* v. *Outram*, 13 Ves. 234.

46. A term of 1000 years was granted, but conditioned to sink and be extinguished upon payment of an annuity for 42 years. To a bill brought by the heir of the grantor against the heir of the grantee, after the expiration of the 42 years, for a surrender of the residue of the term, the personal representatives of the grantor need not be parties. *Bampfeild* v. *Vaughan*, Rep. T. Finch, 104.

47. A bill brought to redeem against the defendant, who had notice of the plaintiff's title, but bought of the executors of a purchaser without notice, the objection allowed for not bringing the representatives of the mesne purchaser before the Court, or otherwise the defendant would be deprived of that defence. *Lowther* v. *Carlton*, 2 Atk. 139.

And see p. 343, *ante*.

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(18) *Heir.*

1 One, seised of lands in fee, binds himself and his heirs in a bond, and devises his lands to J. S. in fee, and dies: in a bill brought by the obligee in the bond, to subject the real assets in the devisee's hands to the payment of debts, the devisor's heir must be made a party. *Gawler* v. *Wade*, 1 P. W. 99.

2. A creditor brings a bill, under the statute of fraudulent devises, against the assignee of the devisee only; the heir at law is a necessary party. *Warren* v. *Stawell*, 2 Atk. 125.

3. Where the debt is a specialty, the creditor must make both the heir and executor parties *Madox* v. *Jackson*, 3 Atk. 406.

4. In a devise of lands to pay debts, if creditors bring the bill to compel a sale, the heir is generally to be made a party; *Secus*, in case of a trust created by deed to pay debts. *Harris* v. *Ingledew*, 3 P. W. 92.

5. In a bill by a second mortgagee to redeem the first mortgage, the mortgagor or his heirs, must be before the Court. In this case the heir being abroad, the Court refused to proceed. *Fell* v. *Brown*, 2 Br. C. C. 276.

6. And although the second mortgage is only of part of the estates comprised in the first mortgage. *Palk* v. *Clinton*, 12 Ves. 49.

7. If a plaintiff claims to have the will established, the heir must be a party, but if only a title under the will, it is not necessary; so a devisee of a mortgaged estate need not make the heir a party to a bill for redemption. *Lewis* v. *Nangle*, 2 Ves. 431.

8. So also the devisee of the mortgagee need not make the heir of the mortgagee a party to a bill for foreclosure, unless the

bill also pray that the will may be established. *Skipp* v. *Wyatt*, 1 Cox, 353.

9. Bill, by devisees in trust to sell, for specific performance of an agreement to purchase: *semble*, the heir of the devisor should be a party to the suit. *Wakeman* v. *Duchess of Rutland*, 3 Ves. 233.

10. And if there is* only an equitable charge upon a copyhold, and the legal estate descends to the heir, it is necessary to make the heir a party to convey the legal estate to a purchaser; but not if, after the testator's death, the heir had conveyed the estate away to another. *Anon*, 3 P. W. 97, (*n*).

11. A bill to execute the trusts of a will of real estate ought to have the heir at law a party. *Graham* v. *Graham*, 1 Ves. J. 276.

12. If a devisee seek to have title deeds delivered to him, he must make the heir a party. *Anon*, 1 Ves. J. 29.

13. An information praying to have money given to a charity applied to other uses than those specified by the will, the heir must be a party. *Attorney-General* v. *Green*, 2 Br. C. C. 492.

And see p. 344, *ante*.

(19) *Impropriator*.

1. Where an impropriator's right does not come in question, he need not be made a party to a bill for substraction of tithes. *Carte* v. *Ball*, 3 Atk. 500.

2. In a bill to establish a *modus* against the lessee of the impropriator, the owners of the impropriation must be parties. *Glanvil* v. *Trelawney*, Bun. 70.

(20) *Incumbent*.

1. Bill for tithes by the bishop and sequestrator during the incapacity of the incumbent, dismissed, the incumbent not being a party. *Bishop of London* v. *Nicholls*, Bun. 141.

2. Bill by plaintiffs, as lessees of the rector of Winterbourne, for a portion of great and small tithes in Stoke Gifford, a neighbouring parish; the vicar of Stoke Gifford, who might be entitled to the small tithes, is a necessary party. *Bailey* v. *Worrall*, Bun. 115.

And see p. 345, *ante*.

(21) *Incumbrancers*.

1. Where a person derives title under a dormant settlement, all the remainder-men in that settlement, as well as all mesne incumbrancers on the estate, must be made parties to the suit. *Edgworth* v. *Edgworth*, 5 Br. P. C. 498.

2. The Court ordered a bill of foreclosure to stand over to make a judgment creditor, the only incumbrancer not before the Court, a party, but would not adopt as a general rule the usual practice to make all incumbrancers parties. *Bishop of Winchester* v. *Beavor*, 3 Ves. 314.

3. If a remainder-man in tail brings a bill against tenants for life to have the title deeds brought into Court, and there are annuities on the reversion, and others who have an interest under the trust term, they must be parties. *Pyncent* v. *Pyncent*, 3 Atk. 571.

And see Tharp v. *Tharp*, 3 Mer. 512.

4. On a bill of foreclosure, subsequent incumbrancers ought to be parties. *Morret* v. *Westerne*, 2 Vern. 663.

5. As to the necessity of making all incumbrancers parties—*quære*. *Palk* v. *Clinton*, 12 Ves. 58.

(22) *Inheritance, Owner of*.

1. Where the suit is to establish a right, the parties entitled to the inheritance must be before the Court. *Poore* v. *Clark*, 2 Atk. 515.

2. Bill to establish a custom, the owner of the inheritance must be a party. *Spendler* v. *Potter*, Bun. 181.

And see p. 343 *ante, and* p. 516* *post*.

(23) *Insolvent Debtors*.

1. An insolvent debtor is not a necessary party to a bill, by a purchaser of his interest in stock, against his assignee. *Collet* v. *Wollaston*, 3 Br. C. C. 228.

(24) *Joint ownership or Liability*.

1. Committee of a voluntary society entering into an agreement with tradesmen for the whole, it is sufficient to make them parties to a bill to enforce the performance of it, and it is not necessary to include all the subscribers. *Cullen* v. *Duke of Queensberry*, 1 Br. C. C. 101.

2. Timber purchased for a colliery: before it was applied to the use of the colliery some of the owners retired, and it was paid for by those only who remained; the former owners are not necessary parties to a suit, by those who remained, against the vendor on account of that sale. *Massey* v. *Davies*, 2 Ves. J. 317.

3. One part-owner of a ship cannot

bring a bill on behalf of himself and the other part-owners, but they must all be parties. *Moffatt* v. *Farquharson*, 2 Br. C. C. 338.

4. Part of a ship's crew appoint two to be agents; on a bill for an account, in their own names, and not on behalf of themselves and others, held that the rest of the crew must be parties. *Leigh* v. *Thomas*, 2 Ves. 312.

5. A bill may be brought by part of a crew, on behalf of themselves and the rest, against the owners, for an account of captures according to the articles. *Good* v. *Blewitt*, 13 Ves. 397.
Pearse v. *Green*, 1 J. & W. 135.
And see Brown v. *Harris*, 13 Ves. 552.

6. Joint owner is not a necessary party to a bill against a factor on a demand against the other moiety; the defendant having kept separate accounts, and admitted the produce of that moiety to be in his possession. *Weymouth* v. *Boyer*, 1 Ves. J. 416.

7. Where two are liable to a demand, you cannot proceed against one alone. *Jackson* v. *Rawlins*, 2 Vern. 195.

8. Where there are two factors, a bill may be filed against one only, the other being beyond sea. *Cowslad* v. *Cely*, Pre. Ch. 83.
And see Barker v. *Wyld*, 1 Vern. 140.

9. In a suit for a share of a partnership adventure, all the parties having shares must be parties. *Ireton* v. *Lewes*, Rep. T. Finch, 96.

10. If one partner is beyond sea, a bill may be filed against the other for a joint demand. *Darwent* v. *Walton*, 2 Atk. 510.

11. In a bill to establish a tithe of fish, all persons interested in any one particular adventure must be parties. *Coppard* v. *Page*, For. Ex. 1.

12. Assignment of a lease in trust for those who should buy shares, the interest being divided into 900 shares; to a bill by the lessor for rent and performance of covenants, it is not necessary to have all the owners of the shares parties. *City of London* v. *Richmond*, 2 Vern. 421.

13. The proprietor of a copyright must file distinct bills against each bookseller taking spurious copies, the liability being separate; so also upon distinct invasions of patent rights; but it is otherwise in a bill to establish a right of fishery or the custom of a mill. *Dilly* v. *Doig*, 2 Ves. J. 486.

14. Upon a bill to recover the payment of 100*l.* a-year, agreed to be paid to plaintiff by a vestry order made by the defendants and others, the parishioners of St. Botolph's, Bishopsgate, for a yearly lecture in the parish, the parties to the order are necessary parties to the suit. *Henchman* v. *Eyre*, Hard. 333.

15. In case of a voluntary society, as a lodge of freemasons, as well as in cases of creditors and legatees, some may sue on the behalf of themselves and the rest, where it is manifestly inconvenient to justice to make them all parties. *Lloyd* v. *Loaring*, 6 Ves. 773.

16. The rule, requiring all persons interested to be made parties, is dispensed with where it is impracticable or extremely difficult: as in a suit to establish a right of service to a mill against a district, the Court only requires parties sufficient to ensure a fair contest; and so in a suit concerning a rent charge out of the profits of the New River Company, the Court will dispense with making all the proprietors of New River shares parties, though they may be liable to pay or contribute to the demand. *Adair* v. *The New River Company*, 11 Ves. 429.

17. Part of the proprietors of an undertaking may bring others of them to an account, without making all the members parties, especially if they sue on behalf of themselves, and all the rest. *Anon*, Pre. Ch. 592.

18. In a bill to establish a contributory *modus*, all the persons liable to the contribution need not be parties. *Scarr* v. *Trinity College*, 3 Anst. 768.

19. One owner of lands in a township may sue for himself and the others, to establish a contributory *modus* for all the lands in the township. *Chaytor* v. *Trinity College*, 3 Anst. 841.

20. Persons contracting on behalf of a legal society, of which they are members, as a committee, are not liable to nonsuit, and cannot defend an action upon an objection of parties. *Cousins* v. *Smith*, 13 Ves. 542.

See further p. 342, *ante*.

(25) *Joint Tenants.*

1. Two joint tenants for life; if one of

them exhibit a bill, the other must be made a party, without the bill shews that he is dead. *Weston* v. *Keighley*, Rep. T. Finch, 82.

2. Where there are three mortgagees, being joint tenants, one cannot bring a bill to foreclose without making the others parties. *Lowe* v. *Morgan*, 1 Br. C. C. 368.

3. Bankers laid out money, belonging to different persons, upon mortgage; a foreclosure by one of the parties so entitled as to his share, without making the other *cestuis que trust* parties. *Montgomerie* v. *Marquis of Bath*, 3 Ves. 560.

(26) *Legatee.*

1. In a bill, to be relieved touching a lease for years or other personal duty, against executors, although they are executors in trust, it is not necessary to make the *cestuis que trust*, or residuary legatees, parties. *Anon*, 1 Vern. 261.

2. In a suit for a legacy it is not necessary to make other legatees parties, although, from a deficiency of assets, all the legatees must abate. *Attorney-General* v. *Ryder*, 2 C. C. 178.

3. Where a legacy is given to two, one cannot sue alone for it; if the residue be given to divers, they must all be parties; but when legacies are given to divers persons, each alone may sue for his own legacy. *Haycock* v. *Haycock*, 2 C. C. 124.

4. A pecuniary legacy to each of three children, and the residue to be equally divided among them: to a bill by one legatee for the pecuniary legacy, it is not necessary to make the others parties; but if the bill is for the residuary share, the others must be parties. *Dunstall* v. *Rabett*, Rep. T. Finch, 243.

And see Atwood v. *Hawkins*, Rep. T. Finch, 113.

5. In a bill against an executor, either by creditors or legatees, it is not necessary to make the residuary legatee a party. *Lawson* v. *Barker*, 1 Br. C. C. 303.

De Golls v. *Ward*, 3 P. W. 311, (*n*).

6. Residuary legatee need not be a party to a bill for a specific legacy. *Wainwright* v. *Waterman*, 1 Ves. J. 311.

7. A bill for a moiety of the residue, the other moiety being given to one of the defendants for life, and at her death, as she should appoint, and in default of appointment over; the legatees over must be made parties. *Sherrit* v. *Birch*, 3 Br. C. C. 229.

8. The general principle requires a residuary legatee to bring before the Court all persons interested in the residue. *Cockburn* v. *Thompson*, 16 Ves. 328.

9. In a devise to sell, and the produce to be divided, all persons interested in the fund must be parties, although the estate is sold before suit commenced. *Faithful* v. *Hunt*, 3 Anst. 751.

See further, p. 344, *ante*.

(27) *Lessor or Lessee.*

1. Where several persons have claims upon an estate in the different characters of purchasers, lessees, and mortgagees, the person claiming the ultimate beneficial interest must make them all parties to the bill, in order that he may not be harassed with a multiplicity of suits about one and the same matter. *Edgworth* v. *Swift*, 4 Br. P. C. 654.

2. A lease of lands is granted, with an exception of mines, &c. and a power of working the same, and a covenant from the lessor, to make satisfaction for all damages and spoil of ground, to arise by working mines. At the time of granting this lease, certain coal mines upon the premises were demised to J. R. In a bill brought for a performance of this covenant against the representatives of the lessor, it is necessary to make the lessee of the coal mines a party. *Green* v. *Poole*, 5 Br. P. C. 504.

3. Plaintiff being co-lessee with A., brought his bill to have the rent apportioned on a partial eviction; and because the other lessee was neither plaintiff nor defendant, for if he refused to be a plaintiff he might be a defendant, the bill was dismissed with costs. *Stafford* v. *City of London*, 1 P. W. 428. 1 Str. 95.

4. Upon a bill brought against an assignee of a lease to pay the rent and perform the covenants in the lease, the original lessee, being liable, ought to be a party. *City of London* v. *Richmond*, 2 Vern. 422.

See further, p. 344, *ante*.

(28) *Lord of the Manor.*

1. Where a bill is brought for surrender of a copyhold estate for lives, the

lord must be a party, because when the surrender is made, the estate is in the lord, and he is under no obligation to regrant it; *contra*, in the case of copyholders of inheritance, there the lord need not be a party. *Anon,* 6 Vin. Ab. 239.

2. If a plaintiff pretends title to lands as freehold, which defendant claims to hold in fee by copy of court roll, and prays in aid the lord of the manor, the lord is a proper party. *Lucas* v. *Arnold,* Cary, 81.

(29) *Lunatic.*

1. A lunatic must be a party to a suit for his own benefit: otherwise perhaps in case of an idiot. *Attorney-General* v. *Woolrich,* 1 C. C. 153.

2. But where the suit is to be relieved against an act done by the lunatic, as assigning a debt, he need not be a party. *Attorney-General* v. *Smith,* 1 C. C. 113.

3. A lunatic cannot be a relator to an information, but if the suit is for his benefit he must be a party. *Attorney-General* v. *Tyler,* 2 Eden, 230. 1 Dick. 378.

4. Where a committee sue in the right of the lunatic, in such case the committee and the lunatic are made parties. *Fuller* v. *Lance,* 1 C. C. 18.

(30) *Mortgagor or Mortgagee.*

1. Second mortgagee contesting by his bill the validity of the first mortgage, the mortgagor must be a party. *Thomson* v. *Baskervill,* 3 C. R. 215.

2. An old mortgage is made to B. for 350*l.* who makes an under-mortgage to C. for 300l., C. brings a bill to foreclose: B., the original mortgagee, or in case of his death his representative, ought to be made a party. *Hobart* v. *Abbot,* 2 P. W. 643.

3. If a mortgagee assign over his mortgage, yet he must be made a party in a bill of redemption, that he may account for what profits he received in his time; this was held by the Court to be the daily practice. *Anon,* 2 Eq. Ca. Ab. 594.

4. If a mortgagee in possession assign over, and the mortgagor prefer his bill, suggesting that the debt is fully paid, and for an account of the surplus, he must make the mortgagee and all the assignees parties; but if the bill be brought for an account, and to pay what is due, he need not make the mortgagee a party. *Anon,* 2 Free. 59.

5. The heir of the mortgagor, on a bill to redeem, need not bring the original mortgagee before the Court, where he has assigned without the mortgagor's joining. *Hill* v. *Adams,* 2 Atk. 39. *Chambers* v. *Goldwin,* 9 Ves. 269.

6. A bill by a second mortgagee to redeem the first mortgagee, the mortgagor must be a party. *Fell* v. *Brown,* 2 Br. C. C. 276. *And see Palk* v. *Clinton,* 12 Ves. 58.

7. Every one having a right to redeem, ought to be a party to a bill of foreclosure. *Bishop of Winchester* v. *Beavor,* 3 Ves. 316.

8. In a bill by a pawnee, for an account and delivery of jewels, the pawnor, or the representative of pawnor, need not be a party. *Saville* v. *Tankred,* 1 Ves. 101.

9. Mortgagees of an equity of redemption, made such pending a suit of foreclosure, will be bound by the decree, though not made parties. *Bishop of Winchester* v. *Paine,* 11 Ves. 194.

See further p. 344, *ante.*

(31) *Obligor or Obligee.*

1. A bill on a bond must be against all the obligors. *Anon,* 2 Free. 127.

2. The rule was dispensed with when the obligors were very numerous. *Lady Cranborne* v. *Crispe,* Rep. T. Finch, 105.

3. Two obligors in a bond bound jointly and severally, and one dies, the executors of the deceased obligor may be sued in equity for the debt, without making the surviving obligor a party. *Collins* v. *Griffith,* 2 P. W. 313.

4. If obligors are bound jointly and severally, the obligee may sue them severally in equity, as well as at law. *Stanley* v. *Stock,* Mos. 383.

5. Where the obligors are only sureties, it is not necessary that the principal should bring them before the Court. *Madox* v. *Jackson,* 3 Atk. 406.

6. On a bill against an executor, to be paid a bond debt, a surety with the testator held to be a necessary party. *Angerstein* v. *Clark,* 2 Dick. 738.

7. A bill filed against the executor of one of several obligors, all the surviving obligors must be parties, that the charge may be equal. *Blois* v. *Blois,* 2 Vent. 348.

8. But otherwise if judgment has been obtained against the deceased obligor, for then the bond is drowned in the judgment. *Blois* v. *Blois*, 2 Vent. 348.

See further p. 342, *ante.*

(32) *Ordinary.*

1. To a bill to establish a customary payment in lieu of tithes, the ordinary must be a party. *Gordon* v. *Simpkinson*, 11 Ves. 509.

2. The ordinary is a necessary party to a bill to establish a *modus*. *Jenkinson* v. *Royston*, 5 Price, 495. Dan. 121.
Hales v. *Pomfret*, Dan. 142.

See further, p. 344, *ante.*

(33) *Plaintiff.*

1. Interest under a power of appointing the application of a charity, not sufficient to sustain a bill as plaintiff. *Attorney-General* v. *City of London*, 1 Ves. J. 243.

2. Bill to be relieved against a bail-bond, assigned by the sheriff by fraud; the plaintiff in the action at law must be made a party. *Izraell* v. *Narbourne*, 1 Vern. 87.

3. Two tenants in common are plaintiffs and one dies, his representatives must make the co-plaintiff a party to the bill of revivor. *Fallowes* v. *Williamson*, 11 Ves. 306.

4. Upon a revivor by *scire facias*, according to the old practice, all the plaintiffs must have joined. *Ibid*, 11 Ves. 311.

And see p. 341, *ante.*

(34) *Remainder-man or Reversioner.*

1. Where a defendant by answer insisted on a foreclosed mortgage of a term of years as his title, and did not insist that a remainder-man should have been a party, and state who he was, defendant's objection on that account at the hearing overruled. *Bush* v. *Western*, Pre. Ch. 530.

2. Where there are many contingent limitations of a trust, it is sufficient to bring the trustee before the Court, together with him in whom the first remainder of the inheritance is vested. *Hopkins* v. *Hopkins*, 1 Atk. 590.

3. Where a mortgagee in fee has made an absolute conveyance with several limitations and remainders over, the first tenant in tail at least must be brought before the Court. *Yates* v. *Hambly*, 2 Atk. 237.

4. On a bill to execute a trust, the first person entitled to the remainder of inheritance is a necessary party, if in being. *Finch* v. *Finch*, 2 Ves. 492.

5. Where the first tenant in tail is a party, it is not necessary to make any other of the remainder-men parties to the suit. *Reynoldson* v. *Perkins*, Amb. 564. 1 Dick. 427.

6. The Court will never go beyond the tenant in tail in possession, and hold it necessary to make the reversioner a party. *Fletcher* v. *Tollet*, 5 Ves. 10.

7. Rule established for convenience, that it is sufficient to bring the first tenant in tail before the Court. *Lloyd* v. *Jones* 9 Ves. 55.

8. A court of equity, in many cases, considers the tenant in tail as having the whole estate vested in him, at least for the purposes of suit; for which purposes it does not look beyond the estate tail in a suit to bind the right to the land, in respect of charges created by the author of the gift, as to which the subsequent remainder-man has a clear interest in the suit of the prior tenant in tail. *Ibid*, 9 Ves. 56.

9. But there is a distinction where the suit is founded upon contract by the tenant in tail. *Ibid*, 9 Ves. 57.

10. Bill claiming a charge upon the whole inheritance, in strict settlement, against the first tenant in tail, in being: if he die without issue, all the proceedings are had against the second son, as if he had been originally a party, by supplemental bill. *Ibid*, 9 Ves. 58.

11. It is sufficient to bring before the Court the first tenant in tail in being, and if there be no tenant in tail in being, then the first person entitled to the inheritance. *Gifford* v. *Hort*, 1 S. & L. 408.

12. Bill for a moiety of a residue; the other moiety was given to A. for life, and upon her decease to such persons as she should appoint; in default of appointment to other persons; those persons must be parties. *Sherrit* v. *Birch*, 3 Br. C. C. 229.

See further, pp. 343, 344, *ante.*

(35) *Tenants or Occupiers.*

1. If a bill is brought to establish a general *modus,* through a whole parish, all the land-owners must be either plaintiffs or defendants; but if the parson sue for tithes in kind, defendant may insist upon such a *modus,* though the rest of the parishioners are not made parties. *Rudge* v. *Hopkins,* 2 Eq. Ca. Ab. 170.

2. Though a *modus* be laid in all the occupiers, yet suing part of the occupiers is sufficient, each being liable for the whole. *Hardcastle* v. *Smithson,* 3 Atk. 247.

3. Decree in time of Charles I. for payment of £40 per annum, out of particular lands, formerly part of the forest of Bladen, to the vicar, in lieu of tithes. In a bill against the land-owners to establish a right for this £40 per annum, it is not necessary that the occupiers as well as land-owners should be made parties to the bill. *Cuthbert* v. *Westwood,* Gilb. E. R. 230.

4. In a suit, on behalf of a charity, for arrears of a rent-charge, it is not necessary to make all the terre-tenants of the land, out of which the rent issues, parties. *Attorney-General* v *Wyburgh,* 1 P. W. 599. *Attorney-General* v. *Shelly,* 1 Salk. 163.

5. Upon a bill for equitable relief as to a rent-charge, all the persons whose estates are liable, must be parties; but the rule will be dispensed with, under circumstances making it impracticable or highly inconvenient to justice. *Adair* v. *New River Company,* 11 Ves. 443.

6. A bill does not lie against several tenants of a manor for quit-rent. *Bouverie* v. *Prentice,* 1 Br. C. C. 200.

7. To a bill by tenants against the lord of the manor to be quieted in the enjoyment of the common, it is not necessary that all the commoners should be parties. *Mayor of York* v. *Pilkington,* 1 Atk. 282.

8. A party claiming a sole right to a fishery may bring a bill, to try the right and be quieted in possession, against several occupiers of land, especially if they are all who claim against the plaintiffs; and that they have no privity between them, but claim by distinct rights, is no objection to their being joined together in the suit. *Ibid.*

9. To a bill for specific performance of articles respecting boundaries of two provinces in America, the tenure of the planters being preserved by the agreement, they need not be parties. *Penn* v. *Lord Baltimore,* 1 Ves. 449.

(36) *Tenants in Common.*

1. The plaintiffs were tenants in common, the suit abated by the death of one, and a bill of revivor filed by his representatives; the other tenant in common must be made party, either as plaintiff or defendant. *Tallowes* v. *Williamson,* 11 Ves. 306. *Boddy* v. *Kent,* 1 Mer. 364.

(37) *Trustees or Cestui que trust.*

1. Where a trustee is called to account of the trust property, all the *cestuis que trust* must be parties. *Hamm* v. *Stevens,* 1 Vern. 110.

2. Upon a bill for a specific performance of a covenant with A. for the benefit of B., A. must be a party. *Cooke* v. *Cooke,* 2 Vern. 36.

3. To a bill for the execution of the trust, the *cestui que trust* must be a party, but the trustees need not, especially if the *cestui que trust* undertakes for him. *Kirk* v. *Clark,* Pre. Ch. 275.

4. Where the real estate is in the hands of trustees, and the trustees convey it over without notice of the trust; if a bill is brought by the *cestui que trust,* the trustees must be made defendants. *Harrison* v. *Pryse,* Barn. 324.

5. In an information to apply money, given to a charity, to other uses than those specified by the will, the trustees must be parties. *Attorney-General* v. *Green,* 2 Br. C. C. 492.

6. Bill by one trustee of stock against the other to compel him to replace it, or give security according to his engagement, wherein the plaintiff joined in transferring the stock into his name; demurrer, because the *cestuis que trust* were not parties, overruled. *Franco* v. *Franco,* 3 Ves. J. 75.

7. Where a remainder-man brings a bill against tenants for life, to have the title deeds brought into Court, parties claiming under the trust deed must be parties to the suit. *Pyncent* v. *Pyncent,* 3 Atk. 571.

8. A bill charges forgery in a lease, and prays relief: the trustees, who were par-

ties to the lease, and to whom the fraud and breach of trust is imputed, must be parties. *Jones* v. *Jones*, 3 Atk. 110.

9. On a bill to set aside annuities, secured by creating a term of years, the trustees of the term must be parties, although, the deed being void at law, the legal estate is not in him. *Bromley* v. *Holland*, 7 Ves. 11.

10. The defendant disputing the terms of an agreement he had entered into, to let to the plaintiff for a term of years, executed a power under a settlement to trustees, with direction to sell; the trustees are necessary parties to a bill for specific performance. *Brodie* v. *St. Paul*, 1 Ves. J. 326.

11. Bill of redemption against the trustee is not sufficient, the *cestui que trust* must be a party. *Whistler* v. *Webb*, Bun. 53.

12. In most cases respecting trust property it is necessary to have the *cestui que trust* before the Court. *Adams* v. *St. Leger*, 1 B. & B. 184.

See further, p. 345, *ante*.

(38) *Vendor*.

1. If an ancestor has agreed for the purchase of particular lands, and dies before it be completed, and the heir at law brings a bill against the devisees, who claim under the ancestor's will made before the purchase, the vendor must be a party, if his title be doubtful; otherwise, if it be clear. *Green* v. *Smith*, 1 Atk. 572.

(39) *Witness*.

1. A mere witness is not a proper party to the suit. *Newman* v. *Godfrey*, 2 Br. C. C. 333.
Heyes v. *Exeter College*, 12 Ves. 343.

2. The secretary and book-keeper of the East-India Company were made defendants to a bill for a discovery of some entries or orders of the Company. Demurrer, for they might be examined as witnesses, also because their answer cannot be read against the Company, was overruled. *Wych* v. *Meal*, 3 P. W. 310.

3. Where, on a treaty of marriage, the mother of the intended husband having first obtained a bond from him, represented to the father of the wife that he was not indebted, by which the father was induced to give a portion to the wife on marriage. In a bill by the husband to be relieved against the bond, as a fraud on the marriage, the father, being a mere witness, is not a necessary party. *Scott* v. *Scott*, 1 Cox, 366.

4. To a bill for relief a mere witness cannot be a defendant, except in the case of a secretary, &c. of a corporation. *Fenton* v. *Hughes*, 7 Ves. 288.

5. A mere witness cannot be made a defendant for discovery of what he is examinable to, unless he is interested. *Plummer* v. *May*, 1 Ves. 426.

6. The exceptions to this rule are arbitrators, attorneys, and corporations whose officers and servants are sometimes made parties. *Dummer* v. *Corporation of Chippenham*, 14 Ves. 252.

See further, p. 345, *ante*.

LIV. Pauper.

1. The indulgence of being allowed to sue *in forma pauperis* extends only to persons suing in their own right, and not to executors or administrators. *Paradice* v. *Sheppard*, 1 Dick. 136.

2. So a next friend cannot sue *in forma pauperis*. *Anon*, 1 Ves. J. 410.

3. A party claiming as heir, against the will and a disputed deed, sued as a pauper. *Perishal* v. *Squire*, 1 Dick. 31.

4. A person, having been examined *pro interesse suo*, was permitted to prosecute, and make out her right, *in forma pauperis*. *James* v. *Dore*, 2 Dick. 788.

5. A bankrupt may petition against his commission *in forma pauperis*. *Ex parte Northam*, 2 V. & B. 124.

6. The affidavit, to ground the order to sue *in forma pauperis*, must be made by the pauper himself, and not by a third person. *Wilkinson* v. *Belsher*, 2 Br. C. C. 272.

7. An affidavit that the defendant is not worth more than £5, except the matters in question, is not sufficient to entitle him to defend *in forma pauperis*; and where it appeared the defendant was in possession of the property in question, the Court dispaupered him. *Spencer* v. *Bryant*, 11 Ves. 49.

8. A pauper will be dispaupered for misconduct. *Ex parte Shaw*, 2 Ves. J. 41.

9. A pauper is liable to be committed for filing an improper bill. *Pearson* v. *Belchier*, 4 Ves. 630.

10. Plaintiff suing *in forma pauperis* shall not amend by leaving out defendants, without paying their costs. *Wilkinson* v. *Belsher*, 2 Br. C. C. 272.

11. Pauper shall not dismiss his bill without costs. *Pearson* v. *Belsher*, 3 Br. C. C. 87.

12. Pauper cannot appeal. *Taylor* v. *Bouchier*, 2 Dick. 504.

But see Wild v. *Hobson*, 2 V. & B. 106.

Matthews v. *Warner*, 4 Ves. 194.

13. Where the respondent, suing *in forma pauperis*, had obtained a verdict in an issue, the House of Lords in directing a new trial ordered the appellants to pay the respondent £60, to enable her to prepare for trial, the same to be deducted out of the costs, if the verdict should be found for the respondents. *Ashe* v. *Ashe*, 7 Br. P. C. 149.

And see Perishal v. *Squire*, 1 Dick. 31.

See further, p. 331, *and as to Costs in a Pauper cause*, p. 424*, *ante*.

LV. Payment of Money.

(*a*) *Into Court.*

1. Money will not be ordered to be paid into Court upon the application of a party who does not show any title. *Brown* v. *Dudbridge*, 2 Br. C. C. 321.

2. When money is directed by an act of parliament to be paid to the Accountant General, he is bound by the act to receive it, and the Court will not make an order for that purpose. *Anon*, 1 Ves. J. 56.

3. Practice, of moving to pay money into Court *forthwith*, altered, in future a day must be named. *Higgins* v. ——, 8 Ves. 381.

4. Where money by an order of Court is paid into the Accountant General's hands to be placed in the Bank, till it can be laid out according to the directions of a decree, a party moving for an application of this money, must not only have a certificate that the money was paid into the Bank, but that it is actually in the Bank at the time the motion is made. *Anon*, 1 Atk. 519.

5. Motion to pay money into Court refused, the affidavit not specifying the sum in the defendant's hands. *Roberts* v. *Hartley*, 1 Br. C. C. 57.

6. Defendant ordered to pay money into Court, before answer, in a case of gross fraud, appearing upon the plaintiff's affidavit and by the defendant in answer. *Jervis* v. *White*, 6 Ves. 738.

7. The Court will immediately on the coming in of the executor's answer, order so much as he admits to have in his hands of the testator's property, to be paid into the Bank, it is not necessary to show abuse of trust. *Strange* v. *Harris*, 3 Br. C. C. 365.

Blake v. *Blake*, 2 S. & L. 26.

8. An admission, in the answer of executors, that there is standing in their names upon the trusts of the will a considerable sum in the three per cent. Bank Annuities, and an offer of appropriation, are sufficient to entitle the plaintiff, a contingent legatee, to move for an appropriation: the order was made upon consent as upon an admission of assets, &c. to transfer. *Pullen* v. *Smith*, 5 Ves. 21.

9. Money in the funds, belonging to wards of the Court, cannot be transferred into the name of the Accountant General to the credit of the cause, until the account is taken by a Master, and the report made. *Bencraft* v. *Rick*, 1 Br. C. C. 56.

10. The Court will not order a balance, appearing upon charge and discharge in the Master's office, to be paid in, before the Master has made his report, even upon his certificate of the sum. *Fox* v. *Macreth*, 3 Br. C. C. 45. 1 Ves. J. 69.

11. But in a subsequent case, on motion, certain sums, admitted by defendant's examination to be in his hands, were ordered to be paid into the Bank in trust for the creditors, although the Master had not made his report. *Thompson* v. *Pycfinch*, 3 Br. C. C. 46. (*n*).

12. Money may be ordered into Court on motion, upon the ground of admission, as by schedules or books containing an account of receipts and payments, and referred to, so as to be part of the answer or examination. *Mills* v. *Hanson*, 8 Ves. 69.

13. In a bill by legatees against the executor, if he admits in his examination a balance due, and claims no interest, the Court will order him to pay it in before the report. *Curgenven* v. *Peters*, 3 Anst. 751.

14. But a motion to pay money into Court, upon the affidavit of an account-

ant, that from the schedules to the answer, the examination and the books of account, such a sum was due, was refused. *Mills* v. *Hanson*, 8 Ves. 68.

15. A motion that defendant might pay money into Court upon casting up books, must be upon the ground of admission by reference sufficient to make them part of the examination, as much as schedules to an answer: in this instance it failed, the plaintiff going upon certain books, and the reference being generally to all. S. C. 8 Ves. 91.

16. Motion for payment of money into Court, not admitted to be due even upon examination of the defendant, but appearing due by his schedule, according to the plaintiff's calculation, refused: for such a purpose the result of the schedule, ascertaining the sum due, must clearly appear verified by affidavit. *Quarrell* v. *Beckford*, 14 Ves. 177.

17. Defendant on motion ordered to pay in the balance ascertained by the report. *Gordon* v. *Rothley*, 3 Ves. 572.

18. Trust fund, which under a power in a marriage settlement had been lent to the husband, decreed to be paid into Court, the trustees representing it to be in danger. *Payne* v. *Collier*, 1 Ves. 170.

19. The Court refused to order dividends, received before the bill filed, of stock purchased by the old government of Switzerland to be paid into Court by the trustees, on the application of the present government, without having the Attorney-General a party. *Dolder* v. *Bank of England*, 10 Ves. 352.

See further, p. 332, *ante; and for Payment of Assets into Court by Executors*, p. 210, *ante; and for Payment of Purchase Money into Court*, p. 462, *post.*

(*b*) *Out of Court.*

1. An order for payment of money out of Court, should be made upon petition, not on motion. *Lord Shipbrooke* v. *Lord Hinchingbrook*, 13 Ves. 394.

2. Payment in part of a legacy ordered on motion with consent, the fund being admitted to be ample. *Pearce* v. *Baron*, 12 Ves. 459.

3. Order for transfer and payment of money out of Court after decree, though the cause was abated by the death of plaintiff: the right being clear. *Roundell* v. *Currer*, 6 Ves. 250. *Finch* v. *Lord Winchelsea*, 1 Eq. Ca. Ab. 2.

4. When a cause abates, money may be ordered to be paid out of Court without revivor, but not without the consent of all the parties interested. *Beard* v. *Earl Powis*, 2 Ves. 399.

5. To enable an executor to obtain an order for the payment of money out of Court, a prerogative probate is necessary, however small the amount. *Docker* v. *Horner*, 3 Br. C. C. 240, 2 Dick. 746. *Challnor* v. *Murhall*, 6 Ves. 118. *Newman* v. *Hodgson*, 7 Ves. 409. *Thomas* v *Davies*, 12 Ves. 417.

6. Where money is given in trust, for all the children of their father living at his decease, though the father and mother are so aged, that their having more children is impossible, the Court will not presume it impossible: but in such case, upon consent of the father, and of the other children, that their shares should remain, to answer what an after-born child might claim, the Court ordered the share of one of them to be paid. *Reynolds* v. *Reynolds*, 1 Dick. 374.

7. Petition by remainder-man of money on which a contingent, though not a probable, interest might arise, to have it paid to him, refused. *Kirby* v. *Clayton*, 2 Ves. 241.

8. The Court refused to pay money, decreed to be laid out in land, to the person first entitled to an estate tail in the land to be purchased, with an ultimate remainder in fee, without proof that all those entitled to remainders in tail were dead without issue. *Hardcastle* v. *Shaftoe*, 1 Anst. 67.

9. The Court ordered the interest of a legacy to plaintiff to be paid to his wife, he being in a state of great imbecility, but not amounting to lunacy. *Bird* v. *Lefevre*, 4 Br. C. C. 100.

10. Money ordered to be paid to a married woman as guardian to an illegitimate child upon her separate receipt. *Wallis* v. *Campbell*, 13 Ves. 517.

11. Order to pay dividends, of a trust fund in Court, to trustees or one of them, the trustees being five in number, and living in different parts of the country. *Shortbridge's case*, 12 Ves. 28.

12. Legacy of stock at a particular age. Order upon the petition of one legatee having attained the age for a transfer

of his share to his attorney. *Hill* v. *Chapman*, 11 Ves. 239.

13. Where an annuity was ordered to be paid out of a fund in Court half-yearly, at Midsummer and Christmas, and the annuitant died between Lady-day and Midsummer, her representative obtained an order for payment of the quarter to Lady-day. *Webb* v. *Lord Shaftesbury*, 11 Ves. 361.

14. The Court will not keep money after the party is entitled to it, though at his request. *Isaac* v. *Gompertz*, 1 Ves. J. 44.

15. The Court will retain monies, decreed to parties, upon application, by petition, of persons having claims upon them. *Duke of Bolton* v. *Williams*, 4 Br. C. C. 430.

16. By a private act of parliament, money in Court was to be paid to certain parties upon petition. The Lord Chancellor thought the Court could not go beyond the line directed by the act itself, and therefore refused to order the money to be paid to persons deriving title from the original parties, but directed them to file a bill. *Ex parte King*, 2 Br. C. C. 158.

17. Money devised to be laid out in land, for a feme covert in tail, with reversion to her in fee; she chose to have it paid out to her husband, but the Court required an affidavit by the husband and wife, that there was no settlement. *Bunford* v. *Bawden*, 2 Ves. J. 39.

18. The rule of evidence in the Accountant General's office ought to be the same as in the Court, although it is not so in practice. In this case, upon the marriage of a woman entitled to the interest of a fund for her separate use, an affidavit was required, beyond the marriage and identity, that there was no settlement or agreement for settlement; but without prejudice to future cases. To obtain payment to the representative, the mere production of the probate is not sufficient; proof of the death is now required, and that the testator was the party in the cause. *Clayton* v. *Gresham*, 10 Ves. 289.

See further, p. 333, *and as to Payment of Legacies*, p. 286, *ante*.

(c) *From Party to Party.*

1. When a decree is to foreclose, the Court, in cases of necessity, will enlarge the time for the performance in paying the money, though the decree be signed and inrolled. *Cocker* v. *Bevis*, 1 C. C. 64.

2. And although the mortgagor, upon the second enlargement of the time for redeeming, signed the register's books, agreeing not to ask a further enlargement, yet the Court enlarged the time for a further period, but upon condition that such last time should be peremptory. *Anon*, Barn. 221.

And see p. 315, *ante*.

3. Notice for payment of mortgage-money at three o'clock, is not forfeited where there is an attendance before four o'clock. *Knox* v. *Simmons*, 4 Br. C. C. 433.

4. An order for payment of money, against one not a party to the suit, must be enforced not by attachment, but by another order, that the party pay it by a definite time or stand committed. *Vickery* v. *Stocker*, 3 Br. C. C. 372.

Anon, 14 Ves. 207.

And see Bowes v. *Lord Strathmore*, 12 Ves. 325.

5. Bill by the issue in tail, to discover a settlement: the defendants plead that the plaintiffs are bastards; a trial at law was directed upon that point, and that the defendants pay the plaintiff £50, to carry it on; but the money not being paid, nor the trial had, the plea was overruled. *Devereux* v. *Devereux*, Rep. T. Finch, 324.

6. The defendant, the wife of the plaintiff, was ordered to be paid £500 to prosecute a suit in the Spiritual Court for jactitation of marriage, although there was no agreement before marriage. *Dickenson* v. *Mavic*, 2 Dick. 582.

For Payment to a Pauper to prosecute, see p. *519, *ante*.

LVI. Perjury.

1. Whether a prosecution for perjury will lie on depositions *de bene esse*—*Quære*. *Cann* v. *Cann*, 1 P. W. 568.

2. Bill retained for twelve months, with liberty for plaintiff to indict the defendant for perjury, if so advised. *Fell* v. *Chamberlain*, 2 Dick. 484.

3. The grand jury, in finding bills of indictment for perjury, should have the original affidavits, office copies are not sufficient. *Keenan* v. *Boylan*, 1 S. & L. 232.

And see p. 334, *ante*.

LVII. Perpetuating Testimony.

1. A bill to perpetuate testimony ought not to be brought for such trivial things as right of common, or for ways or water-courses, or at least not till after a verdict at law. *Gell* v. *Hayward*, 1 Vern. 312.

But see Cresset v. *Mitton*, 1 Ves. J. 449. 3 Br. C. C. 481.

2. A bill will lie to perpetuate testimony of witnesses to prove a *modus*. *Somerset* v. *Fotherby*, 1 Vern. 185.

3. Bill to perpetuate the testimony of witnesses will not lie, where the plaintiff is in a situation to try his right at law. *Lord North* v. *Lord Gray*, 1 Dick. 14.

Parry v. *Rogers*, 1 Vern. 441.

4. But upon affidavit that plaintiff's witnesses were infirm, and unable to travel, so as to give evidence at law, a demurrer upon this ground was overruled. *Philips* v. *Carew*, 1 P. W. 118.

5. And where the plaintiff had a verdict upon the same title, for another part of the estate, and was enjoined upon another bill by the defendant from proceeding in ejectment; a demurrer for that the plaintiff had not established his right at law was overruled. *Cox* v. *Colley*, 1 Dick. 55.

6. Where plaintiff is in quiet possession of a right, but defendants threaten to disturb him when the witnesses are dead, a bill to perpetuate testimony to the right will lie; for the plaintiff cannot try the right upon bare threats. *Duke of Dorset* v. *Girdler*, Pre. Ch. 531.

Cresset v. *Mitton*, 1 Ves. J. 449. 3 Br. C. C. 481.

7. Upon the same principle, where lands are devised by will, and there is no opportunity to prove and establish it at law, a bill to perpetuate testimony thereto will lie. *Anon*, Prac. Reg. 74.

8. A bill will not lie to perpetuate the testimony to a will, as against a purchaser without notice, until after a verdict at law in affirmance of the will. *Bechinall* v. *Arnold*, 1 Vern. 354.

9. During the lifetime of a lunatic, a bill will not lie to perpetuate testimony to his will made before his lunacy. *Sackvill* v. *Ayleworth*, 1 Vern. 105.

10. The next of kin of a lunatic, however hopeless his condition, have no interest whatever in the property; and therefore cannot sustain a bill to perpetuate testimony. So an heir apparent cannot have a writ *de ventre inspiciendo*, but they may contract upon their respective expectations; and may perpetuate testimony with respect to the interest so created. *Lord Dursley* v. *Fitzhardinge*, 6 Ves. 251.

11. The Court will not perpetuate the testimony of a right, which may be barred by the defendant. *Ibid.*

12. A tenant in tail out of possession, cannot bring a bill to perpetuate testimony. *Brandlyn* v. *Ord*, 1 Atk. 571.

13. Bill to perpetuate testimony of the legitimacy of the plaintiffs, entitled in remainder in tail after an estate for life: demurrer by the 7th and 8th in remainder after the plaintiffs and the other defendants, all infants, overruled; any interest, however slight, being sufficient. *Lord Dursley* v. *Fitzhardinge*, 6 Ves. 251.

14. A plaintiff is entitled to perpetuate the testimony of witnesses to an usurious contract, notwithstanding he does not offer to pay what is due; for a man may bring a bill in many cases to perpetuate testimony where he cannot bring a bill for relief without waving the penalty; as in the case of waste, &c. *Earl of Suffolk* v. *Green*, 1 Atk. 450.

15. Bills to perpetuate testimony are never brought to a hearing, or if they are they will be dismissed with costs.

Hall v. *Hoddesdon*, 2 P. W. 162.

Marlar v. *Whitaker*, 2 Dick. 805.

16. A bill to perpetuate testimony must not pray relief, or it will be dismissed. *Anon*, 2 Vent. 366.

But see Scarr v. *Trinity College*, 3 Anst. 768.

17. And where the bill was for discovery and to perpetuate testimony, and plaintiff amended by striking out the discovery and relief, but the bill in praying process, prayed that defendant might abide such order and decree as the Court should think proper, it was held a bill for relief, and a demurrer was allowed. *Rose* v. *Gannel*, 3 Atk. 439.

18. Bill to perpetuate testimony merely, ought not to be brought to a hearing; but if it also pray relief, the defendant may set it down for a dismissal. *Vaughan* v. *Fitzgerald*, 1 S. & L. 316.

See further, p. 334. *ante*.

LVIII. Petition.

1. Where the subject is small, the Court will give relief upon petition, although the regular course is by bill, *Ex parte Morton*, 5 Ves. 449.

2. Whether a debt may be proved or not, may be discussed on a petition in the bankruptcy, but where property is sought to be divested, a bill is necessary. *Assignees of Gardiner* v. *Shannon*, 2 S. & L. 228.

3. The Court refused to order a mortgagee to deliver up the title deeds to assignees of a bankrupt upon petition without suit. *Ex parte Poole*, 1 Ves. J. 160.

And see further as to Petitions in Bankruptcy, p. 110, *ante*.

4. Where the question of interest is not reserved by the decree, it cannot be given on petition. The object of a petition being only to carry on the directions of the decree. *Creuze* v. *Lowth*, 4 Br. C. C. 316.

S. C. Creuze v. *Hunter*, 2 Ves. J. 157.

5. Whether interest can be claimed by petition, the decree containing no direction as to interest—*Quære*, *Bruere* v. *Pemberton*, 12 Ves. 386.

6. Where in taking an account, under a decree against an executrix, the defendant had attempted to support her discharge by forgery, the circumstances were brought before the Court upon petition, on further directions, for the purpose of charging her with interest and costs. *Parnell* v. *Price*, 14 Ves. 502.

7. An order upon a separate report must be obtained by petition. *Van Kamp* v. *Bell*, 3 Mad. 430.

8. An objection to a Master's report of costs must be taken by petition. *Pitt* v. *Mackreth*, 3 Br. C. C. 321.

And see p. *459, *ante*.

9. An objection to the Master's appointment of a consignee should be made by petition, and not by motion. *Bowersbank* v. *Colasseau*, 3 Ves. 165.

For Petition of Rehearing, see Div. LXVII. *post*.

LIX. Plea.

(a) *Form and Validity of.*—(1) *Generally.*

1. Pleading to all except such parts of the bill as are not hereinafter answered, is too general. *Anon*, 3 Atk. 70.

2. If the bill pray discovery only, a plea to the discovery and relief is bad. *Asgill* v. *Dawson*, Bun. 70.

3. If the bill charges fraud, the defendant must support his plea by an answer denying the fraud. *Bicknell* v. *Gough*, 3 Atk. 558.

Price v. *Price*, 1 Vern. 185.

4. If the answer goes to any part of the bill covered by the plea, the plea is thereby overruled. *Blacket* v. *Langlands*, 1 Anst. 14.

Pope v. *Bish*, 1 Anst. 59.

5. Defendants to a bill of revivor cannot plead to that suit a plea which has been pleaded to the original suit, and overruled. *Samuda* v. *Furtado*, 3 Br. C. C. 70.

6. But the defendant may plead facts to shew a supplemental bill is necessary. *Merrewether* v. *Mellish*, 13 Ves. 435.

7. When a plea is overruled on a point of form, *semble*, the defendant cannot plead the same matter more formally. *Freeland* v. *Johnson*, 2 Anst. 407.

8. If plaintiff replies to the defendant's plea, he thereby admits the plea to be good, if it be true: and the validity of the plea, either as to form or substance, cannot afterwards be called in question. *Parker* v. *Blythmore*, Pre. Ch 58.

Harris v. *Ingledew*, 3 P. W. 94.

See further, p. 348, *ante*.

(2) *To the Jurisdiction.*

1. A plea to the jurisdiction must shew what other Court hath jurisdiction. *Earl Derby* v. *Duke of Athol*, 1 Ves. 202.

Nabob of Carnatic v. *East India Company*, 1 Ves. J. 371.

S. C. Nabob of Arcot v. *East India Company*, 3 Br. C. C. 291.

2. A plea of an Act of Parliament giving exclusive jurisdiction to the Courts of A. should aver there is a court of equity there. *Strode* v. *Little*, 1 Vern. 59.

3. A plea of privilege will not hold, if one of the defendants have not privilege. *Fanshaw* v. *Fanshaw*, 1 Vern. 246.

4. Plea of privilege of the University of Oxford, must be under the seal of the University. *Cotton* v. *Manering*, Cary, 104.

(3) *To the Person.*

1. Outlawry cannot be pleaded to a suit

by an executor. *Killigrew* v. *Killigrew*, 1 Vern. 184.

2. A plea of alien; the defendant must aver the party was an alien, or it is no bar. *Burk* v. *Brown*, 2 Atk. 397.

(4) *In Bar.*

1. A legal bar must be strictly pleaded. *Dobson* v. *Leadbeater*, 13 Ves. 233.

2. What would be a good plea in bar to the action at law may not be a good plea to a bill for discovery of facts in support of the action. *Hindman* v. *Taylor*, 2 Br. C. C. 7.

3. A corporation may plead the stat. of limitations. *Wych* v. *East India Company*, 3 P. W. 309.

4. The stat. of limitations cannot be pleaded to a bill for discovery. *Mackworth* v. *Clifton*, 2 Atk. 51.
Downing v. *Kirby*, Rep. T. Finch, 14.

5. Plea of a stated account must state that it was in writing, and set forth the amount of the balance. *Burk* v. *Brown*, 2 Atk. 399.

6. And it must aver that it is just and true to the best of defendant's knowledge and belief. *Anon*, 3 Atk. 70.

7. And if the bill impeaches the account, and charges that plaintiff has no copy, defendant in pleading the stated account must annex a copy. *Hankey* v. *Simpson*, 3 Atk. 303.

8. Plea of title derived from one having a particular estate, and not in possession, it must be set out how such person became entitled. *Hughes* v. *Garth*, Amb. 421.

9. A purchaser with notice, from a purchaser without notice, may plead his purchase. *Lowther* v. *Carlton*, For. 187. 2 Atk. 242.
Harrison v. *Forth*, Pre. Ch. 51.
Brandlyn v. *Ord*, 1 Atk. 571.

10. In all cases of a plea of purchase, or marriage settlement, notice must be denied, though not charged by the bill. It may be sufficient to deny it either by the plea or answer, notwithstanding the objection that it ought to be by plea; since all the defendant has to do is, to prove his plea; for the defendant is not to prove a negative, *i. e.* no notice: but it seems best to deny notice, both by plea and answer. *Aston* v. *Curzon*, 3 P. W. 244, (*n*).

11. In a plea of purchase for valuable consideration, the defendant need not state the actual consideration; but he must state he had no notice when the conveyance was executed. *Story* v. *Lord Windsor*, 2 Atk. 630.
More v. *Mayhow*, 1 C. C. 34.
And see Fitzgerald v. *Burk*, 2 Atk. 397.

12. And if special notice is charged, such notice must be denied as specially; a general denial is not sufficient. *Radford* v. *Wilson*, 3 Atk. 815.
And see Senhouse v. *Earl*, 2 Ves. 450.

13. And if constructive notice is charged, the defendant must answer the facts from which such notice is deduced. *Jerrard* v. *Sanders*, 4 Br. C. C. 322. 2 Ves. J. 187.

14. And the consideration must be actually paid; if, in fact, it is only secured to be paid, the plea will be overruled. *Hardingham* v. *Nicholls*, 3 Atk. 304.

15. In pleading a purchase or mortgage, the defendant must show the vendor or mortgagor was, or pretended to be, seized in fee. *Head* v. *Egerton*, 3 P. W. 280.

16. But where a fine and non-claim is the bar, averment of actual seizin is necessary. *Story* v. *Lord Windsor*, 2 Atk. 630.
Page v. *Lever*, 2 Ves. J. 450.
Dobson v. *Leadbeater*, 13 Ves. 230.

17. A defendant cannot plead that plaintiff is proceeding in a court of law, for the same matter, for until after answer, he cannot put the plaintiff to his election. *Jones* v. *Earl Strafford*, 3 P. W. 79.

18. In pleading a former suit, it is necessary to aver that the present and the former suit are for the same matter. *Devie* v. *Lord Brownlow*, 2 Dick. 611.
Child v. *Gibson*, 2 Atk. 603.

19. A plea of a suit depending for the same matter is not good, if the bills are brought in different rights, as one by the plaintiff as executor of the administrator, and the other as administrator, *de bonis non*, of the intestate. *Huggins* v. *York Buildings Company*, 2 Atk. 44. Barn. 83.

20. A suit, for the purpose of being pleaded, is not considered as depending, till the defendants have appeared, or, at least, been served with process. *Moor* v. *Welch Copper Company*, 1 Eq. Ca. Ab. 39.

21. A plea of former suit depending is good against a creditor coming in before the Master, he being a *quasi* party to such suit. *Neve* v. *Weston*, 3 Atk. 557.

22. A defendant cannot plead a suit

depending in Ireland, for the same matter, as such a plea could not be referred to the Master. *Lord Dillon* v. *Alvares*, 4 Ves. 357.

And see Foster v. *Vassall*, 3 Atk. 587.

23. Where the defendant pleaded former suit depending, and by answer denied the fraud charged, and plaintiff replied generally, witnesses examined and cause heard: held upon re-hearing, that defendant by such proceedings had waved his plea. *Lucas* v. *Holder*, 1 Eq. Ca. Ab. 41.

24. A decree must be enrolled, before it can be pleaded in bar to a second suit, for the same matter. *Anon*, 3 Atk. 809. *S. C. Kinsey* v. *Kinsey*, 2 Ves. 577.

25. Except in the case of another bill dismissed for the same cause; there the decree may be pleaded, though not signed and enrolled. *Prettyman* v. *Prettyman*, 1 Vern. 310.

26. In pleading a decree of dismission, the defendant must show it was *res judicata*, an absolute determination of the Court that the plaintiff had no title. *Brandlyn* v. *Ord*, 1 Atk. 571.

27. Plea of former decree must set forth so much of the former bill and answer, as to shew that the same point was then in issue. *Child* v. *Gibson*, 2 Atk. 603.

28. A decree of foreclosure and nonpayment, cannot be pleaded, unless it has been made absolute. *Senhouse* v. *Earl*, 2 Ves. 450.

29. A plea of sentence in a foreign court, as the Commissary Court in France, is bad. *Gage* v. *Bulkeley*, 3 Atk. 215.

30. A plea must bring new matter before the Court; therefore a plea of a sentence of the Court of Admiralty, recited in the bill, was overruled. *Roberts* v. *Hartley*, 1 Br. C. C. 56.

31. Arbitrators may plead the award to a bill charging partiality, but then they must support their plea by showing themselves impartial. *Lingood* v. *Croucher*, 2 Atk. 396.

And see Tit. *Pleading* VI. *ante.*

(*b*) *Signing.*

1. Where a plea is taken by commission, it does not require the signature of counsel. *Simes* v. *Smith*, 4 Mad. 366.

(*c*) *Where put in on Oath.*

1. Plea put in by husband in the names of himself and his wife, who refuses to swear to it, ordered to be accepted as the plea of the husband only. *Pain* v. ——, 1 C. C. 296.

2. Plea of a former suit depending for the same matter, is put in without oath. *Urlin* v. *Hudson*, 1 Vern. 332.

3. A plea of privilege by a defendant, as foreign opposer in the Exchequer, must be upon oath. *Gibson* v. *Whitacre*, 2 Vern. 83.

4. Plea of outlawry to be on oath. *Parrot* v. *Bowden*, 2 Vern. 37.

5. Plea of outlawry or plea of privilege, by a scholar resident at an university, need not be upon oath. *Prat* v. *Taylor*, 1 C. C. 237. *Anon*, 1 C. C. 258.

6. Plea of outlawry, with the common averment of the identity of the person, need not be upon oath. *Took* v. *Took*, 2 Vern. 198.

7. Plea of conviction of felony must be proved by the record, and therefore need not be put in upon oath, nor need the identity of the person be stated upon oath. —— v. *Davies*, 19 Ves. 81.

8. A plea of purchaser for valuable consideration must be put in upon oath. *Marshall* v. *Frank*, Pre. Ch. 481.

9. A plea of the plaintiff's bankruptcy must be put in upon oath. *Joseph* v. *Tuckey*, 2 Cox, 44.

10. Plea of matter of record, with averments of matters *in pais*, must be filed upon oath; therefore, a plea of the stat. 32 Hen. 8, c. 9, against selling pretended titles, with the necessary averments of want of possession, &c. not being on oath, was ordered to be taken off the file, though set down by the plaintiff for argument, this irregularity not admitting of waver. *Wall* v. *Stubbs*, 2 V. & B. 354.

11. But a plea of mere matter of record need not be filed on oath, being proved by the production of the record. S. C. 2 V. & B. 357.

(*d*) *Time of filing.*

1. Defendant cannot plead after a proclamation returned. *Lloyd* v. *Gunter*, 1 Vern. 275.

2. Defendant in contempt, and being arrested, gives his bail-bond, and puts in a plea; the plea is discharged for irregularity. *Newton* v. *Dent*, 1 Dick. 234.

3. After two insufficient answers to a

bill, and exceptions submitted to, a third answer was reported insufficient: plaintiff then, upon order obtained, amends, and defendant puts in a plea to the amended bill. This plea cannot be taken off the file for irregularity; as a case for a plea may arise, either from the amendments, or from their effect upon the original part of the bill. *Ritchie* v. *Aylwin*, 15 Ves. 79.

4. A plea may be filed under an order for time to answer, for a plea is an answer and upon oath. *Anon*, 2 P. W. 464.
Roberts v *Hartley*, 1 Br. C. C. 56. 2 Dick. 554.
De Minckuitz v. *Udny*, 16 Ves. 355.

5. But not a plea of outlawry, for that is not upon oath. *Philips* v. *Gibbons*, 1 V. & B. 184.

(*e*) *Amending.*

1. A plea may be amended where there is a mere slip, if the material ground of defence appears sufficient, but not otherwise. *Newman* v. *Wallis*, 2 Br. C. C. 143.

2. A plea, in bar, of a fine, without a direct averment of seisin, was overruled, with liberty to amend. *Dobson* v. *Leadbeater*, 13 Ves. 230.

3. Objection to the form of a plea, as it did not conclude either in bar or abatement, nor stated the necessary parties: leave given to amend. *Merrewether* v. *Mellish*, 13 Ves. 435.

4. When the defendants move for liberty to amend their plea, the amendments must be stated, that the Court may see whether it is proper the cause should be delayed for the purpose of admitting them. *Nabob of Arcot* v. *East India Company*, 3 Br. C. C. 291. 1 Ves. J. 387.

See further, p. 349, *ante*.

(*f*) *Referring or setting down.*

1. Plea must be set down within eight days, or it will be presumed to be abandoned. *Jordan* v. *Sawkins*, 3 Br. C. C. 372.

2. In the Exchequer, but not in Chancery, a plea of outlawry should be set down by the defendant. *Chapman* v. *Lansdown*, 2 Anst. 554.

3. In the case of a plea of another suit for the same matter, there must be a reference to the Master. *Wild* v. *Hobson*, 2 V. & B. 110.

4. Where the defendant pleads a decree of dismission of a former cause for the same matter, if the plaintiff, instead of applying for a reference to the Master, set the cause down for a hearing, it is a waver of his right to such reference. *Morgan* v. *Morgan*, 1 Atk. 53.
And see Urlin v. *Hudson*, 1 Vern. 332.

5. If the defendant sets down his plea of former suit depending for the same matter, it will, on motion, be struck out; but unless the plaintiff procures a reference to the Master within a month, the bill will be dismissed. *Baker* v. *Bird*, 2 Ves. J. 672.

(*g*) *Arguing and Disposal of.*

1. Where a defendant dies after filing plea, but before it is argued, his executor cannot proceed to argue the plea, but must plead *de novo*. *Micklethwaite* v. *Calverly*, For 3.

2. Where one part of the plea was inconsistent with the other, the defendant had leave to withdraw it, and plead *de novo*. *Nobkissen* v. *Hastings*, 4 Br. C. C. 254.

3. Though a plea, in bar, be allowed, yet the plaintiff may reply, and put the defendant to the proof of it. *Anon*, Gilb. E. R. 184.

4. A plea covering too much, the Court never divides it, so as to allow it good for part only. *Earl Derby* v. *Duke of Athol*, 1 Ves. 205.

5. A plea covering too much was allowed to stand for an answer, with liberty to except. *Jones* v. *Pengree*, 6 Ves. 580.

6. Plea overruled as double, ordered to stand for an answer, with liberty to except. *Whitbread* v. *Brockhurst*, 1 Br. C. C. 404.

7. A plea may be allowed as to part, and overruled as to other part. *Nobkissen* v. *Hastings*, 4 Br. C. C. 254.
Dormer v. *Fortescue*, 2 Atk. 284.

8. After plea set down, order obtained as of course by the plaintiff to amend the bill, and served on the defendant; the plaintiff not appearing when the plea came on to be argued, it was allowed of course with costs. *Jennings* v. *Pearce*, 1 Ves. J. 447.
Vere v. *Glynn*, 2 Dick. 441.

9. If a defendant sets down a plea, and does not appear when it is called on for argument, the plaintiff, to entitle himself to have the plea overruled, must produce an affidavit of service upon him of the order to set down the plea; but if no

such affidavit is produced, the plea will be struck out of the paper, and will not be restored, but on affidavit of the defendant's solicitor, accounting for his not being prepared when the plea was first called on. *Mazarredo* v. *Maitland*, 2 Mad. 38.

10. On a plea found false, the plaintiff is entitled to a decree, and, if discovery is wanted, to examine defendant on interrogatories. *Wood* v. *Strickland*, 2 V. & B. 158.

LX. Privilege.

(a) *Of Peerage or Parliament.*

1. By order of the House of Lords, Dec. 3, 1640, the nobility of this kingdom, and Lords of the Upper House of Parliament, and the widows and dowagers of the temporal lords shall answer as defendants, upon protestation of honor only, and such order shall extend to all answers and examinations upon interrogatories. Beames' Ord. Ch. 105.

2. The privilege of peerage to answer upon honor, is restrained to an answer to a bill; but the answer of a peer to interrogatories, and his examination as a witness, must be upon oath. *Sir Thomas Meers* v. *Lord Stourton*, 1 P. W. 146.

3. A peeress ordered to produce a deed, confessed in her answer on honor only, not on oath. *Duke of Hamilton* v. *Lady Gerrard*, Pre. Ch. 92.

4. A peeress answering upon honor, is in exactly the same situation as another defendant answering on oath. *Gilpin* v. *Lady Southampton*, 18 Ves. 469.

5. The answer of a peer, without oath or attestation of honor, is regarded, for the purposes of civil justice, as if put in under that sanction. *Curling* v. *Marquis Townshend*, 19 Ves. 628.

6. Since the Union, Irish peers, with the exception of those who are members of the House of Commons, are entitled to every privilege, and therefore to the letter missive. *Robinson* v. *Lord Rokeby*, 8 Ves. 601.

7. The right to the letter missive and a copy of the bill, is privilege of peerage, and not of Parliament, and extends therefore to all Scotch and Irish Peers; an injunction, therefore, or other process not so accompanied, is ineffectual. *Lord Milsingtoun* v. *Earl of Portmore*, 1 V. & B. 419.

8. A decree served on a peer needs no letter missive. *Mackenzie* v. *The Marquis of Powis*, Com. 675.

9. Whether service of a letter missive at the town house of a peer of parliament during the sittings of Parliament, the peer himself being in the country, is good service — *Quære.* *Attorney-General* v. *Earl Stamford*, 2 Dick. 744.

10. Where an order *nisi* for sequestration is obtained against a privileged person, he is not in contempt, unless he neglects to obey the order *nisi*. *Smallbrooke* v. *Lord Donnegal*, 3 Anst. 647.

11. An Irish peeress committed for contempt in refusing to produce her husband, a lunatic, to the commissioners. *Lord Wenman's case*, 1 P. W. 701.

12. Suing the bail below pending a writ of error in Parliament, is a breach of privilege. *Throgmorton* v. *Church*, 1 P. W. 685.

(b) *From Arrest.*

1. Defendant coming for the purpose of putting in his answer was arrested at the plaintiff's suit, and detainers lodged against him. He was discharged, being a breach of the privilege of the Court. *Alisbury* v. *Troughton*, 1 C. R. 92.

2. Order upon the sheriff to discharge a defendant arrested while attending his suit in Chancery; and an order upon the party to discontinue an action against the sheriffs for the escape. *Meynel* v. *Cooper*, 1 C. R. 217.

3. Where a party attended his cause at Westminster, and then went to his solicitor's, where he staid seven or eight hours, and was then arrested; held not to be a breach of privilege. *Harrison* v. *Hart*, Com. 411.

4. Arresting a party going to attend, or returning from attending an arbitration, and being summoned for the purpose, held a breach of privilege; and a party so arrested was ordered to be discharged.
Moore v. *Aylet*, 2 Dick. 780.
S. C. *Moore* v. *Booth*, 3 Ves. 350.

5. Plaintiff in his return from attending a motion against him in the cause was arrested, and a detainer lodged against him in another action: he was discharged from both, the Court examining the parties personally, not by affidavit. *Bromley* v. *Holland*, 5 Ves. 2.

6. Solicitor, arrested in his return from attending the Master, discharged in the original action and subsequent detainers. The proper course is an order upon all the plaintiffs to discharge him. *Ex parte Ledwich*, 8 Ves. 598.

7. Order that the plaintiffs in an action and detainers discharge the defend-

ant, arrested when returning home from his examination before the Master: though necessary deviations are allowed, the question always is upon the *bona fides;* especially where the examination is not finished. *Sidgier* v. *Birch*, 9 Ves. 69.

8. A person attending under a summons from commissioners of bankrupts, privileged from arrest; and it was ordered that the parties arresting and who had lodged detainers, having notice, should discharge him; and the attorney, having undertaken to indemnify the officers, and they having acted under that indemnity, guilty of a contempt, and ordered to pay all costs out of pocket. *Ex parte King*, 7. Ves. 312.

9. The Chancellor intimated, that a creditor attending to prove his debt, though not under a summons, is entitled to privilege. *Ibid.*

10. A bankrupt's privilege from arrest extends to the end of the forty-second day, ordered, that the plaintiff in the action should discharge him; and the officer having acted without instructions was ordered to pay the costs. *Ex parte Donlevy*, 7 Ves. 317.

11. Whether a deviation by a bankrupt returning from examination, for purpose of leaving his books at the house of the assignees, will deprive him of his privilege—*Quære.* *Ibid.*

12. The privilege of a bankrupt from arrest during his examination, extends to an attachment for not paying money under an award, made a rule of Court. *Ex parte Parker*, 3 Ves. 554.

13. A bankrupt pending his examination is protected from an arrest by virtue of an attachment issued for a contempt in paying money into Court, pursuant to a decree. *In re M'Williams*, 1 S. & L. 169.

14. A detainer before the defendant could be discharged from an illegal arrest, as where he was returning from his examination under a commission of bankruptcy against him, cannot be supported. *Ex parte Hawkins*, 4 Ves. 691.

15. The privilege of ambassadors from arrest cannot be waved by any act of their own; nor does an ambassador lose his privilege by trading; but this privilege does not extend to consuls. *Barbuit's case*, For. 280.

And see generally, p. 393, *post; and as to the Privilege of Bankrupts from Arrest*, p. 93, *ante.*

LXI. Process.

1. Process against the husband and wife, but to be stayed against the husband, the wife having absconded. *Samson* v. *Overton*, 1 Dick. 133.

And see Div. VIII, (*a*) *ante.*

2. No process can be taken out agains' the party, whose Clerk in Court is dead, until he has appointed a new Clerk in Court, and *subpœna ad faciend. attornat.* taken out for that purpose. *Ratcliff* v. *Roper*, 1 P. W. 420.

3. The Court will not allow a man to be sued at law for executing the process of the Court, though issued irregularly. *Bailey* v. *Devereux*, 1 Vern. 269.

4. Ojections to irregularity of process can only be waved by the party doing some act expressly founded on it, or amounting to a clear affirmance. *Travers* v. *Lord Stafford*, 2 Ves 22. Amb. 105.

5. An irregularity in processes may be cured by the defendant's appearance. *Floyd* v. *Nangle*, 3 Atk. 569.

And see p. 384, *ante.*

LXII, Pro Confesso.

(*a*) *Information or Bill.*

1. The practice formerly was, to put the plaintiff to make proof of the substance of the bill, though the defendant stood out the last process: but now, if the defendant appears to a bill, and stands out in contempt to a sequestration, the cause is set down to be heard, and the record of the bill produced, and taken *pro confesso.* *Hawkins* v. *Crook*, 2 P. W. 556, Mos. 383.

2. The bill is not to be taken *pro confesso*, if the defendant hath not appeared, but a sequestration shall issue out against him. *Nodes* v. *Batle*, 2 C. R, 283. *Moyser* v. *Peacock*, 3 C. R, 22.

3. Bill may be taken *pro confesso*, after defendant's appearance and sequestration returned; but not where baron and feme are defendants, and the wife only appears. *Gibson* v. *Scevengton*, 1 Vern. 247.

4. An insufficient answer is no answer, and therefore will not prevent a decree to take the bill *pro confesso.* *Turner* v. *Turner*, 1 Dick. 316. 4 Ves. 619, (*n*).

5. Information decreed to be taken *pro confesso* upon two insufficient answers. *Attorney General* v. *Young*, 3 Ves. 209.

6. Where the bill is amended after answer, if the amended bill is not answered, the plaintiff is entitled to a decree that the bill be taken *pro confesso* generally. *Jopling* v. *Stuart*, 4 Ves. 619.

7. But the bill cannot be taken *pro confesso*, as to the matter of the amendments only. *Bacon* v. *Griffith*, 2 Dick. 473. 4 Ves. 619, (*n*).

8. Bill of supplement and revivor against the defendant, who had answered the original bill, ordered to be taken *pro confesso*. *Rees* v. *Mansel*, 1 Dick. 293.

9. Where the defendant is in contempt to a sequestration, the bill may be taken *pro confesso*, notwithstanding the sequestration is neither sealed nor executed. *Anon*, 10 Mod. 431.

10. Notwithstanding goods or real estate are seised upon by a sequestration for want of an answer, the plaintiff may still proceed to a decree *pro confesso*. *Davis* v. *Davis*, 2 Atk. 23.

11. Taking a bill *pro confesso* is analogous to taking a declaration to be true at law. *Ibid.* 2 Atk. 24.

12. A bill being preferred against a quaker for tithes, who refused to answer upon oath, the defendant was brought to the bar, and having been brought three times before, the bill was taken *pro confesso*, and it was referred to a Master to examine what was due, and to be armed with a commission for that purpose. *Anon*, 2 C. C. 237. 2 Free. 27.

13. Decree of the court of policies and assurances in London reversed, the bill there having been taken *pro confesso* after the first summons. *Johnson* v. *Desmineere*, 1 Vern. 223.

14. The defendant, to prevent his being brought up by an *alias pluries habeas corpus*, as often as he was turned over to the Fleet, removed himself back to the King's Bench; ordered, if he did not put in his answer by the time an *alias pluries* would have issued, the bill should be taken *pro confesso* against him. *Pendergrast* v. *Saubergue*, 2 Dick. 535.

15. The defendant being a prisoner in York gaol, and the demand so trifling it would not bear the expense of removing him by *habeas corpus* to the Fleet; it was moved, to save the expense, that for want of appearance a bill of revivor might be taken *pro confesso*: the Court refused to do it in this summary way, but left the plaintiff to the ordinary course. *Anon*, 3 Atk. 690.

16. Bill for an account taken *pro confesso* against surviving executor and devisee in trust. *Shaw* v. *Wright*, 3 Ves. 22.

17. Bill taken *pro confesso* against one defendant, and complete decree against the others. *Earl of Litchfield* v. *Roberts*, 1 Dick. 59.

18. Where there is only one defendant, after all the process of contempt for want of an answer, the bill may be ordered to be taken *pro confesso*, upon motion; but if there are more defendants the cause must be set down. *Seagrave* v. *Edwards*, 3 Ves. 372.

And see p. 394, *post*.

(*b*) ——— *Under Statute*, 5 *Geo.* 2.

1. The stat. 5 G. 2. c. 25, for making process in courts of equity effectual against persons who abscond, extends to bills of revivor. *Henderson* v. *Meggs*, 2 Br. C. C. 127.
Anon, 3 Atk. 690.
Seagood v. *Farrand*, 1 Dick. 300.
Attorney General v. *Smith*, 1 Dick. 135.

2. If the suit abates, even after decree, and the defendant (a defendant in the original cause) absconds, to avoid being served, the statute of 5 G. 2. must be pursued, as if he had been a new defendant. *James* v. *Dore*, 1 Dick. 63.

3. The defendant had left the kingdom two years preceding the filing of the bill: upon an affidavit, merely stating that the defendant continued abroad, as plaintiff believed, to elude justice, the defendant was ordered to appear under the statute 5 G. 2. *Mason* v. *Polier*, 1 Dick. 401.

4. And a similar order was obtained where the defendant had been outlawed, and had not been in the kingdom within the two years. *Clarke* v. *Wright*, 2 Ves. J. 188.

5. But the practice is now settled, that an affidavit, that defendant has been in England within the two years, is absolutely necessary, the act of parliament being too positive for such affidavit ever to be dispensed with. *Neale* v. *Norris*, 5 Ves. 1.
Bishop of Winchester v. *Beavor*, 5 Ves. 113.

6. The time for a defendant's appearance, under the stat. 5 Geo. 2. was enlarged, notice in the parish church having been prevented by the church being

pulled down to be rebuilt. *Wilkinson* v. *Coker*, 1 Dick. 74.

And see Knowles v. *Broome*, 1 V. & B. 305.

7. A minister of the parish, who prevents an order for a defendant's appearance being published pursuant to the 5th G. 2, is indictable for a contempt. *Burton* v. *Mattons*, 2 Atk. 114.

8. The stat. 5 Geo. 2. applies as well to cases where a subpœna has been served, but defendant has not appeared, as where no process has been served at all. *Goddard* v. *Pritchard*, 2 Dick. 662.

And see Mawer v. *Mawer*, 1 Cox, 104. 1 Br. C. C. 388.

And see further, p. 394, *post.*

(*c*) *Discharge of Order for.*

1. Bill having been taken *pro confesso* under the stat. the defendant was allowed to put in his answer, and bring on the cause to be heard, upon giving security for costs, and paying the costs incurred by his default. *Bishop of Rochester* v. *Knapp*, 1 Dick. 70.

2. After an order that a bill be taken *pro confesso*, merely putting in an answer is not sufficient to set aside the order; but if the answer is accepted, the process is waved. *Williams* v. *Thompson*, 2 Br. C. C. 280. 1 Cox, 413.

3. And the defendant must not only have an answer upon the file, but also a receipt for the costs of the contempt. *Sidgier* v. *Tyte*, 11 Ves. 202.

4. The Court will not discharge an order to take the bill *pro confesso*, and give the defendant leave to answer without seeing the answer intended to be put in. *Hearne* v. *Ogilvie*, 11 Ves. 77.

5. Where the defendant applied to discharge an order made under stat. 5 G. 2. c. 25, the Court thought he should make an affidavit in answer to the substance of the charge by the bill, in order to show that he did not abscond to avoid process. *Burton* v. *Maloon*, Barn. 401.

And for impeaching Decree pro Confesso, see p. 438* *ante, and* p. 394, *post.*

(*d*) *Pronouncing Decree.*

1. Decree upon a bill taken *pro confesso* is to be pronounced in Court, not to be drawn up by the plaintiff. *Geary* v. *Sheridan*, 8 Ves. 192.

LXIII. PRODUCTION OR INSPECTION OF DEEDS AND PAPERS.

1. Court roll, &c. ordered to be delivered to persons, appointed to hold the courts of manors. *Brown* v. *Brown*, 1 Dick. 62.

2. If the question in the cause is between the tenants of a manor, the Court will make an order, if necessary, on the lord or steward to produce the court books; or if a book in the hands of another person were ascertained to be a court book or of the court roll of the manor, the Court would take that other person to stand in the place of the lord of the manor, and order him to produce it; but in a suit, not between the tenants, the Court refused an order to inspect the books of a manor in the hands of a private person, and a stranger to the suit; the only way to get at it would be to make the person a party by supplemental bill. *Anon*, 2 Ves. 577.

3. Bill by the heir in tail against the heir general, claiming under a recovery; the Court ordered the defendant to produce the deed making the tenant to the *præcipe*, and the deed declaring the uses of the recovery, admitted by the defendant's answer to be in his custody. *Bettison* v. *Farrington*, 2 P. W. 179, (*n*). 3 P. W. 363.

And see Earl of Suffolk v. *Howard*, 2 P. W. 177.

4. Where the heir at law, by his answer to a bill brought by the devisee to establish the will, admits it to be duly executed, and to the purport as set forth, and then states that he is heir at law of the testator, this is not sufficient to entitle him to the inspection of title deeds and writings belonging to the estate. *Potter* v. *Potter*, 3 Atk. 719.

5. An heir at law has no equity, except to have incumbrances in the way of his legal right removed, and therefore cannot call for the inspection of deeds in the possession of the devisees. In a suit by the heir in tail against devisees, on motion, an inspection was ordered of all deeds of settlement admitted to be in defendant's possession, creating estates in tail general, but no farther. *Lady Shaftsbury* v. *Arrowsmith*, 4 Ves. 66.

6. An order, obtained by a defendant to inspect a deed proved in the cause, and referred to by the deposition, discharged; for a defendant has no right to see the strength of the plaintiff's cause, or the

evidence of his title, before the hearing. *Davers* v. *Davers*, 2 P. W. 410.

7. The plaintiff cannot compel the defendant to produce at the hearing a deed proved by the defendant, and referred to by the depositions of his witnesses; for the deed does not make part of the deposition by mere reference, and notwithstanding he has proved the deed, it is in his election whether or not he will make use of it. *Hodson* v. *Earl Warrington*, 3 P. W. 35.

8. Motion by defendant for inspection of letters referred to by the plaintiff's depositions, as exhibits, refused with costs. *Wiley* v. *Pistor*, 7 Ves. 411.

9. A corporation, as trustees for a charity, shall not be obliged to produce their books relating to the trust; though they submitted by their answer to produce them as the Court shall direct. *Attorney-General* v. *City of Coventry*, Bun. 290.

10. A bill to set aside an annuity; the defendant admitted the draft of the deed to be in his custody, and submitted to produce it as the Court should direct: the Court upon the merits ordered it to be left with the plaintiff's Clerk in Court for inspection. *Stanhope* v. *Roberts*, 2 Atk. 214.

11. Where the defendant by his answer referred to certain deeds and papers then in his possession, but did not describe them or offer to produce them as the Court should direct; the Court would not, on motion of the plaintiff, make an order for their production. *Atkyns* v. *Wright*, 14 Ves. 211.

12. Qualified submission to produce a deed, if the Court shall require it, does not fix the defendant, and deprive him of the discretion of the Court, as to the propriety of the production. *Ibid*, 14 Ves. 213.

13. Where a defendant sets forth the material contents of an instrument, and for the truth of what he so sets forth refers to the instrument, he thereby makes it a part of the answer sufficiently to enable the plaintiff to move for its production. *Ibid*. 14 Ves. 214.

14. Where the plaintiffs, in their answer to a cross bill, referred, for fear of mistake, to books in their custody, they were compelled on motion to produce them before a Master for the inspection of the defendants. *Herbert* v. *Dean of Westminster*, 1 P. W. 773.

15. Answer admitting the execution of an instrument, and craving leave to refer to it when produced, is not sufficient to ground a motion for its production, not being an admission, that it is in the possession or power of the defendant. *Darwin* v. *Clarke*, 8 Ves. 158.

16. Papers specifically referred to in an answer, and admitted to be in the defendant's custody, ordered to be inspected by the plaintiff. *Gardiner* v. *Mason*, 4 Br. C. C. 479.

17. Letters mentioned in the schedule of the answer ordered to be produced, although confidential; for, as they related to the transaction stated by the bill, they formed part of the discovery, which the defendant by answering had submitted to make. *Taylor* v. *Milner*, 11 Ves. 41.

18. Bill for discovery of glebe land, mixed with defendant's lands by his ancestors, who occupied both; answer describing the glebe lands from certain papers in the defendant's possession: ordered on motion to be produced. *Potts* v. *Adair*, 1 Anst. 259.

19. Where the bill prays relief as well as discovery, the Court will not aid the plaintiff in proceeding at law without the authority and control of the Court; and therefore in such a case, a motion that defendant should produce deeds &c. set forth in his answer, at the trial of an ejectment, was refused. *Aston* v. *Lord Exeter*, 6 Ves. 288.

20. Where a defendant is ordered to deposit books in the hands of the deputy remembrancer for the inspection of the other party; if, in rendering the accounts, it become necessary to refer to the books so deposited, such defendant is not obliged to pay for office copies, but is entitled to inspect and take copies. *Gabbit* v. *Cavendish*, 2 Anst. 547.

See further, p. 395. *post*.

LXIV. Publication of Depositions.

(a) *Where allowed.*

(1) *Depositions in the cause.*

1. The defendant cannot give rules to pass publication, until the plaintiff hath been in default one term after the cause is at issue. *Walmsley* v. *Elliot*, 1 Dick. 84.

2. Depositions published, notwithstanding they were taken during an abatement by marriage of the plaintiff, the fact not

being known at the time the commission issued. *Sinclair* v. *James*, 1 Dick. 277.

3. Injunction dissolved, and depositions, taken on the part of the defendant published, that they might be read as evidence at the trial at law. *Emmet* v. *Ayliffe*, 1 Dick. 239.

4. In 1764 the plaintiff filed a bill to perpetuate the testimony of witnesses, and examined them, but proceeded no further: on the death of a witness, in 1777, the plaintiff applied to publish the depositions: held, he had precluded himself by his neglect. *Morse* v. *Stevens*, 2 Dick, 686.

5. Where leave was given by a decree, to exhibit interrogatories, to prove a will of real estate, which had only been proved as to the personal estate; the depositions taken cannot be published without an order of the Court. *Rossiter* v. *Pitt*, 2 Mad. 165.

6. By General Order of the Court of Exchequer, 20th January, 1819; in making out the general paper of causes for hearing after every term, the General Order made on the 21st May, 1788, for having a separate column for causes in which publication has not passed, is to be abided by; and no cause is to be removed to the column for causes in which publication has passed, until publication has actually passed in such cause. *General Order*, 6 Price, 334.

(2) *De bene esse.*

1. In general, an affidavit of the death or absence beyond sea of the witness is necessary before examinations *de bene esse* can be published. *Ward* v. *Sykes*, Ridg. Rep. T. Hard. 193.

2. Depositions *de bene esse*, will be published where an examination in chief is morally impossible; so where a commission had issued to a foreign country, and the execution was prevented by the interference of the public authority there, publication of depositions *de bene esse*, ordered. *Gason* v. *Wordsworth*, 2 Ves. 325, 336. Amb. 108.

3. And where the witness was old, infirm, and unable to travel, publication of depositions taken *de bene esse* was ordered. *Bradley* v. *Crackenthorp*, 1 Dick. 182.

4. And where the witnesses are dead, and there is no opportunity to examine in chief, though after great length of time, depositions *de bene esse* will be published, saving just exceptions. *Anon*, 2 Ves. 497.

5. Depositions of witnesses taken *de bene esse* in 1711, and publication not having passed till 1743, under the circumstances the depositions were ordered to be published, but without prejudice. *Duke of Hamilton* v. *Meynal*, 2 Dick. 788.

6. Witness going to sea, examined *de bene esse*, in order to use his evidence at law: notice of trial being given, and the witness not being returned, his depositions ordered to be published. *Webster* v. *Pawson*, 2 Dick. 540.

7. Witness examined *de bene esse*, afterwards becoming interested, the depositions were nevertheless ordered to be published. *Brown* v. *Greenly*, 2 Dick. 504.

8. Commission under which a witness, since dead, had been examined *de bene esse*, was ordered to be opened by the Clerks in Court, and the deposition of the deceased witness published, for the purpose of being used on a trial at law. *Price* v. *Bridgeman*, 1 Dick. 144.

9. The Court refused to order publication of depositions *de bene esse*, upon the ground of the incapacity of the witness, from a bodily injury, to attend the trial at law, as they could not be used at the trial without proof that the witness was unable to attend; but on the affidavit of a surgeon as to the improbability of the witness's attendance, the Court ordered the officer to attend the trial with the original deposition, to be tendered, if the incapacity of the witness should be proved. *Andrews* v. *Palmer*, 1 V. & B. 21.

And see p. 485, *post*.

10. The Court refused to order depositions *de bene esse* to be published, for the purpose of comparing them with the depositions in the same cause taken on an examination in chief. *Cann* v. *Cann*, 1 P. W. 567.

(3) *In perpetuam.*

1. With respect to the publication of examinations *de bene esse*, examinations on a bill, merely to prove a will *per testes*, and examinations of witnesses on a bill *in perpetuam rei memoriam*, there is this distinction: as to the first, they are not published but by consent, or on a strong case being made; as to the second, publication is of course; and as to the third, the publication is a matter for discretion in the Court, to be exercised according to

the case made; and where devisee under a will brought a bill *in perpetuam rei memoriam* against the heir at law, who had failed in one action of ejectment and had commenced another, publication of depositions was refused. *Harris* v. *Cotterell,* 3 Mer. 678.

2. Depositions *in perpetuam rei memoriam,* not published in the life of the witness, except on incapacity to travel by sickness, &c. such orders, except in the excepted cases, proceeding on affidavit of the death of the witness; some expressly declaring that the depositions of the other witnesses shall not be read. *Morrison* v. *Arnold,* 19 Ves. 670.

3. The defendants to a bill to perpetuate testimony joined in the commission, sued out by the plaintiff, and examined witnesses; publication of the depositions of such of the witnesses who were dead ordered on motion. *Earl Abergavenny* v. *Powell,* 1 Mer. 434.

4. Motion, that depositions of a witness, taken to perpetuate testimony, may pass publication, he being since deceased, is of course. *Bourne* v. *Bligh,* 1 Price, 307.

(*b*) *Enlarging time for.*

1. The Court will not enlarge publication, on the application of a party who has taken the depositions of the opposite party out of the office, although by mistake. *Lawrell* v. *Titchborne,* 2 Cox, 289.

2. Publication may be enlarged upon a very special case, where farther evidence is necessary, and it can be had without injustice or danger; but publication will not be enlarged upon mere ignorance of the party, or negligence of his solicitor; nor to the prejudice of a party by delaying the hearing merely; and there must be an affidavit that the party, his Clerk in Court, and solicitor, have not seen or been informed of, and will not see, &c. the depositions. *Whitclocke* v. *Baker,* 13 Ves. 512.

3. A second application to enlarge publication was allowed, though the cause was set down, the same being so far off in the paper, that it was improbable it would be heard before the time for the enlarged publication expired. *Moody* v. *Leeming,* 1 Mad. 85.

4. Publication in a tithe cause was enlarged, though frequently enlarged before, and though the cause had been standing nearly five years, upon affidavits that due diligence had been used to obtain necessary records, and that it was probable they would be found in the Vatican. Upon such an application it is necessary to satisfy the Court that there has been no previous delay, and that the inquiries to be pursued are likely to further the ends of justice. *Barnes* v. *Abram,* 3 Mad. 103.

5. Where, by accident or surprise, publication passes before the defendant has examined his witnesses, and there has been no blameable negligence, the Court will allow witnesses to be examined, on an affidavit that the depositions have not been seen; but where the defendant obtains leave to enlarge publication, and neglects to examine witnesses within the time to which publication is so enlarged, and after publication passes, obtains irregularly an order as of course to enlarge it, and, being apprised of the irregularity, persists in examining the witnesses, an application to give effect to such new testimony, either by admitting it as evidence to be read at the hearing, or by enlarging publication, will be dismissed with costs. *Concthard* v. *Hasted,* 3 Mad. 429.

6. Where the plaintiff in the original bill is in contempt for want of an answer to the cross bill, the plaintiff in the cross bill may have publication enlarged in the original to a fortnight after the answer is come in to the cross bill. *Creswick* v. *Creswick,* 1 Atk. 291.

7. But if the cross bill be filed after the original cause is proceeded in, to enlarge publication, there must be a special motion on notice; it is not a motion of course, as it is where the original cause is not proceeded in. *Aylet* v. *Easy,* 2 Ves. 336.

8. The practice to enlarge publication, after answer to the original bill, until after answer to a cross bill, is not of course. *Dalton* v. *Carr,* 16 Ves. 93.

9. Where the cross bill was filed after rules for passing publication, a motion to enlarge publication was refused with costs. *Cook* v. *Broomhead,* 16 Ves. 133.

10. Publication in the original bill stayed till after answer to the cross bill. *Gardiner* v. *Mason,* 4 Br. C. C. 478. *Anderson* v. *Lewis,* 3 Br. C. C. 429.

11. The Court of Exchequer, under the circumstances, enlarged publication for the purpose of admitting fresh evidence. *Dingle* v. *Rowe,* Wigh. 99.

LXV. Purchase under Decree.

1. Where under a decree money is to be laid out in purchases to be settled to the uses of a marriage settlement, the Court will not give leave generally to the parties to propose purchases to the Master from time to time, but application must be made to the Court in each separate purchase. *Earl of Harrington* v. *Flemming*, 1 Br. C. C. 74.

See also Div. LXXIII, *post.*

LXVI. Receiver.

(*a*) *Appointment of.*—(1) *Generally.*

1. The Court has no jurisdiction to appoint a receiver unless a cause be depending: the jurisdiction the Court exercises as to idiots and lunatics is a particular one. *Ex parte Whitfield*, 2 Atk. 315.

2. There is no instance of the Court's appointing a receiver of an infant's estate, where there is no bill filed. *Anon*, 1 Atk. 489, 578.

3. A receiver may be granted on motion notwithstanding the reservation of all matters under the decree, for this is a mere provisional order. *Cooke* v. *Gwyn*, 3 Atk. 690.

4. The appointing a receiver is not in all cases a turning the party out of possession; as where a receiver is appointed of an infant's estate, the receiver's possession is the possession of the infant; but on the appointing a receiver in an adversary suit, as where the plaintiff in ejectment has recovered a verdict, here the receiver's possession seems to be the possession of him that has the right to it. *Sharp* v. *Carter*, 3 P. W. 379.

5. The appointment of a receiver does not alter the possession of the estate in the person who shall be found entitled at the time the receiver was appointed, so as to prevent the statute of limitations from running. *Anon*, 2 Atk. 15.

See further, p. 398, *post.*

(2) *In what Cases.*

1. The Court will not appoint a receiver when the matter in dispute depends on a legal title, unless strong grounds of title are shewn, and the rents are in danger. *Mordaunt* v. *Hooper*, Amb. 311.

2. A receiver was appointed before answer, against the legal estate in a trustee to sell and pay creditors, upon strong affidavits. *Vann* v. *Barnett*, 2 Br. C. C. 158.

3. A receiver was appointed against the legal estate under a voluntary conveyance, upon admissions in the answer, showing a strong probable title in the plaintiff to a re-conveyance of the estate. *Hugonin* v. *Baseley*, 13 Ves. 105.

4. A receiver will not be appointed on behalf of an heir at law, as, against a devisee; the heir must try the question at law. *Knight* v. *Duplessis*, 2 Ves. 360.

5. Where a will was set aside for insanity, the Court, upon the application of the heir at law and next of kin, appointed a receiver of the estate, while the validity of the will, as to the personal estate, was in contest in the Ecclesiastical Court. *Montgomery* v. *Clark*, 2 Atk. 378.

6. Where satisfaction is sought out of real assets descended to an infant h r, so that the parol may demur, the Court will appoint a receiver of the real estate descended. *Sweet* v. *Partridge*, 2 Dick. 696.

7. If the person in possession of real estate, which is assets, has by his answer stated the circumstances of the property to be such, that in the administration, both the real estate and rents and profits must become responsible to the demand: the Court will grant a receiver in the first instance. *Jones* v. *Pugh*, 8 Ves. 71.

8. A second mortgagee cannot have a receiver, the mortgagor living, without the consent of the first mortgagee, because the Court cannot prevent the first mortgagee from bringing an ejectment against the receiver, as soon as he is appointed. *Phipps* v. *Bishop of Bath and Wells*, 2 Dick. 608.

But see Dalmer v. *Dashwood*, 2 Cox, 378.

Wilkins v. *Williams*, 3 Ves. 588.

9. Generally, a mortgagee shall not be deprived of possession while any thing remains due; but where the mortgagee of a West India estate refused to swear any thing was due, a consignee was appointed. *Quarrell* v. *Beckford*, 13 Ves. 377.

See further as to consignee, p. 148, *ante*.

10. The defendant was purchaser of part of the plaintiff's interest in a mortgage, and was also in possession of part of the mortgaged premises as tenant; upon a motion by the plaintiff for a receiver, the Court held that the defendant could

not unite the two characters of mortgagee and tenant, and his possession being as tenant, could not be set up against the other mortgagee; and a receiver was accordingly appointed. *Archdeacon* v. *Bowes,* 3 Anst 752.

11. Where, upon an advance of money, the defendant agreed to execute a mortgage, the Court upon a bill for specific performance, and before answer, granted a receiver. *Shakel* v. *Duke of Marlborough,* 4 Mad. 463.

12. A receiver appointed of two-fifths of an estate. *Calvert* v. *Adams,* 2 Dick. 478.

13. Receiver appointed of an undivided estate. *Evelyn* v. *Evelyn,* 2 Dick. 800.

14. A tenant in common in possession was ordered to give security to his co-tenant for his share of the rents, or a receiver to be appointed. *Street* v. *Anderton,* 4 Br. C. C. 414.

15. A dispute in the Ecclesiastical Court concerning the probate, is not of itself sufficient ground for the appointment of a receiver, as that Court can grant an administration *pendente lite.*
Knight v. *Duplessis,* 1 Ves. 324.
Richards v. *Chave,* 12 Ves. 462.
But see King v. *King,* 6 Ves. 172.

16. Where it is probable there will be a misapplication and wasting of the effects of an intestate by a limited administrator, who is only a trustee for an infant, the Court will appoint a receiver. *Havers* v. *Havers,* Barn. 23.

17. Where the acting executor was in contempt to a commission of rebellion, for want of an answer to a former suit for an account, and had absconded from the kingdom, a receiver was appointed on behalf of an infant plaintiff, before service of *subpœna.* *Pitcher* v. *Helliar,* 2 Dick. 580.

18. Where the husband of the executrix was in the West Indies, and therefore not amenable to the process of the Court, a receiver was appointed. *Taylor* v. *Allen,* 2 Atk. 213.

19. Where executors are insolvent, the Court will grant a receiver. *Utterson* v. *Mair,* 4 Br. C. C. 277. 2 Ves. J. 98.

20. That an executor is poor, is not a sufficient reason for appointing a receiver. *Hathornthwaite* v. *Russel,* 2 Atk. 126. Barn. 334.
Anon, 12 Ves. 4.

21. In general, a strong case is necessary to obtain an order for a receiver against an executor, but a receiver was appointed, even before answer, where the affidavit stated misapplication of the assets, and danger to the property from insolvency, and the co-executors consenting to the application. *Middleton* v. *Dodswell,* 13 Ves. 266.

22. Receiver appointed of partnership stock in the brewing trade. *Skipp* v. *Harwood,* 1 Dick. 114.

23. In a cause respecting an account of a partnership, both parties being dead, a receiver shall be appointed; otherwise if one be surviving. *Philips* v. *Atkinson,* 2 Br. C. C. 272.

24. A receiver of the stock of a subsisting partnership cannot be appointed while the trade is going on, except upon a case of the grossest abuse. *Oliver* v. *Hamilton,* 2 Anst. 453.

25. The Court refused to appoint a receiver of a charity estate, against a corporation, as trustees. *The Attorney-General* v. *The Mayor of Stafford,* Barn. 33.

See further p. 398, *post.*

(3) *Who may be appointed.*

1. The Master's report of his approbation of a receiver must stand till the person appointed is impeached as improper. *Creuze* v. *Bishop of London,* 2 Br. C. C. 253.
Thomas v. *Dawson,* 3 Br. C. C. 508. 1 Ves. J. 452.

2. And the objection must be upon special grounds, and, to avail, must show a strong case of disqualification. *Tharpe* v. *Tharpe,* 12 Ves. 317.

3. The Court will not interfere with the Master's appointment of a receiver or consignee, unless upon special grounds and a strong case. *Bowersbank* v. *Colasseau,* 3 Ves. 164.
And see Tharpe v. *Tharpe,* 12 Ves. 319.

4. The Master's judgment is conclusive in appointing a receiver, unless some substantial objection is shewn. It is no objection to a receiver that he is a practising barrister, but the solicitor in the cause cannot be receiver. *Garland* v. *Garland,* 2 Ves. J. 137.
And see Wilkins v. *Williams,* 3 Ves. 589.

5. The Court will not control the Master's appointment of a receiver, with-

out a special case: the trustee of the estate cannot be receiver. *Anon*, 3 Ves. 515.

6. A trustee cannot be receiver, whether he is sole trustee or jointly with others. ——— v. *Jolland*, 8 Ves. 72.

7. The principle of the Court is that the trustee shall not be receiver, if any other can be procured; and where a trustee has been appointed, it has been without emolument. *Sykes* v. *Hastings*, 11 Ves. 363.

8. A mortgagee is not bound to give way to the owner of the estate in the appointment of a receive, and therefore it was held no objection to a receiver that he was proposed by a second mortgagee, and preferred by the Master to the one proposed by the mortgagor and purchaser of the estate. *Wilkins* v. *Williams*, 3 Ves. 588.

9. It was held no objection to a person appointed, that he lived 14 miles from the estate, and was recommended to the Master by the trustee, he being otherwise well qualified. *Tharpe* v. *Tharpe*, 12 Ves. 317.

See further p. 400, *post.*

(*b*) *Recognizance and Sureties.*

1. The course of the Court requires a security by the receiver, and two sureties in a recognizance, and taking the assignment of a mortgage belonging to a receiver instead, is very improper and ought not to be done. *Mead* v. *Lord Orrery*, 3 Atk. 237.

2. Receivers named by the parties were appointed on their own recognizances. *Ridout* v. *Earl of Plymouth*, 1 Dick. 68.

3. Receiver continued on giving security by his own recognizance only, by consent of all parties interested, except one who was an infant and did not oppose. *Countess of Carlisle* v. *Lord Berkley*, Amb. 599.

4. A receiver appointed to collect in assets and to bring actions in the name of an executrix, must give security to indemnify the executrix on account of such actions. *Taylor* v. *Allen*, 2 Atk. 213.

5. Inrolment of recognizances entered *nunc pro tunc*. *Vaughan* v. *Vaughan*, 1 Dick. 90.

6. A receiver gives security duly to account, not for faithful management. *Morris* v. *Elme*, 1 Ves. J. 139.

7. Manager of an estate in the West Indies is not to give security faithfully to manage. *Ibid.*

See further, p. 402, *post.*

(*c*) *Power and Authority.*

1. A receiver need not be served with a writ of execution of a decretal order, but only with a copy, and if he disobeys, shall be committed. *Macarty* v. *Gibson*, Mos. 40.

2. Order that a receiver might distrain, in the names of trustees. *Shelly* v. *Pelham*, 1 Dick. 120.

3. Tenants directed to pay their rents in a given time, on the first application, or to stand committed; and the receiver to be at liberty to distrain on one tenant. *Mitchel* v. *Duke of Manchester*, 2 Dick. 787.

4. A receiver appointed by the Court has power to distrain for rent, and need not apply for a particular order for that purpose only, unless there be a doubt who had a legal right to the rent. *Pitt* v. *Snowden*, 3 Atk. 750.

5. Where the tenants have attorned to the receiver he can distrain, and an order of Court, though sometimes made, is unnecessary. *Hughes* v. *Hughes*, 1 Ves. J. 161. 3 Br. C. C. 87.

6. If a receiver is appointed and the owner of the estate is in possession of part of the premises, application should be made to the Court that the owner should deliver possession to the receiver; for the receiver cannot distrain on the owner in possession, he not being tenant. *Griffith* v. *Griffith*, 2 Ves. 401.

7. A receiver cannot proceed in ejectment, without leave of the Court. *Wynn* v. *Lord Newborough*, 3 Br. C. C. 88. 1 Ves. J. 164.

8. Ejectment cannot be brought against a receiver without leave of the Court. *Angel* v. *Smith*, 9 Ves. 335.

9. Upon motion that a receiver might be at liberty to defend an ejectment, and charge the expense in his accounts; the parties interested being adult and consenting, it was referred to a Master, to see if it was for their benefit. *Anon*, 6 Ves. 287.*

10. Motion by a remote remainderman, and tenants, to restrain receiver from ejecting tenants, refused with costs,

their interest not being sufficient. *Wynn* v. *Lord Newborough,* 3 Br. C. C. 88. 1 Ves. J. 164.

11. A receiver is to let the estate to the best advantage; but he cannot raise the rents upon slight grounds, nor turn out tenants, nor let even for one year without application to the Master. *S. C.* 1 Ves. J. 164.

12. A receiver cannot sell and let, or make expenditures without application to the Court; a manager in the West Indies may. *Morris* v. *Elme,* 1 Ves. J. 139.

See further p. 401, *post.*

(*d*) *Accounts and Allowances.*

1. A receiver to the guardian of an infant, who has his account allowed him by the guardian, shall not be obliged to account over again to the infant when he comes of age. *Clavering's Case,* Pre. Ch. 536.

2. A. is the receiver of an estate, out of which he was to pay to B. an annuity quarterly, and B. requested it might be paid into his bankers. A. accordingly made to his bankers, in July, a payment, which did not become due till Michaelmas, and on Michaelmas-day the banker stopped payment and became a bankrupt; it was held that the loss should fall wholly on the receiver, B. having no right to the money before the day. *Lady Shaftesbury's case,* Pre. Ch. 558.

3. Receiver was held not liable to a loss by the failure of the testator's banker at Bristol, with whom the receiver, when going to London to pass his accounts, deposited the money, intending to draw for it; for the sum in his hands being large, it was a necessary precaution to remit it to London through a banker. *Knight* v. *Earl Plymouth,* 1 Dick. 120. 3 Atk 480.

4. Where a receiver pays money to a tradesman and takes bills for the sum; if he was in credit at the time, though he fails soon after, it shall not affect the receiver. *Ibid.*

5. But if the money had been lost by his wilful default, and placing it in what he knew at the time to be an improper hand, the Court will oblige a receiver to answer the loss out of his own pocket. *Ibid.*

6. Where a receiver makes remittances to his own credit and use, and not to a separate account of the trust, he will be charged with a loss by the failure of the bankers. *Wren* v. *Kirton,* 11 Ves. 377.

7. Semble, if a receiver, appointed by the Court upon the application of a mortgagee or incumbrancer, embezzle or waste the rents and profits, the loss must fall on the mortgagor. *Rigge* v. *Bowater,* 3 Br. C. C. 365.

8. A receiver during the infancy of the plaintiff, who had no guardian, was directed to place out the surplus of the rents, when the same should amount to a competent sum, on government or other securities; having never placed it out at interest according to the decree, the Court directed that he should pay interest at £4 per cent. from the time of the decree till the infant came of age. *Hicks* v. *Hicks,* 3 Atk. 274.

9. It is no excuse for the receiver that the Master did not give any directions about it, for it was his duty to remind the Master to lay out the surplus rents when it amounted to a competent sum. *Ibid.*

10. That buildings and farms are in ruinous condition, and tenants often breaking, will not justify a receiver's keeping the balance in his hands, for it is not to be supposed he could exhaust the whole received from the rents of the estate. *Ibid.*

11. The receiver's settling the accounts and delivering the vouchers to the plaintiff when he came of age, and his admitting the balance and receiving it without objection, had no weight, as this transaction was two days only after he came of age. *Ibid.*

12. Receiver must pay in his money yearly, and must pay nothing out without an order; he shall pay interest for money kept in his hands even a quarter of a year after it ought to have been paid in: enquiry directed as to that, though he had passed his accounts, and all parties declared themselves satisfied. *Fletcher* v. *Dodd,* 1 Ves. J. 85.

13. Receiver not passing his accounts, shall always pay interest upon the balances in his hands. —— v. *Jolland,* 8 Ves. 72.

14. A receiver who does not pass his accounts regularly, is not to be allowed his poundage. *White* v. *Lady Lincoln,* 8 Ves. 371.

15. Manager of an estate in the West Indies ordered to account for the produce, and to consign so far as the management requires it, but must have a discretion as

to what is to be applied there. *Morris* v. *Elme*, 1 Ves. J. 139.

16. A receiver is not to lay out money in repairs at his own discretion: but under circumstances an enquiry was directed; and the report stating, that the expenditure was for the lasting benefit of the estate, and by the direction of the trustees, the order for the allowance was made. *Blunt* v. *Clitherow*, 6 Ves. 799.

17. Receivers and committees are not to apply the trust fund in repairs to any considerable extent, without a previous application. Where the receiver had expended money in repairs, an enquiry was directed, whether the repairs were reasonable. *Attorney-General* v. *Vigor*, 11 Ves. 563.

18. Receiver not paying in a balance under an order may be proceeded against personally by commitment. *Davies* v. *Cracraft*, 14 Ves. 143.

19. A previous order in the alternative that he shall pay by a certain day or stand committed is necessary; it is not sufficient that the receiver upon his appearance by counsel, and praying time, has been ordered to pay by a certain day. *Ibid.*

See further, p. 401, *post*.

(c) *Discharge of.—Receiver or Surety.*

1. When a receiver is appoined and has given security, he must shew a reasonable cause to entitle himself to be discharged. *Smith* v. *Vaughan*, Ridg. Rep. T. Hard. 251.

2. Bill filed by a creditor on behalf of himself and other creditors, and a receiver appointed; the receiver shall not be discharged upon the consent of the plaintiff against the consent of an incumbrancer, who is a party defendant. *Largan* v. *Bowen*, 1 S. & L. 296.

3. And although an incumbrancer were not a party, nor had proceeded in the suit, and were obliged to file a new bill; yet, *semble*, the Court would not discharge the receiver; and would direct that such bill should be taken as filed at the same time with the former. *Ibid.*

4. A receiver will be continued until deeds of sale under the decree are executed, for the purpose of collecting arrears of rent. *Quin* v. *Halland*, Ridg. Rep. T. Hard. 295.

5. A commission of bankruptcy cannot supersede a decree of this Court for a receiver, which is a discretionary power exercised by this Court with as great utility as any sort of authority that belongs to it; and is provisional only, and does not affect the right of parties. *Skip* v. *Harwood*, 3 Atk. 564.

6. Sureties for a receiver will not be discharged at their request. *Griffith* v. *Griffith*, 2 Ves. 401.

See further, p. 402, *post*.

LXVII. Rehearing.

(a) *Generally.*

1. An order for rehearing cannot be obtained on motion: it must be by petition. *Attorney-General* v. *Brooke*, 18 Ves. 319.

2. It is in the discretion of the Court, whether or not to grant a rehearing. *Mills* v *Banks*, 3 P. W. 8.

3. A petition of rehearing must be signed by two counsel, and then a rehearing is of course. *Cunyngham* v. *Cunyngham*, Amb. 91.

4. A rehearing will be granted when applied for, as it is considered to be the duty of the Court to review its decision when called upon so to do, in order, if possible, to save the expense and delay of an appeal. *Pentland* v. *Stokes*, 2 B. & B. 76.

5. Petition for a rehearing ought to state the grounds on which it is sought to rehear the cause. *Gifford* v. *Hort*, 1 S. & L. 398.

6. A petition for rehearing or for leave to file a bill of review is bad for the uncertainty. *Hyde* v. *Donne*, 2 Anst. 551.

7. A petition of rehearing will be ordered to be taken off the file for irregularity, if it states a case different from that on which the decree was pronounced. *Wood* v. *Griffith*, 1 Mer. 35. 19 Ves. 550.

8. A new plaintiff by supplemental bill may impeach a decree upon rehearing, on the petition of former parties. *Hill* v. *Chapman*, 3 Br. C. C. 391. 1 Ves. J. 405.

9. The Lord Chancellor will not rehear an order of a preceding Lord Chancellor while it rests in minutes.
Taylor v. *Popham*, } *Monke* v. *Taylor*, } 15 Ves. 72.

10. Two days notice sufficient for a rehearing. *Robinson* v. *Taylor*, 1 Ves. J. 45.

11. A cause, which was originally heard

before the Lord Chancellor, must, on rehearing, be opened as a case. *Anon,* 2 Atk. 50.

12. If the petition of rehearing be against the decree in general, the whole cause is open; otherwise, if it be only in respect of particular parts of it. *Colchester* v. *Colchester,* Sel. C. C. 13.

13. On the petition of the plaintiff to rehear, the cause is open, with respect to him, as to those parts only, complained of by the petition; but as to the defendants the cause is open as to the whole and every part of it. *Rawlins* v. *Powel,* 1 P. W. 300.

14. Where a decree is obtained by default, and upon petition a rehearing is granted, if the person in possession of the decree does not attend at the rehearing, the bill will be dismissed with costs as to the petitioner. *Wilson* v. *Dabbs,* Sel. C. C. 50.

(*b*) *Where granted or refused.*

1. The Court will not rehear a cause after decree signed and enrolled. *Coltman* v. *Warr,* 2 C. R. 361.
Taylor v. *Sharp,* 3 P. W. 371.

2. A rehearing not granted, though one only of several defendants has signed and enrolled the decree of dismissal. *Gore* v. *Purdon,* 1 S. & L. 234.

3. A plaintiff must make a decree complete against a defendant, though he has made a default, before he can petition for a rehearing. *Baxter* v. *Wilson,* 2 Atk. 152.

4. After a decree by consent, there cannot be a rehearing, although the party did not really give his consent. *Bradish* v. *Gee,* Amb. 229.
King v. *Wightman,* 1 Anst. 80.

5. If a fact be mistaken at the hearing and decretal order, it must be rectified by rehearing, and not by bill of review. *Combs* v. *Proud,* 1 C. C. 54.
2 Free. 182.

6. Omission in a bill of revivor, to make one defendant a party, is no cause of rehearing, the proceedings having been in the said defendant's name. *Peachy* v. *Vintner,* 1 C. R. 252.

7. A rehearing is the proper mode of impeaching a decree not signed, and enrolled, for error. *Bolger* v. *Mackell,* 5 Ves. 509.

8. A decree was made *ex parte* against A. to pay one moiety of a sum of money, said to be due from A. and B. to C. upon a stated account between C. and B. but to which A. was neither party nor privy: some years passed before A. knew of this decree, but on being informed of it, he applied by petition, to have the cause reheard: this was refused, and the petition dismissed; but on an appeal, the order of dismission was reversed, and the Chancellor directed to rehear the cause. *Duchess of Hamilton* v. *Manby,* 6 Br. P. C. 347.

9. The Court doubted whether a decree made by the Chancellor upon exceptions to a decree of commissioners of charitable uses could be reheard. *Saul* v. *Wilson,* 2 Vern. 118.

But ultimately the cause was reheard. See Mr. Raithby's note.

10. Before enrolment of the order made on arguing exceptions to a decree of charitable uses, it may be reheard. *Rawson* v. *Turner,* 2 Dick. 519.

11. An agreement was signed by the parties, and by consent made an order of Court, to submit to such decree as the Court should make, and neither party to bring an appeal; yet the cause allowed to be reheard. *Buck* v. *Fawcett,* 3 P. W. 242.

12. The cause reheard, notwithstanding the parties had entered into an agreement, which was made an order of Court, not to rehear the cause. *Bowker* v. *Hunter,* 2 Dick. 611.

13. After a hearing by Judge Ramsford for the Lord Keeper Bridgeman, and afterwards a rehearing before the Lord Keeper, the cause was again reheard. *Porter* v. *Hubbart,* 2 C. R. 85.
3 C. R. 78.

14. Cause heard at the Rolls: the decree appealed; the cause heard on the appeal; afterwards appeal reheard by Lord Camden, C. though at first objected to, as against rule. *Howel* v. *Howel,* 1 Dick. 426.

15. An appeal from the Rolls is in fact a rehearing, and therefore such an appeal cannot be reheard. *Fox* v. *Mackreth,* 2 Cox, 158.
East India Company v. *Boddam,* 13 Ves. 421.

And see Brown v *Higgs,* 8 Ves. 561.

16. Unless in a case of manifest mistake, or where the judge who pronounced the decree himself apprehends that he has mistaken the case; then a rehearing is a

matter of discretion with the Court. *East India Company* v. *Boddam*,
13 Ves. 423.

17. Bill of review reheard. *Neal* v. *Robinson*, 1 Dick. 15.

18. A cause was ordered to be reheard upon payment, by the petitioners, of all costs incurred since the decree, within a week after service of a taxed bill of costs; but on an appeal, it was declared, there was not sufficient ground for imposing such terms on the petitioner; but that it would have been sufficient for the Court to have required him to give security for, or submit to pay the costs, in case the decree should not be materially varied on the rehearing. *Houghton* v. *West*,
2 Br. P. C. 88.

19. Decree on default, setting aside a lease of a charity-estate, with covenant for perpetual renewal, and directing an account of the actual rent; a rehearing was permitted on paying costs, and not disturbing proceedings before the Master, to the draft of a report of what was due, but the money not to be paid into Court before the report made. *Attorney-General* v. *Brooke*, 18 Ves. 319.

20. A cause reheard after thirty years, the enrolment being lost. *Devering* v. *Cooper*, 3 C. R. 27.

21. Generally, a cause cannot be reheard after twenty years. *Smith* v. *Clay*,
Amb. 645.
3 Br. C. C. 639, (*n*).

22. Decree *nisi* made absolute; two years after the defendant was permitted to have the cause reheard upon paying such costs of his default, to be taxed, as he would have paid, had he applied to shew cause, and submitting to pay any costs the Court might direct at the rehearing. *Cunyngham* v. *Cunyngham*, Amb. 89.
1 Dick. 145.

23. In a similar case a rehearing was allowed, although the Master's report under the decree had been confirmed absolutely, and the time appointed for defendant to redeem had elapsed. *Kinsay* v. *Kinsay*, 1 Dick. 145.

24. Decree *nisi* made absolute, and proceedings before the Master; defendant to be at liberty to rehear upon paying the costs of default, and making the usual deposit, and submitting, in case the decree should be so varied as to render the proceedings before the Master useless, to pay the costs the plaintiff had incurred. *Fry* v. *Prosser*, 1 Dick. 298.

25. Bill dismissed, owing to the neglect of the plaintiff's solicitor, and the order of dismission enrolled; the enrolment discharged and the cause reheard, upon payment of costs. *Robson* v. *Cranwell*,
1 Dick. 61.

26. The plaintiff allowed to rehear the cause, when his bill had been dismissed for want of his appearing at the hearing, upon payment of costs to the defendant, and consenting to pay the costs, which on the rehearing might be awarded against him. *Terran* v. *Waite*, 2 Dick. 782.

27. Bill decreed to be taken *pro confesso* against husband and wife, reheard on the petition of the wife, the husband being dead. *Took* v. *Clark*, 1 Dick. 350.

28. Rehearing on terms, after a decree *nisi* by default made absolute, the petitioner, the widow of the defendant having been covert at the time of default. *Vowles* v. *Young*, 9 Ves. 172.

29. If, after the hearing, a witness is convicted of perjury, advantage may be taken of it upon a rehearing. *Needham* v. *Smith*, 2 Vern. 464.

30. Where, upon further directions, the decree appeared to be wrong, it was altered, by a short petition of rehearing, by consent *Bailey* v. *Ekins*, 7 Ves. 324.

31. Creditors coming in under the decree, may petition for a rehearing. *Gifford* v. *Hort*, 1 S. & L. 409.

32. Generally, there can be no rehearing for costs only. *Wirdman* v. *Kent*, 1 Br. C. C. 140.
2 Dick. 594.
Eyre v. *Parnell*, 8 Br. P. C. 349.

33. But under particular circumstances there may be a rehearing for costs. *Couper* v. *Scott*, 1 Eden, 17.
1 Br. C. C. 141, (*n*).

And see p. 382, *ante*.

(*c*) *Evidence upon.*

1. The Court permitted letters, not proved at the original hearing, to be read as evidence upon a rehearing. *Dashwood* v. *Lord Bulkeley*, 10 Ves. 236.

2. Upon rehearings, new evidence is admitted in some instances; but then the party, if he succeeds, ought to indemnify the other for not having that evidence at the time it ought to have been read.
White v. *Fussel*, 1 V. & B. 153.

3. Motion on a rehearing before the Chancellor, for leave to prove exhibits *viva voce*, which were not proved on the hearing at the Rolls, was granted,

saving just exceptions. *Walker* v. *Symonds*, 1 Mer. 37, (*n*).
And see p. 383, *ante.*

LXVIII. Rejoinder.

1. The defendant, though he is not served with a subpœna, mey rejoin *gratis.* But plaintiff cannot compel him to rejoin without a subpœna. *Anon.* Mos. 123.

2. If a plaintiff replies, defendant may rejoin *gratis*, and give a rule to produce witnesses. *Flower* v. *Herbert*, 1 Dick. 349.

3. The Court will, under circumstances, give the defendant leave to withdraw rejoinder, and rejoin *de novo.* *Berks* v. *Wigan*, 1 V. & B. 221.
And see p. 68, *ante.*

4. A rejoinder is only a fiction of the Court, and is never actually filed. *Rodney* v. *Hare*, Mos. 296.

LXIX. Replication.

1. Where there is a plea and answer, and the plaintiff replies, the replication must be to the answer, as well as to the plea. *Niccol* v. *Wiseman*, 2 Vern. 46.

2. Whether to a plea, the plaintiff has a right to reply generally, and examine at large—*Quære.* *Orde* v. *Huddleston*, 2 Dick. 510.

3. The defendant has eight days to put in an answer to amended bill, and the plaintiff cannot before that time file a replication. *Lloyd* v. *Lloyd*, 2 Cox, 431.

4. Cause stood over, with liberty for the plaintiff to file a replication upon payment of costs. *Barker* v. *Wyld*, 1 Vern. 140.

5. The plaintiff obtained a decree upon bill and answer by default, but upon showing cause, the decree was allowed in favor of defendant; upon a rehearing, on petition of the plaintiff, leave was given him to reply to the answer upon payment of costs. *Donnegall* v. *Warr*, 1 Eq. Ca. Ab. 43.

6. Where witnesses have been examined, and no replication, the Court at the hearing, or even after a decree, will order a replication to be filed *nunc pro tunc:* a cause is at issue by the replication, and a rejoinder is never actually filed. *Rodney* v *Hare*, Mos. 296.

7. If a defendant disclaims generally, and the plaintiff replies to her answer, and serves her with a subpœna to rejoin, she is entitled to have costs against him for the vexation. *Williams* v. *Longfellow*, 3 Atk. 582.

8. The plaintiff, in an interpleading bill, must compel the defendants to answer; he must reply, and have a subpœna to rejoin, in order that the defendants may examine witnesses. *Anon*, 1 Dick. 291, (*n*).

9. Answer to an infant's bill; answer not replied to, and therefore taken to be true. *Thurston* v. *Nutton*, 3 P. W. 237, (*n*).

10. If a plaintiff, who is of age, does not reply, it is an admission of the facts in the answer; but an infant can admit nothing, and therefore his not replying does not affect him. *Legard* v. *Sheffield*, 2 Atk. 377.

11. The Court will not give leave to withdraw a replication, unless something is added as a reason for such indulgence; as that the plaintiff may be thereby enabled to amend his bill: or otherwise it may be a contrivance to defeat the defendant of his full costs by getting the bill dismissed at the hearing with forty shillings costs. *Pott* v. *Reynolds*, 3 V. & B. 20, (*n*).
3 Atk. 565.

12. An order to withdraw replication on payment of twenty shillings costs, is of course; the General Order, 27 April, 1748, giving a discretion to the Court to exceed forty shillings costs in case of dismissal of a suit, heard upon bill and answer. *Cowdell* v. *Tatlock*, 3 V. & B. 19.

13. A replication, filed on the day of cause shewn, against dismissing a bill, is irregular, and the Court will order it, on motion, to be taken off the file. *Christie* v. *De Tastet*, 1 Price, 242.

14. Order to dismiss a bill for want of prosecution, operates from the time of its being pronounced; and therefore, a replication filed afterwards, though before service of the order, does not prevent its effect; but the practice not being previously settled, the bill in this case was restored on terms and payment of costs. *Lorimer* v. *Lorimer*, 1 J. & W. 284.

LXX. Retaining Suit.

1. The cases where the bill is retained, that there may be a trial at law, are,

where it is necessary to establish the legal right, in order to found the equitable relief; but where the subject appeared to be matter of law, the bill was dismissed. *Walton* v. *Law*, 6 Ves. 150.

2. Bill for legal demand retained, with liberty to bring an action; the assistance of the Court being required upon equitable circumstances. *Stevens* v. *Praed*, 2 Ves. J. 519.

3. It is not a necessary consequence, that the bill will not be dismissed, because it has been retained for the purpose of a trial at law. *Harmood* v. *Oglander*, 6 Ves. 225.

4. Where, upon a motion to dismiss for want of prosecution, the plaintiff produces an order obtained for subpœna to rejoin, and an affidavit of the number and distance of the other defendants, the Court will not dismiss; and if for want of such order and affidavit the bill has been dismissed, still upon procuring them afterwards, and payment of costs out of pocket, the Court will retain the suit. *Anon*, 2 Atk. 604.

5. On motion to retain a bill, the plaintiff must shew that an order for a subpœna to rejoin was dated before the notice to dismiss. *Ibid.*

6. Where the plaintiff became bankrupt, and before the assignees could obtain the consent of the creditors to prosecute the suit, the bill was dismissed; the Court under the circumstances retained the suit, on the plaintiffs undertaking to make themselves parties within a week. *Lingard* v. *Wegg*, 3 Br. C. C. 435.

And see p. 67, *ante.*

7. Where a defendant to a cross bill had been guilty of laches, in drawing up and serving the order to dismiss, it was discharged, and without costs, on account of the delay occasioned. *Browne* v. *Byne*, 1 V. & B. 310.

8. After the usual motion to dismiss a bill for want of prosecution, the suit may be retained upon special application on affidavit, within a reasonable time, and with notice; but not on application *ex parte*, as formerly. *Fuller* v. *Willis*, 3 V. & B. 1.

Day v. *Snee*, 3 V. & B. 170.

9. On motion, after an order to dismiss bill for want of prosecution, supported by affidavit as to merits, and accounting for the delay, the bill was retained on the terms of undertaking to file a replication forthwith, and speed the cause to a hearing, and paying costs. *Bellingham* v. *Bratty*, 1 Mad. 265.

10. It is not the ordinary practice to restore a bill which has been regularly dismissed for want of prosecution; but this may be done under circumstances, though not for the mere purpose of agitating the question of costs. *Hannam* v. *South London Water-Works*, 2 Mer. 63.

11. The refusal of a former motion to discharge an order to dismiss, does not constitute a ground to prevent the party from applying to have the bill restored. *Ibid.*

12. Order to dismiss a bill, no notice of which is given before the bill is amended, is a nullity, and it is not necessary to move to discharge it. *Tanner* v. *Dean*, 4 Mad. 176.

LXXI. Review, Bill of.

(a) *In what Cases allowed.*

1. If a decree be obtained and enrolled, so that the cause cannot be reheard, then there is no remedy but by bill of review, which must be on error appearing on the face of the decree, or on some new matter, as a release, or a receipt, discovered since. *Taylor* v. *Sharp*, 3 P. W. 372.

Ashton v. *Smith*, 8 Br. P. C. 354.

2. By the established practice of the Court of Chancery, there are but two sorts of bills of review; one, founded on supposed error appearing in the decree itself, the other, on new matter. And as to the new matter, it must have arisen in time after the decree: or upon new proof, which could not have been used at the time when the decree passed But this new proof must be such as was not known either to the party, or his attorney, solicitor, or agent. *Le Neve* v. *Norris*, 2 Br. P. C. 73.

And see Ludlow v. *Macartney*, 2 Br. P. C. 67.

3. It is sufficient to entitle a party to a bill of review, if the new proof did not come to his knowledge till after publication; or when, by the rules of the Court, he could not make use of it. *Norris* v. *Le Neve*, 3 Atk. 35.

Ridg. Rep. T. Hard. 322.

4. The discovery of new matter, in being at the time of a decree, but not known

till afterwards, entitles the party to a review. *Standish* v. *Radley*,
2 Atk. 178. Barn. 463.
Wortley v. *Birkhead*, 2 Ves. 576.

5. But the party must shew that such new matter is relevant, for its being new matter will not alone entitle them to such a bill. *Bennet* v. *Lee*, 2 Atk. 529.
Earl Portsmouth v. *Lord Effingham*,
1 Ves. 434.

6. The new matter ought to be such as may be used as evidence of what was in issue in the cause. *Patterson* v. *Slaughter*, Amb. 293.
See contra, *Anon*, 2 Free. 31.

7. There can be no bill of review for any matter subsequent to the decree, as the plaintiff's confession. *Curtis* v. *Smallridge*, 2 Free. 178.
1 C. C. 43.

8. Error discovered, after report confirmed, would be ground for bill of review. *Worge* v. *Bradley*, 2 Dick. 570.

9. Where the matters mentioned in the decree as proved, were in fact not proved, it is not error to found a bill of review; for if the fact be mistaken, it should be remedied by rehearing before enrolment. *Combs* v. *Proud*,
1 C. C. 54. 2 Free. 182.

10. Upon a bill of review the party cannot assign for error, that any of the matters decreed are contrary to proofs in the cause. *Mellish* v. *Williams*,
1 Vern. 166.

11. A demurrer to a bill of review, brought after affirmance of the decree in Parliament, was overruled; but the plaintiff was ordered not to proceed after answer put in, without special leave of the Court. *Barbon* v. *Searle*,
1 Vern. 416.

12. After a trial of an issue at law and decree, and a perpetual injunction, the party enjoined was allowed to bring a bill of review, upon evidence newly discovered. *Attorney-General* v. *Turner*,
Amb. 587.

13. A bill of review lies not after a bill of review, although there be error manifest in the decree. *Denny* v. *Filmer*,
2 C. C. 133.
Nel. 64.
1 Vern. 135.
2 Free. 172.
Pitt v. *Earl of Arglass*,
1 Vern. 441

14. Matter of abatement is not error, upon which to found a bill of review. *Slingsby* v. *Hale*, 1 C. C. 122.
Lady Cranbourne v. *Dalmahoy*,
1 C. R. 231. 2 Free. 169.

15. Bills of review ought not to be grounded upon irregularity in point of form. *Hartwell* v. *Townsend*,
2 Br. P. C. 107.

16 Bill of review of a decree of foreclosure was dismissed, where it appeared the defendant's agent, attorney, and solicitor had attended the Master on his behalf, in taking the account under the decree. *Gould* v. *Tancred*,
2 Atk. 533.

17. And where the persons, under whom the petitioners for the bill of review claim, were fully acquainted with the matter complained of thirty-five years since, such an effluxion of time and knowledge in the ancestor of the whole transaction, will have great weight with the Court on such applications. *Norris* v. *Le Neve*, 3 Atk. 38.
Ridg. Rep. T. Hard. 331.

18. A bill of review for error apparent will not lie after 20 years from the decree, the time runs from the decree, and not from the enrolment merely. *Smith* v. *Clay*, Amb. 645.
3 Br. C. C. 639, (*n*).
And see Edwards v. *Carroll*,
2 Br. P. C. 98.

19. But this rule does not apply to persons having contingent interests, and then not existing or under disabilities. *Lytton* v. *Lytton*, 4 Br. C. C. 441.

20. Demurrer to a bill of review allowed, because the decree had been made 27 years. *Sherrington* v. *Smith*,
2 Br. P. C. 62.
And see Gorman v. *M'Culloch*,
5 Br. P. C. 597.

21. A bill of review is brought only to re-inspect what the same Court has done before; and therefore does not lie upon the decree of another court of equity. *Portington* v. *Tarbock*, 1 Vern. 178.

See further, p. 340, *ante*.

(*b*) *For or against whom.*

1. The Court refused to allow the plaintiff to bring a bill of review, unless he has performed the decree; or would swear he was unable to do it, and would surrender himself to the Fleet, to lie there

till the matter on the bill of review was determined. *Williams* v. *Mellish*, 1 Vern. 117.

2. By the rules of the Court of Chancery relating to bills of review, if the duty decreed be the payment of money, it must be paid before the party, against whom the decree is, be admitted to file a bill of review; and if the party bringing the bill prevails, the money is refunded to him. It is a stronger case where the money to be paid is for costs only, which in all events ought to be paid before bill of review brought. *Bishop of Durham* v. *Liddell*, 2 Br. P. C. 63.

3. But the Court dispensed with the rule upon the defendant giving good security for payment of the money decreed. *Savil* v. *Darcey*, 1 C. C. 42. 2 Free. 172.

4. And where the defendant was in possession of the estate, and the plaintiff made oath that he was not worth £40 besides the matter in question, he was allowed to bring a bill of review without paying the costs in the original cause. *Fitton* v. *Earl Macclesfield*, 1 Vern. 264. 2 Free. 88.

5. In a bill of review all things are to be performed, according to the former decree, that do not extinguish the right; otherwise the non-performance is a good plea in bar, as if writings are to be brought into Court, or costs paid; but not to release the right, or make a conveyance, as that would destroy the right. *Fitton* v. *Lord Macclesfield*, 2 Free. 88. *Anon*, 12 Mod. 343.

6. Neither assigneee nor devisee can have relief by bill of review; they not being in privity. *Hartwell* v. *Townsend*, 2 Br. P. C. 107. *Slingsby* v. *Hale*, 1 C. C. 122.

7. A bill of review cannot be filed by the party in favor of whom the decree was pronounced. *Glover* v. *Portington*, 2 Free. 182.

But see S. C. 1 C. C. 53, *where the demurrer is said to have been overruled, and the bill consequently allowed.*

8. The defendant, an infant, appealed to the House of Lords from a decree obtained without examining witnesses, and a petition for leave to examine witnesses upon the appeal was rejected. This is no objection to the appellants bringing a bill of review. *Needler* v. *Kendall*, Rep. T. Finch, 468.

9. A bill of review will not lie against those who were not parties to the original bill. *Earl Carlisle* v. *Goble*, 3 C. R. 94. Nel. 52. 2 Free. 148.

(c) *Leave of Court, and Deposit.*

1. Upon every bill of review to reverse a decree, the plaintiff must deposit £50 with the register to answer costs. *Anon*, 2 P. W. 283.

2. A bill of review upon new matter cannot be filed without leave of the Court; otherwise, if the bill be brought upon error in law, apparent upon the face of the record. *Anon*, 2 P. W. 283. *Gould* v. *Tancred*, 2 Atk. 534.

3. And in the latter case, the constant method is for the defendant to put in a plea and a demurrer; a plea of the decree, and a demurrer against opening the enrolment, upon which the Court judges whether there are grounds for opening the enrolment; so, in effect, no bill of review can be brought without leave of the Court. *Gould* v. *Tancred*, 2 Atk. 534.

4. Where a bill of review is filed for reversing a former decree, and besides specifying errors in the decree, contains original matter, and is filed without leave of the Court, it is not to be set aside for irregularity; for, under these circumstances, it should be considered as a cross bill. *Houghton* v. *West*, 2 Br. P. C. 88.

(d) *Proceedings and Evidence upon.*

1. When a bill of review is brought for error apparent, the constant method is for the defendant to put in a plea and demurrer, a plea of the decree and a demurrer against opening the enrolment. *Gould* v. *Tancred*, 2 Atk. 534.

2. But pleading the decree is unnecessary if it is fairly set forth in the bill. *See* 5 Br. P. C. 597, (*n*). Mitf. 166.

3. Though the plaintiff, in a bill of review, is confined to errors upon the face of the record, and cannot go out of it, yet the defendant is at liberty to allege every matter relevant to his defence, whether in or out of the record, by way of plea, as a release, &c., nor has he any other method of introducing it; and when pleaded, the Court is to judge whether the plaintiff is entitled to the review he seeks. *Hartwell* v. *Townsend*, 2 Br. P. C. 107.

4. Upon an objection that the bill assigned errors collected from the proofs in the cause, and which did not appear in the decree, Lord Keeper North observed that was occasioned by the ill way they had got of drawing up decrees without stating the facts, and that the plaintiff in a bill of review should not be bound by it, unless the matter of fact were particularly stated in the decree. *Bonham* v. *Newcomb*, 1 Vern. 214.

5. Facts proved, and allowed by the Court as proved, should be particularly so mentioned in the decree; or if a bill of review be brought, those facts will be taken as not proved; for otherwise a decree could never be reversed by bill of review, but upon appeal only. *Brend* v. *Brend*, 1 Vern. 214.
S. C. Broad v. *Broad*, 2 C. C. 161.

6. Upon a bill of review no proofs are to be admitted but such as were in the original cause. *Taylor* v. *Wood*, Nel. 195.

7. On arguing a demurrer to a bill of review, nothing can be read but what appears on the face of the decree; but after demurrer overruled, a plaintiff may read any evidence as at a rehearing. *Catterall* v. *Purchase*, 1 Atk. 290.

8. Papers in the hands of a party to a former cause, but not till after publication had passed, though not produced then, may be read upon a bill of review. *Standish* v. *Radley*, 2 Atk. 179.
Barn. 470.

9. Where a party in a first cause has examined a great number of witnesses to establish a particular point, the Court will never suffer him in a second to contradict what he attempted to prove in the first. *Bennet* v. *Lee*, 2 Atk. 531.

10. The rule, as to bills of review, is that the decree can be varied only upon errors complained of, except as to matters merely consequential upon the variations made. *Moore* v. *Moore*, 2 Ves. 596.

LXXII. Revivor.

(*a*) *In what Cases a Suit ought to be revived.*

1. In case of abatement, it is not necessary to revive against a defendant that has not answered. *Oxburgh* v. *Fincham*, 1 Vern. 308.

2. Bill for discovery, suit abated after answer, not to be revived. *Gould* v. *Barnes*, 1 Dick. 133.

But see p. *547, *post.*

3. A perpetual injunction having been decreed, it is not necessary, upon an abatement, to file a bill of revivor merely to keep on foot the injunction. *Yeomans* v. *Kilvington*, 1 Dick. 351.
Askew v. *Townsend*, 2 Dick. 471.

4. And where a feme plaintiff marries, and the husband dies before revivor, a bill of revivor is unnecessary; but the subsequent proceedings ought to be in the name and description acquired by the marriage. *Godkin* v. *Earl Ferrers*, Mitf. 47.

5. Where the suit abated by the death of one defendant, application by the other defendant that plaintiff might revive in a month, or the bill be dismissed as against the surviving defendant, publication having passed, refused. *Parkinson* v. *Kerridge*, 2 Dick. 518.

6. Where an administrator obtained a decree against the defendant, for a sum of money, and for conveying lands, and the defendant died; held that the plaintiff might revive against the personal representative for the sum of money, without making the heir a party; for it is like a judgment at law where there may be two revivers. *Ferrers* v. *Cherry*, 1 Eq. Ca. Ab. 3.

7. When a cause is abated by the death of a defendant, the plaintiff is not obliged to bring a bill of revivor, but may file a new bill. *Anon*, 3 Atk. 486.
Spencer v. *Wray*, 1 Vern. 463.

8. In a bill of interpleader, a trial at law is directed between the defendants; the suit is thereby ended as to the plaintiff, so that if the plaintiff dies, defendants may proceed without reviving the cause. *Anon*, 1 Vern. 351.

9. Where the suit abates by the death of a party before the decree is drawn up; it must be revived before the decree can be passed. *Bertie* v. *Lord Falkland*, 1 Dick. 25.

10. Where a cause stood for judgment, and one of the defendants died, judgment was pronounced without a bill of revivor. *Davies* v. *Davies*, 9 Ves. 461.

11. A decree and sequestration for a personal duty against one who dies; this shall not be revived against his heir or real estate, though it were for money payable on the behalf of a charity. *University College* v. *Foxcroft*, 2 C. R. 244.
1 Vern. 166.

And see p. *553, *post.*

12. Part of the matters being omitted in drawing up the decree, and after the decree signed and enrolled the defendant dies, a bill of revivor lies to revive the matters omitted. *Williams* v. *Arthur*, 1 C. C. 37. 2 Free. 177.

13. After decree signed and enrolled, and several proceedings had respecting costs, the suit abated by death of the plaintiff, held that a bill of revivor was the proper mode of reviving the decree. *Croster* v. *Wister*, 2 C. R. 67.

14. On an appeal, the House reserved giving judgment upon the point, till an account was taken between the parties; the account was taken accordingly; but before the appeal was brought on again, one of the parties died, and the suit below was thereupon regularly revived; this was held sufficient, and that the appeal itself need not be revived. *Lake* v. *Mason*, 5 Br. P. C. 280.

15. When an appeal is abated in the House of Lords, the order to revive is obtained of course, and there is no fresh summons. *Byne* v. *Potter*, 5 Ves. 305.

16. After decree signed and enrolled, and the accounts taken, but the costs not taxed, the suit abated by marriage of the female plaintiff; it was revived, and costs ordered to be taxed. *Sayer* v. *Sayer*, 1 Dick. 42.

17. Costs taxed become a judgment debt; and although the decree is not enrolled, the suit may be revived for such costs only. *Edgill* v. *Brown*, 1 Dick. 62.

18. The enrolment of a decree is not necessary to entitle the representatives of a party to revive for costs. *Lowten* v. *Mayor of Colchester*, 2 Mer. 116.

19. Revivor is allowed for costs which have been taxed; but if the party, whether plaintiff or defendant, to whom costs are decreed, die before taxation, so that they are uncertain and unliquidated, they are lost, and no revivor is allowed. *White* v. *Hayward*, 2 Ves. 461. 1 Dick. 173.

But see, as to a distinction between abatement by death of the plaintiff, and abatement by death of the defendant, Morgan v. *Scudamore*, 3 Ves. 195.

20. The Court inclines against the rule of not reviving for costs untaxed, and therefore will not enforce it if the decree remains in any part unexecuted; and if the decree is against an executor for a sum with costs, out of assets, and the executor pays the sum, but not the costs, and dies; it is held a decree executory, and the plaintiff entitled to revive. *Johnson* v. *Peck*, 2 Ves. 465.

S. C. Johnson v. *Leake*, 3 Atk. 773.

21. And where a duty is also decreed, or where the costs are directed out of a particular fund, though nothing in the decree remains to be done, the case is held to be an exception to the rule. *Kemp* v. *Mackrell*, 3 Atk. 812. 2 Ves. 580.

22. It is now a settled rule, that where costs are payable out of a particular fund, there may be a revivor for such costs alone. *Morgan* v. *Scudamore*, 3 Ves. 196.

Lowten v. *Mayor of Colchester*, 2 Mer. 116.

23. And where at the hearing of an original and cross cause, the cross bill was dismissed with costs, and an account directed in the original suit, and the plaintiff died before the account was taken; the Court held it a decree executory, and therefore, that the representative of the plaintiff was entitled to revive for the costs of the cross cause. *Kemp* v. *Mackrell*, 3 Atk. 812. 2 Ves. 580.

24. Where costs are decreed to all parties out of a real estate, though one of them die before taxation, the costs are a lien upon the estate, and the heir at law of the deceased party is entitled; and there being nothing in the decree executory, there is no occasion to revive.

Blower v. *Morret*, 1 Dick. 254. 3 Atk. 772.

25. And where the costs were ordered to be paid into the Bank, the Court thought it sufficient to take the case out of the rule of not reviving for costs alone. *Hall* v. *Smith*, 1 Br. C. C. 438. 2 Dick. 649.

26. Where a plaintiff dies after a judgment for costs, but before taxation, his representatives are entitled to revive for such costs only. *Morgan* v. *Scudamore*, 2 Ves. J. 313. 3 Ves. 195.

And see Horwood v. *Schmedes*, 12 Ves. 311.

27. The general rule is, that there shall be no revivor for costs alone, unless the costs have been taxed previously to the abatement of the suit; but where the costs have been taxed, there is a right to revive, merely for the purpose of having them paid; and more especially where the abatement has happened by the death

of the party, in whose favor the costs were decreed. Another exception is, where the costs are decreed to be paid out of a particular fund. *Lowten* v. *Mayor of Colchester*, 2 Mer. 113.

28. A cause is not out of Court for this purpose, in consequence of the bill having been dismissed. Nor is the enrolment of the decree necessary to entitle the representatives of a party to revive for costs. *Ibid*, 2 Mer. 116.

29. On a bill in equity being abated by death, the executor or administrator will be barred by the statute of limitations, if they do not revive within six years; but not after a decree to account. *Hollingshead's Case*, 1 P. W. 742.

30. If a defendant is in execution for costs, and the plaintiff dies, an order may be obtained that his representative should revive within a limited time, or the defendant be discharged. *White* v. *Hayward*, 2 Ves. 461. 1 Dick. 173.

And see Div. I, *ante*.

(*b*) *Who may or may not revive.*

1. An order to dismiss for want of prosecution, after an abatement, although irregular, must not be regarded as a nullity. Consequently, such order must be discharged before the plaintiff can obtain an order to revive. *Boddy* v. *Kent*, 1 Mer. 361.

2. Where divers are plaintiffs, and the bill after hearing abates, some of them, without the rest, may revive the cause. *Exton* v. *Turner*, 2 C. C. 80.

3. If one joint tenant plaintiff die, his representatives cannot revive without making the other a party. *Fallowes* v. *Williamson*, 11 Ves. 306.

4. After answer to a bill for discovery, if the suit abates by the death of defendant, the plaintiff may revive for further discovery. *Gould* v. *Barnes*, Beames on Costs, 199.

5. Where, after answer to a bill for discovery, the suit becomes abated by the marriage of the plaintiff, the defendant cannot revive, as that would be reviving for costs only. *Dodson* v. *Juda*, 10 Ves, 31.

6. After a decree for a mutual account, the defendant may revive. *Lord Stowell* v. *Cole*, 2 Vern. 219, 296.

7. After a decree to account, and abatement of the suit by defendant's death, his representative may revive. *Kent* v. *Kent*, Pre. Ch. 197.

8. A defendant cannot revive but in one instance, and that is after a decree to account; because in that case he is considered as an actor, for till the account is taken, it is not known on which side the balance lies. *Anon*, 3 Atk. 691.

9. After a decree, a suit may be revived by defendant, or the representative of a deceased defendant, in every case where they have an interest in the prosecution of the suit. *Williams* v. *Cooke*, 10 Ves. 406.

See also Finch v. *Lord Winchelsea*, 1 Eq. Ca. Ab. 2.

10. But a defendant cannot revive merely for the purpose of dissolving an injunction, and proceeding at law; for then he has no interest in the further prosecution of the suit in equity. *Harwood* v. *Schmedes*, 12 Ves. 311.

11. If a creditor is admitted by order to come in before the Master, and prove his debt, and pay his contribution, he is entitled to revive, if the cause abates. *Pitt* v. *Duke of Richmond's Creditors*, 1 Eq. Ca. Ab. 3.

12. Where administrator obtains a decree and dies, the administrator *de bonis non* can revive. *Owen* v. *Curzon*, 2 Vern. 237.

13. A representative of a person, who had obtained an order to tax a bill on an undertaking to pay, can revive it upon the same terms only. *Murphey* v. *Balderston*, 2 Atk. 114.

14. An assignee cannot bring a bill of revivor. *Harrison* v. *Ridley*, Com. 589.

15. A purchaser is not entitled to revive for want of privity. *Dunn* v. *Allen*, 1 Vern. 426.

16. A devisee cannot bring a bill of revivor, not being in representation to the devisor, but in nature of a purchaser. *Backhouse* v. *Middleton*, 3 C. R. 39. 1 C. C. 174.

S. C. Anon, 2 Free. 132.

17. Where a suit abates by the death of the plaintiff, a person claiming by provision or *per formam doni*, and not as heir or representative of the deceased plaintiff, cannot revive; he must bring his original bill, or commence an action at law. *Osborne* v. *Usher*, 6 Br. P. C. 20.

(*c*) *Proceedings to Revive.*

1. The defendant ought to show cause against reviving the suit by plea or demurrer; but if no cause be shown, and it appear at the hearing that the plaintiff has no title to revive, he cannot have a decree. *Harris* v. *Polland*, 3 P. W. 348.

2. In general cases, the defendant may, and in many cases must, answer a bill of revivor; as an executor, as to the nature and amount of assets. *Fallowes* v. *Williamson*, 11 Ves. 312.

3. A defendant by his answer to a bill of revivor, is not to contest the justice of a decree, but only to show cause against it. *Clare* v. *Warden*, 1 Dick. 20.

S. C. Clare v. *Wordell*, 2 Vern. 548.

4. Upon a bill in nature of a bill of revivor against a devisee, the devisee cannot dispute the justice or validity of the decree; for then, a devisee would be in a better case than an heir, and the rule is, that *hæres natus* is more to be favored than *hæres factus*. *Minshull* v. *Lord Mohun*, 2 Vern. 672.

Affirmed on appeal, *Mordaunt* v. *Minshull*, 6 Br. P. C. 32.

5. On a bill of revivor, the plaintiff cannot dispute the decree, though in some few cases the defendant may. *Robinson* v. *Robinson*, 2 Ves. 232.

6. Where, after decree, either party is entitled to revive, and the plaintiff files a bill of revivor, but neglects to revive, the defendant, the time for answering being out, may revive, under the plaintiff's bill. *Whitehear* v. *Hughes*, 1 Dick. 283.

7. After decree, the plaintiff filed his bill of revivor, but neglected to revive: the defendant answered, and then obtained an order to revive the suit. *Gordon* v. *Bertram*, 1 Mer. 154.

LXXIII. Sale before the Master.

(*a*) *Generally.*

1. The Court refused to make an order, under an act of parliament for the sale of estates, upon the opinion of a coveyancer approving a conveyance, without a reference to the Master. *Ex parte Duchess of Newcastle*, 6 Ves. 454.

2. Sale of a plantation at St. Christopher's decreed, for satisfaction of money charged on it. *Gascoine* v. *Douglas*, 2 Dick. 431.

3. A moiety only can be sold in equity, for payment of a judgment debt. *O'Gorman* v. *Comyn*, 2 S. & L. 137.

4. A purchase before the Master is not complete before confirmation of the report; therefore a loss by fire after the report, but before confirmation, falls upon the vendor; and notwithstanding the sale has been delayed by the purchaser having opened the biddings. *Ex parte Minor*, 11 Ves. 559.

5. Where estates for lives have dropt in between the report and the purchaser taking possession, the Court has either directed the purchaser to make compensation in respect of the estates being bettered, or to go again before the Master for a resale. *Blount* v. *Blount*, 3 Atk. 638.

And see Ex parte Manning, 2 P. W. 410.

6. A purchaser under a decree shall not be affected by error in the decree; as by its not giving a day to an infant defendant to shew cause, or in decreeing a sale of lands to satisfy judgment debts, without an account of the personal estate. *Bennet* v. *Hamill*, 2 S. & L. 566.

7. The rule that a purchaser shall have possession as from the quarter day preceding the sale, does not apply to a colliery, which is an article of trade, the profits accruing daily; the proper period is the month or week in which the purchase takes place, according to the usual course of taking the account. *Wren* v. *Mirton*, 8 Ves. 502.

See further, p. 405, *post*.

(*b*) *Opening Biddings.*

1. Opening biddings, even after confirmation of the report of the purchaser, and a deposit made, depends entirely upon the circumstances of the case, and the discretion of the Court. *Ryder* v. *Earl Gower*, 6 Br. P. C. 326.

2. On a sale in this Court, the biddings may be opened even a second time, where the report of the purchaser has not been confirmed; but shall not be opened at all if the report has been confirmed. *Scott* v. *Nesbit*, 3 Br. C. C. 475.

3. Biddings are opened for the benefit of the suitor and of the estate, not of the purchaser: as where he was mistaken as to the time of sale, and the advance offered is small: to open the biddings of

£5020, the Court required an advance of £500. *Anon.* 1 Ves. J. 453.

4. Biddings opened, on a considerable advance, for an estate sold before the Master in separate lots, and the estate ordered to be sold in one lot, the former bidders being satisfied all their expenses; the residuary legatee and trustee appearing and consenting. *Watts* v. *Martin,* 4 Br. C. C. 113.

5. Biddings opened on advancing £100 on £800, and £200 on £1200. *Anon,* 2 Ves. J. 487.

6. Biddings opened on advance of £50 on £380, and paying the expenses; £10 *per cent.* not sufficient on a small sum. *Upton* v. *Lord Ferrers,* 4 Ves. 700.

7. Biddings opened on an advance of £200 upon £3200, but £100 was held too little. *Anon,* 5 Ves. 148.

8. Biddings opened on an advance of £200 on £2360; the person on whose behalf the motion was made being prevented from bidding, and having employed a surveyor to value the estate, who attended as agent, bidding for the purchaser. *Tait* v. *Lord Northwick,* 5 Ves. 655.

9. Biddings opened in favor of a person who was present at the sale, upon an advance of £400 upon £1000, and paying into Court £700 of the purchase-money. *Rigby* v. *M'Namara,* 6 Ves. 117.

10. The rule that an advance of £10 *per cent.* entitles a party to open biddings is not to prevail in future. *Andrews* v. *Emerson,* 7 Ves. 420.

11. There is no general rule fixing the advance of £10 *per cent.* upon opening biddings: more or less will be required according to circumstances. *White* v. *Wilson,* 14 Ves. 151.

12. Mere inadequacy of price, or that the sale took place before the amount of the personal estate was ascertained, is not sufficient ground to open biddings, after the report confirmed. *Prideaux* v. *Prideaux,* 1 Br. C. C. 287.
And see Curtis v. *Price,* 12 Ves. 105.

13. Where the person principally interested was a prisoner for debt at the time of sale, and joined in the motion, and an advance was offered of £4000 upon £15,300, the Court opened the biddings after confirmation of the report; but the whole advance was required as a deposit. *Watson* v. *Birch,* 2 Ves. J. 51. 4 Br. C. C. 172.

14. The general rule is not to open biddings after confirmation of the report, upon negligence, surprise, or circumstances of the estate; there must be something unconscientious on the part of the purchaser. *White* v. *Wilson,* 14 Ves. 151.

15. As where there is fraud in the purchaser, or fraudulent negligence in another person, as the agent, of which it would be against conscience that the purchaser should take advantage; or unless some particular principle arises out of the character of the purchaser, as connected with the ownership of the estate; or some trust or confidence; or his conduct in obtaining the report. *Morice* v. *Bishop of Durham,* 11 Ves. 57.

16. Upon opening biddings the Court refused to dispense with a deposit, or to order a small one upon particular circumstances. *Anon,* 6 Ves. 513.

17. A person who by opening the biddings has occasioned a re-sale at a considerable advance, though not himself the purchaser, is not entitled to his costs, such costs being considered as a premium for the opportunity of bidding. *Rigby* v. *M'Namara,* 6 Ves. 466.
Earl of Macclesfield v. *Blake,* 8 Ves 214.

18. But under special circumstances, as where the party opens the biddings not for his own benefit, but for the benefit of the parties concerned, he shall have his costs. *Owen* v. *Foulks,* 9 Ves. 349.
West v. *Vincent,* 12 Ves 6.

19. On opening biddings, the Court in the reference of costs of the purchaser, will not give a particular direction for a specific expense. *Anon,* 2 Ves. J. 286.

20. *Semble,* where one person is reported purchaser of several lots before the Master, if the biddings are opened as to one of the lots, he shall have an option to open them as to all. *Boyer* v. *Blackwell,* 3 Anst. 657.

See further, p. 406, *post.*

(c) *Where enforced or purchaser discharged.*

1. In the case of a sale before the Master, the practice is, if the purchaser is responsible, to obtain an order upon him to complete his purchase; but if he is not responsible, then, on the report being con-

firmed, to move to discharge him from his bidding. *Cunningham* v. *Williams*, 2 Anst. 344.

2. Solicitor, on behalf of sham bidders, obtained an order to open the biddings; on the report of their being the best bidders, and their not proceeding, the solicitor was declared to stand as the best bidder, at the price at which he opened the biddings. *Molesworth* v. *Opie*, 1 Dick. 289.

3. The Court refused to discharge the solicitor in the cause from a purchase before the Master, though he made it with a view of preventing a sale at an under value. *Nelthorpe* v. *Pennyman*, 14 Ves. 517.

4. If a purchaser before the Master submits to lose his deposit, he cannot be compelled to complete the purchase. *Savile* v. *Savile*, 1 P. W. 745.

5. Motion that a person reported best purchaser should complete his purchase by a certain day, refused, the report not being absolutely confirmed. *Anon*, 2 Ves. J. 335.

6. The Court will not discharge a purchaser and substitute another in his room, even upon paying the money in, without an affidavit that there is no under bargains. *Rigby* v. *M'Namara*, 6 Ves. 515. *Vale* v. *Davenport*, 6 Ves. 615.

(*d*) *Payment of Purchase Money.*

1. In sales under a decree, it is irregular to pay the purchase money to the party, it ought to be paid into Court. *Bennett* v. *Hamill*, 2 S. & L. 581.

2. Where two persons jointly purchased a lot sold under the decree, the Court would not permit one of them to pay into Court his proportion of the purchase money. *Darkin* v. *Marye*, 1 Anst. 22.

3. A purchaser may be committed for disobeying an order to pay in his purchase money. *Lansdown* v. *Elderton*, 14 Ves. 512.

See further, p. 406, *post.*

LXXIV. Scandal or Impertinence.

1. An answer may be scandalous even in the title, if it reflects upon the plaintiff, because it is no part of the defence, and cannot be put in issue. *Peck* v. *Peck*, Mos. 46.

2. Whatever is scandalous is of course impertinent, but if relevant, although not material, it cannot be either scandalous or impertinent. *Fenhoulet* v. *Passavant*, 2 Ves. 24.

3. Although an answer may strongly reflect, it is not therefore scandalous if material and relevant. *Coffin* v. *Cooper*, 6 Ves. 514.

4. Matter in an answer relevant, according to the case made by the bill, is not scandalous whatever may be the nature of it. *Lord St. John* v. *Lady St. John*, 11 Ves. 526.

5. A counsel who sets his hand to a bill containing scandalous matter is liable to costs. *Emerson* v. *Dallison*, 1 C. R. 104.

6. Where a bill is reported impertinent, the defendant is entitled to have it expunged as a matter of course, immediately upon the report made. *Muscott* v. *Halhed*, 4 Br. C. C. 222.

See further p. 352, *and for reference of Pleadings for Scandal or Impertinence, see* p. 490*, *ante.*

LXXV. Sequestration.

(*a*) *Issuing.*

1. If a party in contempt be not in custody, the serjeant at arms must return a *non est inventus*, before a sequestration can issue. *Ex parte Jephson*, Pre. Ch. 549. *Rowley* v. *Ridley*, 2 Dick. 624.

2. If the party in contempt be taken on attachment, no sequestration lies till the time of the return of the attachment is out, on which the body was taken; for until the return of the writ, it is not certain the defendant will not obey the decree. *Martin* v. *Kerridge*, 3 P. W. 241.

3. Where the defendant is taken upon an attachment for want of an appearance, a messenger must be moved for before a sequestration issues. *Miles* v. *Lingham*, 7 Ves. 231.

4. A sequestration will be granted in Chancery or Exchequer, for a personal duty, for the Court hath authority to see its decrees executed. *Guavers* v. *Fountain*, 2 Free. 99. *Hide* v. *Pettit*, 1 C. C. 91. 2 Free. 125, 168.

5. All decrees in Chancery as well for personal as for real things shall be executed by sequestration. *Beddingfield* v. *Zouch*, 2 Free. 168. *Hide* v. *Pettit*, 1 C. C. 91. 2 Free. 125, 168.

6. The Court of Chancery in England may grant a sequestration against the defendant in Ireland, but it must be after sequestration taken out here, and *nulla bona* returned. *Fryer* v. *Bernard*, 2 P. W. 262.

7. A sequestration which is a kind of suspension *nisi, &c.* was granted against the warden of the Fleet for not answering. No attachment lies against him, because he is supposed to be always in Court, and though it is directed to the sheriff; the body, when brought in, is turned over to the Fleet. In C. B. if the warden will not appear, they forejudge him his office. *Anon*, Mos. 238.

8. Defendant, in contempt for disobedience of a decree, was brought from Bristol by *habeas corpus cum causis*, and turned over to the Fleet, and a sequestration issued. *Elvard* v. *Warren*, 2 C. R. 151.

9. A party to a suit in contempt and in custody, must be turned over to the prison of the Fleet, before a sequestration can issue against him. *Kinsey* v. *Yardley*, 1 Dick. 265.

Markham v. *Wilkinson*, 2 Anst. 579.

10. A defendant, a prisoner in the King's Bench prison, under a criminal prosecution, brought up by *habeas corpus*, and turned over to the prison of the Fleet, *pro forma*, (to ground an order for a sequestration), and from thence carried back to the King's Bench, with his cause; and immediately a sequestration was moved for and granted. *Bowes* v. *Countess of Strathmore*, 2 Dick. 711.

11. On the return of an attachment for non-performance of an order against one in the Fleet, the next process is a sequestration. *Anon*, Mos. 301.

12. Sequestration for not performing the decree upon the return to an attachment, that the defendant was in custody of the warden of the Fleet. *Errington* v. *Ward*, 8 Ves. 314.

13. A receiver having been appointed, with the usual directions for the tenants to attorn, and a tenant having been served with a writ of execution of the order, and arrested upon an attachment, and turned over to the Fleet, sequestration refused. *Attorney-General* v. *Tancred*, 2 Dick. 798.

And see Rowley v. *Ridley*, 2 Dick. 622.

14. First process of contempt against a menial servant of a peer of the realm is a sequestration *nisi*. *Anon*, 1 P. W. 534.

15. A sequestration *nisi*, is the first process against a peer or member of the House of Commons: but if there be a sequestration *nisi* against a peer, for want of an answer, and the peer puts in an answer, which is reported insufficient, yet the order for a sequestration shall not be absolute, but the plaintiff must move again *de novo*, for a sequestration *nisi*. *Lord Clifford's case*, 2 P. W. 385.

Rashley v. *Buller*, 1 Dick. 152.

S. C. Butler v. *Rashfield*, 3 Atk. 740.

16. Sequestration against an infant lord, for not appearing. *Anon*, 2 C. C. 163.

17. For a sequestration for non-payment of money, the first motion is *nisi*. *Crawley* v. *Clarke*, 3 Br. C. C. 373.

See also Lowten v. *Mayor of Colchester*, 3 Mer. 543.

18. Sequestration for not restoring papers, an order having been made, and served personally. *In the matter of Hassenclever*, 1 Br. C. C. 434.

19. Defendant in contempt for not producing deeds; sequestration against him. *Trigg* v. *Trigg*, 1 Dick. 325.

20. Sequestration for want of answer can be obtained upon an order *nisi* only, not absolute in the first instance. *Bernal* v. *Marquis of Donegal*, 11 Ves. 43.

See further p. 410, *post.*

(*b*) *Serving Order for.*

1. Service of an order of sequestration *nisi* upon the clerk in Court good, the plaintiff having tried in vain to serve it personally. *Marquis of Lothian* v. *Garforth*, 5 Ves. 113.

(*c*) *Execution and Operation of.*

1. A sequestration binds from the time of awarding the commission, and not only from the time of executing it. *Burdett* v *Rockley*, 1 Vern. 58.

2. In Chancery not only the body of the defendant, but also his lands and goods are liable to a sequestration. *Martin* v. *Kerridge*, 3 P. W. 240.

3. A sequestration covers the personal estate, and the Court will direct a sale for a duty; it also covers the rents and profits of the real estate, but not the land. *Hyde* v. *Greenhill*, 1 Dick. 107.

And see Earl Athol v. *Earl Derby*, 1 C. C. 222.

4. Sequestration being executed on a

bill decreed to be taken *pro confesso*, held to be improper. *Vaughan* v. *Williams*, 1 Dick. 354.

5. The executing of a sequestration on mesne process, held to be improper, and though the bill was decreed to be taken *pro confesso*; and the sequestrators being decreed to account, costs were reserved generally. *Heather* v. *Waterman*, 1 Dick. 335.

6. A decree against the defendant, for £500, was prosecuted to a sequestration, and the sequestrators in possession of lands which the defendant held for a term: ordered, upon motion, that the commissioners of sequestration do sell the term, towards satisfaction of the decree. *Ellard* v. *Warren*, 2 C. R. 192. 3 C. R. 87.

7. Sequestration for the non-performance of a decree, and the sequestrators in possession of a house, of which the defendant was tenant for life: upon motion ordered that the Master allow a tenant for the house, and the sequestrators to make a lease, and the tenant to enjoy. *Harvey* v. *Harvey*, 3 C R. 87.

8. Sequestrators ordered to sell a leasehold estate, sequestered for a duty. *Sutton* v. *Stone*, 1 Dick. 107.

9. Where lands of a corporation were sequestered for non-payment of money, under a decree, a grantee of fee-farm rents, under the statute 22 Car. 2. c. 6. was allowed to come in *pro interesse suo*; but the Court would not order the arrears of the rents to be paid by the sequestrators out of the money or rent sequestered, but allowed the grantee liberty to distrain at law, without incurring a contempt. *Attorney General* v. *Mayor of Coventry*, 1 P. W. 306.

10. If the sequestration is executed, a judgment creditor, though prior, can only claim to be examined *pro interesse suo*; if not executed he may take execution. *Angel* v. *Smith*, 9 Ves. 336.

For asserting claims by Examination pro interesse suo, see further, p. 454*, *ante*.

11. Estate ordered to be sold for the payment of debts; money levied from the rents and profits under a sequestration paid into Court, though the contempt had been cleared. —— v. *Bennet*, 1 Ves. J. 89.

12. Where the sequestration issues for non-payment of money, the sequestrators may be ordered to sell. *Cavil* v. *Smith*, 3 Br. C. C. 362.

13. Application to empower sequestrators on mesne process to grant leases, refused. *Bray* v. *Hooker*, 2 Dick. 638.

14. The Court refused to order leasehold estates, taken under a sequestration upon mean process, to be sold, but directed the sequestrators to apply the profits: the Court also ordered the dividends of money in the Bank, on the testator's account, to be paid under the will, but could not order the Bank to transfer before the act 36 G 3. c. 90. *Shaw* v. *Wright*, 3 Ves. 22.

15. Court refused to order perishable goods, taken under a sequestration for want of an answer, to be sold, till the cause came on to be heard; but on the bill being taken *pro confesso*, it was ordered. *Wilcocks* v. *Wilcocks*, Amb. 421.

16 The object of a sequestration upon mesne process is to keep the party out of possession; but the Court doubted whether there could be a sale of goods taken under such sequestration further than to pay the expenses. *Hales* v. *Shaftoe*, 1 Ves. J. 86. 3 Br. C. C. 72. 2 Cox, 224.

17. The Court will sell perishable commodities, rents paid in kind, or the natural produce of a farm, under a sequestration for want of an answer. *Shaw* v. *Wright*, 3 Ves. 23.

18. Whether a sequestration on mesne process can be executed farther than to pay the expenses; and whether a chose in action is liable to a sequestration—*Quære*. *Simmonds* v. *Lord Kinnaird*, 4 Ves. 735.

19. Motion to sell furniture under a sequestration for not performing a decree must be on notice. *Mitchell* v. *Draper*, 9 Ves. 208.

20. Motion, for sequestrators to set and let, must be made on notice. *Neal* v. ——, Ridg. Rep. T. Hard. 193.

See further, p. 410. *post*.

(d) *Abatement or Discharge.*

1. A sequestration must be returned before a motion can be made to dicharge it. *Anon*, Bun. 31.

2. On a question whether a defendant could be heard, before he had cleared his contempt, though he offered to pay all the plaintiff's demands; it was ordered,

that he should bring before the Master all the principal, interest, and costs, and then be at liberty to move to have his sequestration discharged. *Lord Wenman* v. *Osbaldiston*, 2 Br. P. C. 276.

3. Where lands of the husband, out of which an annuity to the wife issued, were sequestered, the husband dying, the sequestration was discharged as to the annuity. *Proctor* v. *Reynel*, 1 C. R 247.

4. After a decree for a personal duty, a sequestration issues, and then the defendant marries and dies; whether the sequestration shall take place of the wife's dower—*Quære*. *Burdett* v. *Rockley*, 1 Vern. 118.

5. Decree and sequestration for a personal duty, shall not be revived against the heir. *University College* v. *Foxcroft*, 1 Vern. 166.

6. A sequestration revived was discharged, as to the real estate, on motion of the devisee. *Hyde* v. *Greenhill*, 1 Dick. 106.

7. Where a defendant has stood out the whole process of contempt to a sequestration, for want of an answer, and the bill taken *pro confesso*, on a decree against him *ad computandum*; the Court will not discharge the sequestration on paying the costs of the contempt only, but will keep it on foot as a security to the plaintiff for the defendant's appearing before the Master to take the account. *Maynard* v. *Pomfret*, 3 Atk. 468.

8 Application to discharge a sequestration issued against the defendant, for breach of an injunction to stay waste, upon the ground that the defendant had put in his answer, and that therefore it was irregular; but as the injunction was in force, the defendant not having applied to dissolve it, the Court denied the motion. *Robinson* v. *Lord Byron*, 2 Cox, 4. 2 Dick. 703.

9. Appointment of a receiver, in the place of the sequestrators, discharges the sequestration. *Shaw* v. *Wright*, 3 Ves. 22.

10. Sequestration against a defendant on mesne process, abates on the death of the plaintiff, but is revived with the suit. *Hyde* v. *Forster*, 1 Dick. 132.

11. A sequestration which issues as a mesne process of the Court falls with the death of the person; but if for non-performance of a decree, the death of the party does not determine it. *Hawkins* v. *Crook*, 3 Atk. 594. *Burdett* v. *Rockley*, 1 Vern. 58.

12. A sequestration, though for the performance of a decree, abates by the death of the party, and therefore differs from an extent on a judgment: also a sequestration takes the whole profits, and an extent a moiety only. *Bligh* v. *Earl Darnley*, 2 P. W. 622.

13. Sequestration to compel performance of a decree abates by the death of either party. *Wharam* v. *Broughton*, 1 Ves. 180. *Burdett* v. *Rockley*, 1 Vern. 118. *And see White* v. *Hayward*, 2 Ves. 464.

14 Sequestration in mesne process; if the party die, the sequestration is gone; but if the sequestration be for a duty, and the person dies, it abates only, and is revived with the suit. *Rowley* v. *Ridley*, 2 Dick. 626.

See further, p. 410, *post*.

(*c*) *Sequestrators.*

1. A sequestrator is not entitled to a stated fee of 6*s*. 8*d*. *per* day, whatever may be the amount of effects seized under the sequestration; and where the sequestration did not get in £40 in almost two years, the Master allowed a gross sum, which the Court thought sufficient. *Wood* v. *Freeman*, 2 Atk. 442.

2. Exceptions taken by sequestrators, for that the Master had not allowed them 6*s*. 8*d*. a day; they were allowed 1*s*. a day each. *Prentice* v. *Prentice*, 1 Dick. 388.

3. The Court will not order a sequestrator his fees, who has made no return of goods sequestered, and, many years before application, delivered them over without making a demand; but if the plaintiff seeks an account of goods sequestered, the sequestrator may set off his fees at any time, if he has from time to time made returns of what he has seized under the sequestration. *Hawkins* v. *Crook*, 3 Atk. 594.

4. A commission to the sheriff to put the plaintiff's sequestrators in possession. *Russel* v. *Bodvil*, 1 C. R. 186.

5. It is a contempt to disturb sequestrators in possession. *Angel* v. *Smith*, 9 Ves. 336.

6. Tenants ordered to attorn to se-

questrators under a sequestration for a duty. *Wood* v. *Adams*, 2 Dick. 576.

7. But the Court would not commit tenants who refused to obey an order for them to attorn to sequestrators in mesne process. *Rowley* v. *Ridley*, 2 Dick. 622.

See further, p. 410, *post.*

LXXVI. Sergeant at Arms.

1. Upon a *cepi corpus* returned, the practice is to move for a messenger, and, upon his return that he cannot find the defendant, to move for a sergeant at arms. *Wilkinson* v. *Belsher*, 2 Br. C. C. 181.
Sambroke v. *Ekins*, 1 Dick. 68.

2. If the goods sequestered are not sufficient to answer the duty decreed, the plaintiff may move to revive the order for a serjeant at arms. *Barnesly* v. *Powel*, 1 Dick. 130.
Hopkins v. *Adcock*, 2 Dick. 443.
Anon, Mos. 246.

3. Serjeant at arms directed on petition, to go against the defendant, for want of his answer, he having consented that the serjeant at arms should go, in case he did not answer. *Countess of Londonderry* v. *Cornthwaite*, 1 Dick. 285.

4. An order was made, that defendant should, within four days, put in an answer to interrogatories, or in default a serjeant at arms to go against him; he put in an answer, which was reported insufficient, and upon motion, the serjeant at arms was directed to apprehend him. *Weston* v. *Jay*, 1 Mad. 527.

5. When process to a serjeant at arms is issued, but not executed, and answer is put in, and exceptions submitted to by a note between the Clerks in Court; if no farther answer is put in, the serjeant at arms may be ordered to go against the defendant. *Waters* v. *Taylor*, 16 Ves. 417.

6. The Court will not order a serjeant at arms against a defendant in contempt for disobedience of an order, without an affidavit of service. *Whitehead* v. *Thistlethwait*, 3 Atk. 619.

7. Serjeant at arms not granted under a four-day order in the Court of Exchequer, to bring in books, &c. before the Master, until made absolute by a subsequent order upon the Master's certificate of the same date. *Carleton* v. *Smith*, 14 Ves. 180.

8. A feme covert is liable to be arrested by a serjeant at arms for not putting in a separate answer, pursuant to an order obtained at her request. *Powel* v. *Prentice*, Ridg. Rep. T. Hard. 258.
And see p. 372, *ante*.

LXXVII. Solicitor.

1. Where a solicitor is guilty of malpractices, he may be degraded by applying to strike him out of the roll of solicitors. *Anon*, 2 Atk. 173.

2. Where a solicitor has been negligent in managing a client's business, the Court of Chancery can grant an attachment against him; and Courts of law exercise the same summary jurisdiction ov attorneys. *Floyd* v. *Nangle*, 3 Atk. 568.
S. C. Lloyd v. *Nangle*, 1 Dick. 129.

3. The stat. 2 G. 2. c. 23. lays down certain rules for regulating the behaviour of attorneys and solicitors with regard to their clients. *Walmesley* v. *Booth*, 2 Atk. 27.

4. Where an attorney is retained to appear and does not, the Court will punish him for it: an attorney once chosen cannot be changed without leave of the Court. *Ibid.*

5. At law the party cannot change his attorney, without a judge's order. *Twort* v. *Dayrell*, 13 Ves. 196.

6. A party may change his solicitor, and the discharged solicitor has a lien for his costs upon the papers in his possession; but cannot, otherwise than by retaining them, stop the progress of the cause. *Merrywether* v. *Mellish*, 13 Ves. 161.
Twort v. *Dayrell*, 13 Ves. 195.
O'Dea v. *O'Dea*, 1 S. & L. 315.

7. A client may discharge his solicitor, but a solicitor declining to proceed with a cause to the hearing cannot claim a lien upon a fund in Court. *Cresswell* v. *Byron*, 14 Ves. 271.

8. In the Common Pleas an attorney quitting his client before trial cannot bring an action for his bill. *Ibid*, 14 Ves. 273.

9. Motion that an attorney may be compelled to produce papers of his client's refused with costs. *Wright* v. *Mayer*, 6 Ves. 280.

10. Order without a cause in Court, upon the general jurisdiction over a solicitor, that he shall deliver his bill, for the purpose of getting possession of title deeds deposited with him for suffering recoveries, &c. *Ex parte the Earl of Uxbridge,* 6 Ves. 425.

11. The Court will not strike a solicitor off the roll at his own request, without an affidavit that there is no other reason for the application; and that he does not apply under an apprehension that somebody else will. *Ex parte Owen,* 6 Ves. J. 11.

Ex parte Foley, 8 Ves. 33.

12. Order for taxing a bill of costs entitled in the cause, if obtained by a party to the cause, is regular under the general jurisdiction; but one, not a party in the cause, must apply *ex parte* under the statute of 2 Geo. 3. c. 23. s. 22. *Bignol* v. *Bignol,* 11 Ves. 328.

13. But the irregularity would be waved by proceeding under the order. *Ibid.*

14. Whether a party having obtained such an order in a cause, may pursue it under the statute—*Quære,* *Ibid.*

See further p. 413, *post*; *and for the liability of a Solicitor for costs, see also* p. *425, *ante.*

LXXVIII. Speeding Cause.

1. One defendant may obtain the usual order to speed the cause by motion to dismiss for want of prosecution, though the other defendant stands out process of contempt, and it cannot be of any use to go to a hearing without him. *Anon,* 9 Ves. 512.

2. Plaintiff driven by motion to dismiss with costs for want of prosecution, to an undertaking to speed the cause; notwithstanding the bankruptcy of the defendant, and that all the relief could be had under the commission. *Monteith* v. *Taylor,* 9 Ves. 615.

3. Order on a peremptory undertaking to speed the cause, may be entered *nunc pro tunc* of course, on motion, without notice, though above two years afterwards. *Dixon* v. *Shum,* 18 Ves. 520.

4. An undertaking to speed the cause, upon motion to dismiss for want of prosecution; if made in term, the plaintiff has the whole of the following vacation, but if made in the vacation, only the following term to proceed in. *Findlay* v. *Wood,* 1 V. & B. 499.

Wilson v. *Timpson,* 2 Mad. 123.

Holtzaphell v. *Baker,* *Ibid,* (*n*).

5. Where the register took no note of an undertaking to speed a cause, given on a motion to dismiss, and the order to dismiss was drawn up; on affidavit of the facts, the mistake was remedied, but the plaintiff was directed to pay the costs of drawing up the order, and of the present motion. *Hibberson* v. *Cooke,* 4 Mad. 248.

LXXIX. Staying Proceedings.

1. Bill against an ambassador to redeem; the Court ordered all proceedings to stay for a year and a day, unless the defendant should return sooner. An ambassador, when defendant, has a right to an essoin for a year and a day, and may afterwards renew it, if the occasion continues *Pilkington* v. *Stanhope,* 2 Vern. 317.

2. The Court, on motion, has sometimes stayed proceedings in a suit, where the parties have entered into an agreement for the purpose. *Rowe* v. *Wood,* 1 J. & W. 337.

See Forsyth v. *Manton,* 5 Mad. 78.

3. Motion to open the enrolment of a decree, and to stay proceedings under it, to give an opportunity of appeal, will be refused, when the decree is made upon the merits; as at law, a judgment by default may be set aside on motion, but not a judgment on the merits. *Charman* v. *Charman,* 16 Ves. 115.

And see p. 383, *ante.*

4. The Court having refused to vacate the enrolment of a decree by default, dismissing the bill with costs, afterwards, upon a new bill for the same purpose, granted a motion for time to answer till a month after payment of the costs of the other cause; adopting the practice at law. *Pickett* v. *Loggon,* 5 Ves. 702.

5. Demurrer allowed in the Exchequer upon argument with 30s. costs. In another suit in Chancery between the same parties and to the same effect it was ordered, on motion, that the defendant should have time to answer till payment of those costs, but without prejudice to an application to dismiss the bill. *Holbrooke* v. *Cracraft,* 5 Ves. 706, (*n*).

6. The plaintiff filed a bill in Chancery

and dismissed it after answer, he then filed another bill in the Exchequer for the same matter: the Court of Exchequer stopped his proceeding till the costs in Chancery were paid. *Baldwyn* v. *Malo*, 3 Anst. 835.

7. The practice at law, to stay proceedings until payment of costs for former proceedings at law between the same parties, in its general application, is confined to actions of ejectment and for *mesne* profits, and has been followed in Equity even where the former suit was in another Court of Equity for the same matter; but it is not applied in Equity to a former suit at law, as the case of an ejectment by the heir, and a suit in the Spiritual court by some of the next of kin, disputing, as paupers, a will, on the ground of incapacity, the plaintiff in Equity being another of the next of kin. *Wild* v. *Hobson*, 2 V. & B. 105.

8. Proceedings in a suit for the same purpose are not stayed until payment of costs of a former suit by the same party in *forma pauperis*, except in cases of great vexation. *Ibid*, 2 V. & B. 112.

9. The Court will not stay proceedings on either of two bills brought for the same purpose, the one by the party interested, the other by his assignee. *Gage* v. *Bulkeley*, Amb. 103.

10. But otherwise if the bills are brought by the same person or on behalf of an infant. *Ibid.*

And see p. *489, *ante*.

11. The general rule of the Court is not to stay proceedings in an original cause, till the answer comes in to the cross bill, but to stay publication only. *Ramkissenseat* v. *Barker*, 1 Atk. 21.

And see p. *533, *ante*.

12. The Court will at any time stop a suit when a defendant submits to satisfy the plaintiff's just demands; therefore, on the motion of the defendant, before answer, who submitted to pay the plaintiff's full demand, a reference was made to the Master to ascertain what was due to the plaintiff for principal, interest, and costs, in respect of the legacy claimed by the bill; the same to be paid within a given period: and if not paid, the plaintiff's costs of the application and of the Master's report, to be taxed and paid by the defendant, and the plaintiff to be at liberty to proceed in the cause. *Boys* v. *Ford*, 4 Mad. 40.

13. In a suit for account of tithes, the Court refused a motion before answer, that defendant should be at liberty to pay in a sum of money as the amount due, and costs, and that plaintiff should proceed at the peril of costs, for, until discovery, the plaintiff could not know what was the amount due. *Hull* v. *Mathews*, 2 Anst. 446.

14. Order to stay proceedings until security given for costs, upon affidavit that the plaintiff, after answer put in, had abandoned this country and resided in the Isle of Man. *Weeks* v. *Cole*, 14 Ves. 518.

And see p. *405, *ante*.

LXXX. Subpœna.

(a) Generally.

1. The plaintiff may move for a *subpœna* returnable immediately, without a affidavit, against an officer of the Court; for he is presumed always to attend. *Anon*, Mos. 41.

2. There can be no contempt without service of the subpœna. *Thomson* v. *Baskervill*, 3 C. R. 215.

3. Where there is but one defendant, he must be served with the body of the subpœna; but where there are several, the labels only must be left with those first served, shewing them the body of the subpœna, and the body itself must be left with the defendant last served; but entering appearance cures irregularity of service. *Anon*, 3 Atk. 567.

4. Where there is only one defendant, the subpœna itself must be served. *De Tillon* v. *Sidney*, 1 Anst. 79.

5. It is not the practice of the Court of Exchequer, to serve a subpœna *ad respondendum*, by leaving the body of the writ with the defendant, where there is but one, as is the practice in the Court of Chancery. It is sufficient if a copy be left, and the original produced. *Bland* v. *Buckley*, 6 Price, 34.

6. Service of all processes intended to bring a party into contempt, should be personal if possible; but in the Court of Exchequer, if it can be made to appear that service cannot be effected personally, and that there is probable cause to suspect that the party keeps out of the way for the purpose of avoiding such personal service, the Court will grant a rule *nisi* for an attachment, and order that service, by leaving the rule at the dwelling-house

shall be sufficient. *Weston* v. *Faulkener,* 2 Price, 2.

7. Orders for service of subpœna are discretionary. *Anon,* 2 Ves. 23.

(*b*) *To Appear and Answer.*

1. Plaintiff seeking relief against a husband, seized or entitled in right of his wife, but against the separate estate of the wife, must serve the wife. *Jones* v. *Harris,* 9 Ves. 486.

2. Serving a subpœna at a place where the defendant lodged but once, and that two years before such service, is not good. *Parker* v. *Blackbourne,* Pre. Ch. 99. 2 Vern. 369.

3. Service of subpœna by leaving the label at a counting-house of defendant, not sufficient unless given to a partner or some acknowledged clerk there. *Menzies* v. *Rodrigues,* 1 Price, 92.

4. If a copy of subpœna *ad resp.* be left with a servant of defendant's brother, (who was also his partner and a co-defendant in the suit) at whose house such servant acknowledged that he resided, it will be good service, although the party be out of the kingdom at the time. *Birdwood* v. *Hart,* 3 Price, 176.

5. Service by sending the subpœna to the defendant under cover to the person to whom he had directed his letters to be sent, ordered to be good service. *Hunt* v. *Lever,* 5 Ves. 147.

6. Service at the last place of abode of defendant's wife ordered to be good service. *Sir William Pulteney* v. *Shelton,* 5 Ves. 147.

7. Lord Chancellor, as one of the commissioners of *Oyer* and *Terminer,* gave leave to serve a subpœna upon a defendant, who was in confinement in Newgate for murder, for which he was indicted, and a special verdict found. *Anon,* Mos. 237.

8. A. being beyond sea, sues B. at law, whereupon B. files his bill for a discovery: the Court will order service on an agent, having a letter of attorney to defend suits, &c. to be good service: *Anon,* 1 P. W. 523.

9. Where the defendants, executors to the testator in the cause, living abroad, gave a letter of attorney to a person to prove the will; service of a subpœna to appear and answer on such attorney or proctor held to be good service. *Hales* v. *Sutton,* 1 Dick. 26.

10. Service of a subpœna to appear, upon a person who transacted business under a letter of attorney from the defendant, ordered to be good service. *Carter* v. *De Brune,* 1 Dick. 39.

11. Service of a subpœna to appear and answer, upon the agent, or factor, in England, of another defendant who lived in Jamaica, ordered to be good service. *Hyde* v. *Forster,* 1 Dick. 102.

12. The Court refused to order a substitution of service of subpœna, to appear and answer, on a person to whom defendant, residing out of the jurisdiction, had given a power of attorney to act for him in the management of his affairs. *Smith* v. *Hibernian Mine Company,* 1 S. & L. 238.

13. When the defendants are beyond the jurisdiction of the Court, service of the subpœna on their Clerk in Court shall not be deemed good service, though they have by that Clerk in Court filed a bill relative to the same subject. *Bond* v. *Duke of Newcastle,* 3 Br. C. C. 385.

14. The Court refused to allow substitution of subpœna, to appear and answer, upon a defendant, who, by his answer, admitted that the other defendant had absconded, and was out of the jurisdiction, having previously executed a power of attorney to him, to receive the arrears then due of an annuity, which it was the object of the bill to set aside. *Rickcord* v. *Nedriff,* 2 Mer. 458.

15. Bill filed against two partners, and one being abroad, the subpœna against the absent partner was permitted to be served on the partner at home. *Coles* v. *Gurney,* 1 Mad. 187. *And see Love* v. *Baker,* 1 C. C. 67.

16. Where the plaintiff at law is abroad, and an injunction bill filed, and motion that service of the subpœna upon the attorney at law, shall be good service, an affidavit of the truth of the equity of the bill must accompany the motion for the subpœna. *Delancy* v. *Wallis,* 3 Br. C. C. 12. *Stephen* v. *Cini,* 4 Ves. 359.

17. But it is not necessary that such affidavit should state a previous application to the attorney, and his refusal to accept service. *French* v. *Roe,* 13 Ves. 593.

18. To support an application, that service of a subpœna on a bill of interpleader upon the solicitor who brings the

action, might be deemed good service, it is not only necessary that the party applying should state that he knows not where the plaintiff at law is to be met with, and that the solicitor has refused to appear; but the Court requires that the solicitor should be stated to have positively refused to inform them where he is to be found, and also that the process should have been previously formally tendered to him. *East India Company* v. *Collins*, 6 Price, 404.

19. The father of an infant ordered to discover where the infant was, that he might be served with a subpœna. *Hockly* v. *Lukin*, 1 Dick. 353.

20. Service of subpœna on the mother of infants, to appear and answer, they being secreted, deemed good service on the infants. *Baker* v. *Holmes*, 1 Dick. 18.

Garnum v. *Marshal*, 1 Dick. 77.

S. C. Smith v. *Marshall*, 2 Atk. 70.

21. Service of subpœna upon the father-in-law of an infant good service. *Thompson* v. *Jones*, 8 Ves. 141.

22. Where there are cause and cross cause, and the plaintiffs in the original cause are many, several of whom are out of the jurisdiction, and some peers; motion that service on the Clerk in Court be good service, refused: but the plaintiffs shall not proceed in the original cause till they have answered in the cross cause. *Anderson* v. *Lewis*, 3 Br. C. C. 429.

23. In a cross cause, service upon the Clerk in Court of the defendant, the plaintiff in the original suit, good service. *Gardiner* v. *Mason*, 4 Br. C. C. 478.

And see pp. 248, *387, *and* Div. LXI. *ante*.

(c) *For further answer, or to answer an amended Bill.*

1. Where new matter is suggested by an amended or supplemental bill, foreign and repugnant to the title set up by the original bill, there can be no proceedings against the defendant, without serving him with a *subpœna ad faciend. attornat*, nor ought the cause to be brought to a hearing without such service; because the defendant should have an opportunity of defending himself against the new matter. *Chevers* v. *Geoghegan*, 6 Br. P. C. 11.

2. Bill amended, and the plaintiff amends the defendant's copy of the bill; no occasion to serve the defendant with a *subpœna* to answer the amendment, to put the new matter in issue. *Hail* v. *Camp*, 1 Dick. 108.

Bagshaw v. *Batson*, 1 Dick. 113.

3. Plaintiff cannot take exceptions, and at the same time serve defendant with a *subpœna* to make a better answer. *Strickland* v. *Mackenzie*, 1 Dick. 49.

4. When defendant is in contempt for want of his answer, and puts in an answer, which is reported insufficient; it is not necessary to serve him with a *subpœna* for a better answer; the plaintiff may go on with the process where he left off. *Bromfield* v. *Chichester*, 1 Dick. 379.

5. On an amended bill, it is not necessary to serve new *subpœnas* on the original defendants. *Angerstein* v. *Clarke*, 1 Ves. J. 250.

Skeffington v. ——, 4 Ves. 66.

6. A defendant has appeared and answered the original bill, and the plaintiff afterwards amends: when the defendant is out of the jurisdiction, the Court will not order service on the Clerk in Court, in the original suit, to be taken as good service, on the defendant, of the *subpœna* to appear to and answer the amended bill. *Roberts* v. *Worsley*, 2 Cox, 389.

7. Order that service of the *subpœna* to answer the amended bill upon the Clerk in Court or solicitor may be good service, upon the special circumstances, viz. that, though the defendant had not been served with the *subpœna*, he had appeared on two motions; that his answer was very important; that he lived abroad out of the jurisdiction, and would not appear to answer. *Gildenichi* v. *Charnock*, 6 Ves. 171.

8. After a joint answer by husband and wife, and amendment of the bill, the husband going abroad, the wife, being the material party, cannot be brought into contempt, without a previous order upon her to answer separately; order accordingly for a subpœna to her alone. *Carleton* v. *M'Enzie*, 10 Ves. 442.

9. Defendant in contempt, and some exceptions allowed to his answer, and some overruled. If the plaintiff excepts to the Master's report as to the exceptions overruled, as well as the defendant to those which the Master has allowed,

the defendant is entitled to be served with a subpœna for a better answer, after the plaintiff's exceptions have been allowed by the Court, and the defendant's disallowed. *Agar* v. *The Regent's Canal Company*, Coop. 221. 19 Ves. 379.

(*d*) *To Revive.*

1. Husband and wife sue for an annuity in right of the wife, the wife dies. Upon a bill of revivor by the husband, the defendant must be served with a subpœna. *Cecill* v. *Earl of Rutland*, Toth. 173.

2. A defendant to a bill of revivor must have an opportunity to shew cause against the order to revive; but where the defendant had pleaded, the Court, upon overruling the plea, ordered the cause to be revived, without a subpœna being issued. *Huggins* v. *York Building Company*, Barn. 83.

3. Service of a subpœna to revive, on the defendant's Clerk in Court in the original cause, refused. *Brown* v. *Lee*, 2 Dick. 545.

4. A similar application was refused, after solemn debate, and great consideration. *Lee* v. *Warner*, 2 Dick. 546.

5. Although a defendant has appeared and answered the original bill, if he cannot be found to be served with a subpœna to answer a bill of revivor, the plaintiff must proceed under the stat. 5 G. 2. c. 25. to have the bill taken *pro confesso*. *Henderson* v. *Meggs*, 2 Br. C. C. 127.

(*e*) *To hear Judgment.*

1. If a cause is adjourned for want of parties, though the defendant is served with the order, he must be served with a subpœna to hear judgment. *Knowles* v. *Spence*, Mos. 225.

2. Service of subpœna to hear judgment is necessary, though the cause is set down under the order, upon a peremptory undertaking to speed the cause. *Dixon* v. *Shum*, 18 Ves. 520.

3. The defendant dying after service of the subpœna to hear judgment; whether, upon a bill of revivor, a new subpœna to hear judgment is necessary—*Quære*. *Byne* v. *Potter*, 5 Ves. 305.

4. Where an infant is defendant, the service of the subpœna to hear judgment must be on the guardian appointed to defend the suit, and not upon the infant. *Taylor* v. *Atwood*, 2 P. W. 643. *Freeman* v. *Carnock*, 2 Dick. 439.

5. Where neither the party nor her Clerk in Court could be found, service of a subpœna to hear judgment upon her solicitor, ordered to be good service, together with leaving a copy of the order at the defendant's last place of abode. *Anon*, 2 Ves. 23.

(*f*) *To be examined before a Master.*

1. The subpœna for examination before the Master is the same as the subpœna to answer the bill, but the label explains the purpose. *Parkinson* v. *Ingram*, 3 Ves. 608.

(*g*) *To show Cause against Decree.*

1. Delivering the body of the subpœna to the defendant's wife, at his dwelling-house, which she threw down, and the solicitor afterwards thrust under the door; held to be good service of subpœna to show cause against a decree *Lander* v. *Whitmore*, 2 Dick. 596.

2. An infant, having a day to shew cause against a decree of foreclosure after he attained twenty-one, attained that age, and left the kingdom, before he was served, to avoid his creditors: application to serve his Clerk in Court with the subpœna: Lord Thurlow thought it must be personal service; but it being again moved, upon strong affidavit, it was granted. *Elcock* v. *Glegg*, 2 Dick. 764.

3. Assignees of a bankrupt bring a bill, and obtain a decree *nisi* against defendants, by default, and new assignees, chosen after the decree, bring a supplemental bill in nature of a bill of revivor; they shall stand in the place of the former to all intents and purposes, and may serve the defaulters with a subpœna to shew cause. *Brown* v. *Martin*, 3 Atk. 218.

(*h*) *For Costs.*

1. Where the Clerk in Court was dead, and the suit abated, and no other proceeding to be had, but to recover the costs, service of a subpœna for costs on the solicitor for the surviving defendant ordered to be good service. *Tyssen* v. *Ward*, 1 Dick. 166.

LXXXI. Supplemental Bill.

1. Where assignees of a bankrupt die,

or are discharged, and others are put in their room; to have the benefit of the proceedings in a suit by the old assignees, they must bring a supplemental bill, *Anon.* 1 Atk. 88. 571.

2. On abatement by bankruptcy of a defendant, an executor, after a decree for an account, a supplemental bill, in the nature of a bill of revivor, is necessary. *Russell* v. *Sharp*, 1 V. & B. 500.

3. Where a plaintiff takes the benefit of an insolvent debtor's act, his assignees, to have the benefit of the suit, must file a supplemental bill. *Williams* v. *Kinder*, 4 Ves. 387.

4. On the bankruptcy of the plaintiff, the defendant may move, that the plaintiff shall procure his assignees to file a supplemental bill, or that the bill shall stand dismissed, but without costs. In principle the suit is abated, the bankrupt having lost his capacity to sue *Wheeler* v. *Malins*, 4 Mad. 171.

5. If a creditor files a bill on behalf of himself and other creditors, and dies after a decree in the cause, the proper course is, for the creditor, who is desirous of prosecuting the suit, to move that he may be at liberty to file a supplemental bill, if the representatives of the deceased plaintiff do not revive within a limited time; and so serve the order upon such representatives. *Dixon* v. *Wyatt*, 4 Mad. 392.

6. Where a small sum of money (£50) was decreed to the plaintiff, who became bankrupt, the Court ordered it to be paid to the assignees, on petition of the bankrupt, without filing a supplemental bill. *Setcole* v. *Healey*, 2 Br. C. C. 322.

7. Tenant in tail claiming upon the death of the former tenant in tail without issue, not through or under him, but a new limitation in remainder, is entitled to continue the suit of the former tenant in tail, and to the benefit of the proceedings, by a supplemental bill. *Lloyd* v. *Johnes*, 9 Ves. 37.

8. Upon the marriage of a female plaintiff, revivor alone is not sufficient, where the interest of third persons, as trustees, and the issue must be brought forward, a supplemental bill is in such case necessary. *Merrywether* v. *Mellish*, 13 Ves. 161.

9. Supplemental bill may be brought to obtain a further discovery from a defendant, where the proceedings are in such a state, that the original bill cannot be amended for that purpose. *Goodwin* v. *Goodwin*, 3 Atk. 370.

10. Where a supplemental bill is brought after publication, it is irregular to examine witnesses to a matter which was in issue, and not proved in the original cause, and such proofs are not to be read: if there be no proof to the new matter in the supplemental bill it must be dismissed. *Bagnal* v. *Bagnal*, 4 Vin. Ab. 439.

11. It is not necessary to file a supplemental bill, in order to state that an *habere* has been executed, and possession changed pending the cause. *O'Connor* v. *Spaight*, 1 S. & L. 306.

12. The defendant to a supplemental bill demurred, for that he was no party to the original bill, nor was any new matter pretended in the supplemental bill to have arisen since the filing of the original bill: demurrer allowed. *Baldwin* v. *Mackown*. 3 Atk. 817.

13. Where full directions have not been given, a supplemental bill may be brought in aid of a decree of the Court. *Dormer* v. *Fortescue*, 3 Atk. 133. *Fletcher* v. *Hoghton*, 5 Ves. 550.

14. After decree, plaintiff filed a supplemental bill for further discovery, and defendant was ordered to answer, but the plaintiff not to reply or proceed further. *Boeve* v. *Skipwith*, 2 C. R. 142.

15. When a supplemental bill is brought for a new matter, discovered since the hearing of the cause, before the former decree is signed and enrolled, if the defendant to such bill is able to shew there is no new matter discovered, he must take advantage by plea or demurrer, and it is too late to insist upon it at the hearing. *Lewellin* v. *Mackworth*, 2 Atk. 40.

But see on this case, Mitf. 236 (*n*).

16. Supplemental bill in nature of a bill of revivor, will not lie to carry a former decree into execution, which has not been made absolute. *Brown* v. *Heathcote*, 1 Dick. 100.

17. In a bill of review a new supplemental bill may be added. *Price* v. *Keyte*, 1 Vern. 135.

18. Where the decree is neither signed nor enrolled, it cannot be impeached by a bill of review, but only by a supplemental

bill in nature of a bill of review. *Lewellin* v. *Mackworth*, 2 Atk. 40. Barn. 445.
Standish v. *Radley*, 2 Atk. 178. Barn. 468.
Gartside v. *Isherwood*, 2 Dick. 614.

19. Supplemental bill in nature of a bill of review, cannot be heard, till a petition of rehearing or appeal is presented. *Moore* v. *Moore*, 2 Ves. 596. 1 Dick. 66.

20. The defendant appealed from the decree, and the plaintiff, apprehending he had not proper parties to the decree, filed a supplemental bill; a demurrer, for that the appeal was pending, overruled. *Woodward* v. *Woodward*, 1 Dick. 33.

21. Where a decree has been had against a tenant in tail, affecting the right of a tenant in tail in remainder, the latter may file a supplemental bill to make himself party to the former suit, for the purpose of appealing. *Giffard* v. *Hort*, 1 S. & L. 386.

22. Where a supplemental bill brings a new person or a new interest before the Court, it is open to the parties to make any objection to the decree, which might have been made at the first hearing. *Hill* v. *Chapman*, 3 Br. C. C. 391. 1 Ves. J. 405.

23. By general order, 17 October, 1741, no supplemental or new bill, in nature of a bill of review, grounded upon matter discovered since the decree, shall be exhibited without leave of the Court, and a deposit, which, together with the deposit made upon obtaining a rehearing of the decree, shall make up the sum of £50. 2 Atk. 139, (*n*). Beam. Ord. Ch. 366.

24. Deposit on a supplemental bill in nature of a bill of review made *nunc pro tunc*. *Loubier* v. *Cross*, 1 Dick. 223.

See further, p. 339, *ante*.

LXXXII. Supplicavit.*

(*a*) Granting.

1. *Supplicavit* of the peace, granted on petition and articles, and not on motion, and issued without indorsement, was yet held regular. *Stoell* v. *Botelar*, 2 C. R. 68.

2. Writ of *supplicavit* was granted upon articles filed on oath of assault and battery, and that the applicant went in fear of his life; and to be indorsed for £4000. *Clavering's case*, 2 P. W. 202.

3. A quaker cannot be admitted to exhibit articles of the peace for a writ of *supplicavit*, against her husband, upon her affirmation, as it is in nature of a criminal prosecution. *Ex parte Gumbleton*, 2 Atk. 70.

4. In the case of articles of the peace, where the party complained of is not in Court, an attachment for a breach of the peace goes on the oath of the complainant. *Ibid.*

5. The Master of the Rolls would not order a *supplicavit* to be marked with the sum the sheriff should take security in, because there was no affidavit of the husband's circumstances, as a measure for him to go by. *Ex parte Lewis*, Mos. 191.

6. The Lord Chancellor ordered a *supplicavit* to be marked without affidavit, only upon enquiry of the husband's circumstances from the solicitor for the wife. *Ex parte Gibson*, Mos. 198.

See further p. 122, *ante*.

(*b*) Discharge of.

1. A defendant, against whom a *supplicavit* had issued, complaining the articles to ground it were not sufficient, and producing a certificate of his good behaviour, the Court referred it to the two next justices of the peace in the neighbourhood, to inquire into it. *Snelling* v. *Flatman*, 1 Dick. 6.

2 Upon motion to discharge an order for a *supplicavit*, or to lessen the sum indorsed upon it, being £4000, the Court said, that its interposition was to prevent mischief and to save life, and that if the sum were too great, the party ought to make an affidavit of his inability: the application was refused. *Clavering's case*, 2 P. W. 203.

3. A party, taken on a *supplicavit*, and continuing in prison a year, without any fresh threatening, ought to be dischaged. *Ex parte Sir R. Grosvenor*, 3 P. W. 103.

4. Commitment on *supplicavit* for want of sureties must not tend to perpetual imprisonment. *Baynum* v. *Baynum*, Amb. 63.

5. If nothing new happens, it is usual to discharge the party at the end of a

year: sometimes the Court has lessened the security required. *Ibid.*

6. Denying the fact is not sufficient cause to discharge the order; nothing is, but proof of combination and contrivance, *Ex parte King*, Amb. 240.

S. C. King v. *King*, 2 Ves. 578.

7. The Court refused to discharge a *supplicavit* after upwards of two years, where it was granted against the husband, on the application of the wife, and the cause of the original ill usage still subsisted; although there was no fact of violence or threat since the *supplicavit* granted. *Ex parte King*, Amb. 333.

LXXXIII. Ward of Court.

1. Though a father has a right to the guardianship of his children, and, provided it be without a breach of the peace, may take them from the person in whose custody they are, yet, if he takes them in coming to or returning from the Court, it will be a contempt. *Ex parte Hopkins*, 3 P. W. 151.

2. Marriage of an infant ward of Court is a contempt, although the parties have no notice that the infant is a ward of Court. *Herbert's case*, 3 P. W. 115.

3. Contempt in marrying a ward by commitment not sufficient, held to be a conspiracy, and an information recommended. *Schreiber* v. *Latcward*, 2 Dick. 592.

4. There must be a reference to the Master for a proper settlement, before contempt for marrying a ward of Court can be cleared. *Stevens* v. *Savage*, 1 Ves. J. 154.

See further, p. 464, *post*, *and* Div. XXXVI. *ante.*

LXXXIV. Witness.

1. A commissioner may be a witness, but he must be first examined. *Bright* v. *Woodward*, 1 Vern. 369.

2. A solicitor ordered to be examined against his client in a case of fraud. *Cutts* v. *Pickering*, 3 C. R. 66.

3. No person is privileged from being examined, except of the profession, as counsel, attorney, or solicitor, not an agent, for he may be only a steward or servant. *Vaillant* v. *Dodemead*, 2 Atk. 524.

4. A Clerk in Court may be examined to prove a deed, for a conveyancer may be examined. *Ibid.*

5. A Clerk in Court or solicitor may be examined, touching transactions antecedent to the commencement of the suit, and the knowledge whereof could not come to him as solicitor. *Ibid.*

6. The owner of lands in a parish, in the hands of a tenant, may be a witness in a suit for tithes in that parish. *Ayde* v. *Flower*, Bunb. 7.

7. The inhabitant of a parish where a *modus* is insisted on, is *prima facie* a bad witness: if he occupies no titheable land he must shew it. *Watson* v. *Lindsel*, Bun. 40.

8. A bare trustee may be examined as a witness for the *cestui que trust*. *Scroggs* v. *Scroggs*, Amb. 272.

Armiter v. *Swanton*, Amb. 393.

9. A trustee, who is ordered to account, cannot be a witness. *Smith* v. *Duke of Chandos*, Barn. 416.

10. The evidence of a co-executor in a bill for an account of assets is inadmissible. *Mabank* v. *Metcalf*, 3 Atk. 95.

11. A *particeps criminis* is not a competent witness ro prove a fraud. *Downing* v. *Townsend*, Amb. 594.

12. In general the rules of evidence are the same in equity as at law, except in the cases of fraud and trust. *Man* v. *Ward*, 2 Atk. 229.

And see generally, p. 478, *post; and for Examination of Witnesses, see further* Div. XXX. p. 452*, *and for depositions*, Div. XXIV. p. 442*, *ante*,

LXXXV. Writ.

(*a*) *Of Assistance.*

1. Where a tenant, party to the suit, refuses to deliver possession of the estate pursuant to a decree, and the Court grants an injunction to deliver possession; upon motion, supported by affidavit of personal service of the writ of injunction, and of disobedience to it, the Court will grant a writ of assistance. *Dove* v. *Dove*, 1 Br. C. C 375. 1 Cox, 101. 2 Dick. 617.

2. All process of contempt must issue out in course to a sergeant at arms, before an injunction or writ of assistance to put the party in possession under a decree. *Venables* v. *Foyle*, 1 C. R. 178.

3. After an injunction to deliver possession, a writ of assistance will be directed to the sheriff commanding him to put the party in possession. *Stribley* v. *Hawkie*, 3 Atk. 275.

4. In the same manner, the Court will grant a writ of assistance to put sequestrators in possession. *Edwards* v. *Poul*, 2 Dick. 695.

5. And also to put receivers into possession. *Anon*, 3 P. W. 380, (*n*).

(*b*) *De coronatore eligendo.*

1. The under-sheriff, under pretence of administering the oath, swears a candidate coroner. The Court ordered him to shew cause, why he should not be committed, and not to file a return to the writ, without leave of the Court. But this is not a good cause at law, and therefore not in equity, to direct the new writ to the other coroner. *Ex parte Jones*, Mos. 254.

And see p. 153, *ante.*

(*c*) *Dedimus potestatem.*

1. Where the parties to a fine, husband and wife, are abroad, and, for the purpose of taking their acknowledgment, a *dedimus* is sued out, which, from accidental circumstances, is not returned within a year after the teste; the Court will not alter the teste of the writ, but will direct the cursitor to receive it, and make out the writ of covenant conformably. *Townend* v *Lowe*, 1 Cox, 410.

(*d*) *De excommunicato capiendo.*

1. Supersedeas to a writ *de excom. capiend.* refused, though the *significavit* was general and uncertain; and said, that the method was to proceed by *habeas corpus*. But an appeal being brought, a supersedeas was granted. *Rex* v. *Sneller*, 1 Vern. 24.

2. Motion to supersede a writ of *excommunicato capiendo*, first for want of addition; secondly, because not said that the defendant was commorant in the diocese: the Court disallowed both exceptions, but inclined to think that after the writ has been issued out of the Court of Chancery and been brought into the King's Bench, and there delivered to the sheriff, but not actually returned to the King's Bench, the Court of Chancery, on a plain error appearing, may supersede or quash it. *Rex* v. *Barrard*, 1 P. W. 435.

3. An *excommunicato capiendo* was on motion superseded before the return, for the generality of the *significavit* whereon it was awarded, which was only that the party was excommunicated *in quadam causa appellationis & querelæ;* for the Lord Chancellor held clearly, that till the return of the writ, the Court of King's Bench cannot relieve him; and if this Court cannot help him till the return of the writ, he must in the mean time lie in prison, and the Lord Chancellor said that at the common law the *excommunicato capiendo* was not returnable till the *pluries*, but went first, and then an *alias;* and if that is not obeyed, then a *pluries;* and if not then returned, then an attachment to the sheriff. *Barlow* v. *Collins*, 1 Eq. Ca. Ab. 416.

4. One that had been a prisoner in Newgate for debt, but since removed to the Fleet, is excommunicated. The Court of Chancery will not direct the cursitor to make out a writ of *excommunicato capiendo* to the Warden of the Fleet, but the writ may be directed to the sheriff, who may return a *non est inventus;* and on the return the King's Bench may grant a *habeas corpus*, and thereupon charge him with an *excommunicato capiendo*. *Capt. Studwicke's case*, 3 P. W. 53.
S. C. Anon, Mos. 365.

5. On motion to quash the writ of *significavit*, because the cause of excommunication was not set forth, and for divers other causes, it was held sufficient to warrant the writ of *excommunicato capiendo*. *Trebec* v. *Keith*, 2 Atk. 498.

6. The Court cannot do any thing after the return of the writ *excommunicato capiendo* is out, the King's Bench having the cognizance; for they can compel the sheriff to return it, and the application to quash it must be there. *Ex parte Little*, 3 Atk. 479.

7. If the writ had issued in the vacation, and not yet returnable, the Court of Chancery would have given relief, and discharged the person out of custody. *Ibid.*

8. The Court refused to supersede a writ *de excommunicato capiendo*. *Ex parte Cheveley*, 2 Dick. 473.

9. On a motion for a writ to absolve

a person unlawfully excommunicated, it is necessary to give notice to the party complainant in the Ecclesiastical Court. *Boraine's case,* 16 Ves. 346.

(e) *De Ventre inspiciendo.*

1. A writ *de ventre inspiciendo* is of common right, being to secure the next heir from a fraudulent and supposititious birth, and lies for a tenant in tail; because, at the time it was first allowed, an estate tail was a fee simple conditional. *Ex parte Ayscough,* Mos. 391. 2 P. W. 591.

2. A widow being admitted to be with child, the Court will fix a place agreeable to both parties, where she shall be till delivered, and where the heir may from time to time, at proper seasons and on notice, send women to see her, and to be present when the child is born: and in such case there is no need to execute the writ in a strict manner. *Ibid.*

3. Writ *de ventre inspiciendo* against a married woman, whose husband had been near ten years abroad, on the application of a devisee in a will, there being a limitation in the will that if she had a male child within forty weeks after the testator's decease, he should take previous to the devisee: ordered to issue, but to lie in the office fourteen days, and if she submitted to an examination of midwives in the mean time, not to go, otherwise to issue. *Ex parte Wallop,* 4 Br. C. C. 90. 2 Dick. 781.

4. The writ *de ventre inspiciendo* may be had where the exigency of the case requires it, and by the devisee as well as by the heir; and is always applied for by petition. *Ex parte Bellett,* 1 Cox, 297. 2 Dick. 781.

(f) *Intrusion.*

1. In a writ of intrusion by a remainder-man or reversioner, after a life estate, the demandant must allege and count upon an actual seisin, by the person creating the life estate taking the esplees; and the fifty years allowed by statute 32 Hen. 8, c. 2, s. 2, for bringing the writ, is reckoned from that seisin, and not from the death of the tenant for life, or the commencement of the adverse possession. *Widdowson* v. *Earl of Harrington,* 1 J. & W. 532.

(g) *Replevin.*

1. The Court will not, on motion, supersede a writ of replevin, unless there is a fraudulent use made of it; after a writ has once issued from the Court of Chancery it is *de officio,* and the Court has nothing further to do with it. *Anon,* 2 Atk. 237.

And see p. 405, *post.*

(h) *Restitution.*

1. A writ of restitution will not be granted to put into possession a person not a party to the cause, who had been turned out by an injunction, though he had a legal title; he having obtained such possession under a grant from the defendant, pending the suit. *Gaskell* v. *Durdin,* 2 B. & B. 167.

PRINCIPAL AND AGENT.

I. AUTHORITY TO AGENT.

1. A joint authority is determined by the death of one of the parties. *Cole* v. *Wade,* 16 Ves. 45.

2. But authority to an agent does not determine by the bankruptcy of the principal, when the agent being abroad acts under the authority, without notice of the bankruptcy. *Ex parte M'Donnell,* Buck, 399.

3. And under such circumstances, semble, the death of the principal will not determine the authority. *Ex parte M'Donnell,* Buck, 405.

II. PRINCIPAL WHERE BOUND.

(a) *By Acts of Agent.*

1. Purchaser under a particular, giving

a false description, not bound at law or in equity, nor by any act of his agent, without a fresh authority or subsequent approbation, a different agreement requiring a fresh authority. *Deverell* v. *Lord Bolton*, 18 Ves. 509.

2. Where a special agent at the time makes a declaration that he has no authority, the principal is not bound; so a general agent, as an auctioneer, may limit his general power of agency, but only by declaration, equivalent in legal effect to the general authority. Upon that principle evidence of loose declarations at the sale is not admitted. *Howard* v. *Braithwaite*, 1 V. & B. 210.

3. Government allowing the colonel of a regiment to appoint his own agent, the colonel is answerable for such agent, not by virtue of any security which he gives to Government, but by operation of law. *Antrobus* v. *Davidson*, 3 Mer. 578.

4. A power of attorney sent out to India, acts of such attorney, after the death of the principal, which happened in this country, but without notice, were supported. (*Cited*) *ex parte M'Donnell*, Buck, 405.

5. When in the case of a lease for lives, renewable for ever, a landlord has once acquired the right of refusal to renew it; it is doubtful whether an agent can pass from it without a special authority. *Mountnorris* v. *White*. 2 Dow, 471.

6. Whatever the duty of an agent requires him to do in the business of his employers, must be presumed so to be done with their knowledge and direction. *Ex parte Machel*, 1 Rose, 447. 2 V. & B. 216.

(*b*) *By Notice to Agent.*

1. Notice to agent will affect principal, and it makes no difference that such agent is in fact the owner of the estate. *Sheldon* v. *Cox*, 2 Eden, 224.

2. And there is no difference between personal and constructive notice, except as to guilt. *Ibid*, 228.

3. Notice to an agent to bind his principal, must be in the same transaction; and this, though the agent acted as attorney for both vendor and vendee, *Mountford* v. *Scott*, 3 Mad. 34.

4. A witness to a will or deed, who afterwards happens to be concerned as agent in a transaction relative to other property, cannot be supposed to have notice of the contents of the will or deed, so as to fix such notice upon his principal. *Rancliffe, Lord* v. *Parkins*, 6 Dow, 224.

III. Agent.

(*a*) *Rights and Liabilities.*

1. Where money was advanced to an agent for payment of duties, and the plaintiff, his administratrix, upon a doubt of such duties being paid, invested a sum of money in the hands of trustees, as a security to the principal. A period of seventeen years elapsed, without any claim for the duties having been made; but as the treasury, owing to a fire at the custom-house, could not ascertain that they had been paid, the court refused to give any other relief than ordering the money to be paid into court, and the accrued dividends to be paid to the plaintiff. *Linton* v. *Hyde*, 2 Mad. 94.

2. Agent, acting gratuitously, was held personally liable for a sum lost by the failure of his bankers, in whose hands he had placed it to his own account. *Massey* v. *Banner*, 4 Mad. 413.

Affirmed an appeal, 1 J. & W. 241.

3. An agent depositing money with a banker to his own account, cannot relieve himself from liability, by informing his principal of the payment, without a correct specification of the particulars. *Ibid.*

4. Where a solicitor, acting in getting in debts due to the estate of an intestate, under the authority of, and as local agent to the administrator, another person being the immediate and general agent of the administrator, under whose direction the solicitor acts, has received money in the course of his agency, which it is his duty, according to his instructions, to remit to the general agent; if, in order to effect the object of remittance more conveniently, he procure a banker's bill for that purpose, which is accidentally drawn in his favor, so that it becomes necessary that he should indorse it, and he does so, a court of equity will restrain an action commenced against him on such indorsement, whether brought by the indorsee (the principal agent) or by a banker, with whom the bill has been deposited, for the purposes of being presented for acceptance and payment by the drawer, although the

banker, may have given credit for the amount, if the latter can be shewn to have had any knowledge or information of the circumstances attending the transaction, and of the relative situation of the parties. *Kidson* v. *Dilworth*, 5 Price, 564.

(*b*) *Purchasing of his Principal.*

1. An agent employed to sell a reversionary legacy, cannot become the purchaser himself, without the knowledge of his principal, at an undervalue: and nothing will amount to a confirmation of such a transaction, until the vendor be fully apprised, that if he chose to impeach the original transaction, he might be relieved against it. *Crowe* v. *Ballard*, 2 Cox, 253.

2. A general land agent purchasing the estate, in respect of which he is agent, is bound to communicate to his principal all the knowledge as to the value of the estate, acquired by him as such agent. *Cane* v. *Lord Allen*, 2 Dow, 294.

3. When one acts as agent for another on the one side, and for himself on the other, he is bound to make the transaction very clear, and the court throws upon him that burthen of proof, which, in ordinary cases, would be on the other party. *Morgan* v. *Sir W. Lewes*, 4 Dow, 45.

4. It is doubted whether Equity ought to allow a dealing between an agent and his principal under any circumstances, there being such a conflict between interest and duty. *Dunbar* v. *Tredennick*, 2 B. & B. 319.

5. An agent employed to sell an estate, secretly buying it himself in the name of a trustee whom he represents to his employer as the real purchaser, cannot call for an execution of the trust until the transaction is confirmed by the vendor. *Woodhouse* v *Meredith*, 1 J. & W. 204.

6. The agent of a trustee for the sale of an estate employed for the sale of the estate, cannot become the purchaser. *Whitcomb* v. *Minchin*, 5 Mad. 91.

7. After an acquiescence for twenty years, reversionary leases, obtained by an agent from his principal at undervalue, the relation of creditor and debtor also subsisting, will not be set aside; the fiduciary character having, during that period, ceased to exist, and the transaction being recognised on the oath of the principal as fair. *Medlicott* v. *O'Donel*, 1 B. & B. 156.

8. After an acquiescence in the sale of the reversion, calculated on the rents reserved in such leases, it cannot, from the laches of the plaintiff being in other respects fair, be impeached. *Ibid.*

PRINCIPAL AND SURETY.

Page

I. AGREEMENT TO BECOME SURETY.

1. In an agreement in writing to pay the debt of another, there need not appear any consideration as between the creditor and surety to bring it within the statute of frauds. *Ex parte Gardom*, 15 Ves. 286.

2. Engagement to pay the debt of another, requires writing under the statute of frauds. *Ex parte Carr*, 3 V. & B. 110.

II. RIGHTS AND REMEDIES OF SURETY.

1. If a debtor deposits with his creditor securities for money as collateral security for his debt, and afterwards borrows a further sum of the creditor, for which a third person becomes surety, in case of the bankruptcy of the debtor, if the securities deposited are more than sufficient to satisfy the first debt, the surety will be entitled to the benefit of the surplus in reduction of the second debt. *Praed* v. *Gardiner*, 2 Cox, 86.

2. A surety joins his principal in a

bond for the payment of a sum of money, with interest, and takes a counter-bond from the principal, conditioned to save harmless and indemnify the surety, his heirs, executors, &c. from payment of the said principal sum and interest, "and from all damages he might sustain for or on account of the non-payment of the said principal sum and interest," and after the death of both principal and surety, the executors of the surety pay a part of the principal money, and several sums as interest upon it. The executors of the surety will be allowed, under a decree against the administrator of the principal, to have interest upon the part of the principal sum, but not upon the interest, so paid by them, and notwithstanding the condition of the counter-bond. *Rigby* v. *Macnamara*, 2 Cox, 415.

3. Settlement by husband on marriage, of money upon trust, to permit the wife to receive the interest during her life to her separate use, with a proviso against anticipation. The husband joins with a surety in a covenant to pay an annuity, secured by the wife's assignment of the interest to become due, and of the principal sum; in the event of there being no children of the marriage, the surety will not be entitled to any remedy in equity under the assignment in respect of payment of the arrears of the annuity recovered against him by an action upon the covenant, although he had no notice of the proviso in the settlement against anticipation. *Jackson* v. *Hobhouse*, 2 Mer. 483.

4. A. and B., by deed, jointly and severally covenanted with C. to pay her an annuity during her life; and, by another deed, A. and B. covenanted with each other, that each should pay one-half of the annuity, and indemnify the other against all actions, "damages, demands, sums of money, and expenses which might be incurred by reason of the non-payment thereof." Held that B., having, in consequence of A.'s insolvency, made several payments of A.'s moiety of the annuity, was not entitled to interest on the sums so paid, although he might recover it at law in the shape of damages. *Bell* v. *Free*, 1 Wil. 51. 1 Swan. 90.

5. Semble, a surety who pays off a specialty debt, is to be considered as a specialty creditor of his principal. *Robinson* v. *Wilson*, 2 Mad. 434.

6. Father, tenant for life, borrows money; to secure which he and his son, remainder-man in tail or in fee, join in a mortgage of the inheritance. The son is entitled in equity to rank as a creditor on the real and personal assets of his father for the money, and to call on the mortgagee to make the utmost of his mortgage for his, the son's, relief. *Rosse, Earl of*, v. *Sterling*, 4 Dow, 442.

III. Extent of his Liability.

1. In the case of an ordinary money-bond, there is no distinction, upon the face of it, between principal and surety. *Secus*, in the case of an indemnity-bond, where the surety expressly stipulates for the acts of his principal. *Antrobus* v. *Davidson*, 3 Mer. 569.

2. As the obligation of indemnity arises not out of any principle of equity, but from the special convention of the parties, the bond which creates must determine the extent of the liability. The legal effect of such a bond is to protect against the consequences of future deficiencies, but not to entitle the party to call for anticipated and precautionary payment; and there is no principle in equity to extend the legal effect of the bond: so where a colonel of a regiment took a bond of indemnity from his agents, with another as surety, in respect of all charges, &c. to which he may become liable by their default, and the agents become bankrupts, and the representatives of the colonel (deceased) having received notice from Government, of a demand upon the colonel's estate, by virtue of an unliquidated account, though no demand had been made upon the agents for any sum actually due, a bill by the representatives of the colonel, against the representatives of the surety, to pay the balance due to Government, and also to set aside a sufficient sum out of the testator's estate, to answer future contingent demands, cannot be supported upon the principle of a bill *quia timet*, as it would be asking a new and different security from that which the surety consented to give—a security by deposit of money, instead of a security by personal obligation. *Ibid*, 3 Mer. 569.

IV. Contribution among Sureties.

1. The doctrine of contribution

sureties is not founded in contract, though contract may qualify it, but it is the result of general equity, on the ground of equality of burthen and benefit. Therefore, where three sureties are bound by different instruments, but for the same principal, and the same engagement, they shall contribute. *Dering* v. *Earl of Winchelsea*,

1 Cox, 318.

2. In a suit by a surety against his co-surety and the principal, for a contribution from the co-surety, in respect of money actually paid by the plaintiff for the principal, it is not necessary to prove the insolvency of the principal; otherwise, where the principal is not a party to the suit. *Lawson* v. *Wright*, 1 Cox, 275.

3. The right of one surety to call upon another for contribution, applies as well to cases where they become sureties by separate instruments, as to cases where they become sureties by the same instruments. *Mayhew* v. *Crickett*,

1 Wil. 418.

V. Release of Surety by Agreement with the Principal.

1. A creditor, having among other securities a bond with a surety, taking a mortgage from the principal debtor for part of his debt, and agreeing to receive the residue by instalments secured by warrant of attorney, but "without prejudice to any security he now holds," injunction will be granted against suing the surety. *Boultbee* v. *Stubbs*,

18 Ves. 20.

2. In general, if time is given to the principal, the surety is discharged.

Ibid.

3. Composition, with reserve of the remedy against sureties, is valid, but it must plainly appear. *Ibid.* 18 Ves. 22.

4. A. guarantees the payment of any goods to be supplied by B. to C., between the 2d of April, 1814, and the 2d of April, 1815. C. accepted bills for the amount of the goods delivered, and B. permits him to renew such bills when payable, without any communication to A. on the subject of such renewal. Held, that the period of credit to be given under this guarantee is not unlimited, but according to the usual course of trade; and A. was discharged from his guarantee, by virtue of the rule that a creditor giving further time to the principal, without the consent of the [illegible] surety, although it [illegible] any [illegible] was proved that the renewal was given only in consequence of C.'s inability to pay, and that no injury could accrue to A; the surety being himself the fit judge of what is, or what is not for his own benefit. *Samuell* v. *Howarth*, 3 Mer. 272.

5. Where a creditor, having already a warrant of attorney from his debtor, takes a promissory note from him and a surety, and afterwards enters up judgment under his warrant of attorney, and takes the goods of the principal in execution, and subsequently withdraws the execution without the knowledge of the surety, the surety is thereby discharged; but if the surety, knowing that the execution is withdrawn, makes a new promise, his liability is restored, and he cannot object to the promise, as being without consideration. *Mayhew* v. *Crickett*,

1 Wil. 418.

6. If, by any arrangement between the creditor and the debtor, the situation of the surety is altered, he is thereby discharged; so where the assignee of an annuity by deed, agreed to allow the grantor more advantageous terms of repurchasing, and further agreed not to demand or sue for that or another annuity, for five years, or until the death of the father of the grantor, and afterwards consented to receive the arrears by instalments, to neither of which agreements the surety was a party; the surety was held to be discharged from past as well as future payments. *Eyre* v. *Bartrop*,

3 Mad. 221.

7. It is competent, for creditors executing a deed of composition with the principal debtor and certain of his sureties, to reserve their remedies against other sureties. *Ex parte Carstairs*,

Buck, 560.

8. If a creditor executes a deed of compromise with the principal debtor, he thereby discharges the surety. Not so, if it be stipulated in the deed of composition that the remedies against the sureties shall be reserved. Parol evidence of the undertaking of the parties to the deed, that the remedies against the sureties should be reserved, cannot be admitted. *Ex parte Glendinning*, Buck, 517.

9. The court will grant a perpetual injunction to restrain a landlord from proceeding at law on an assignment of a replevin bond against the sureties, if there have been an agreement to refer, and a reference between the landlord and a

tenant, without the concurrence of the surety, of the matters in difference, whereby the performance of the condition of the bond (to proceed with effect) has been suspended: on such an agreement having been entered into, the bond became *functus officio*. *Bowmaker* v. *Moore*, 3 Price, 214.

10. Commissioners, under an act of Parliament, for advancing money to merchants by way of loan, make an advance for A., who with B., as surety, becomes bound to repay within a limited time. A. obtains from the commissioners several extensions of the time for payment, without the privity or knowledge of B., his surety, and at length becomes bankrupt without having paid: held that the obligation of the surety was discharged upon the indulgence granted to the principal, without his privity or knowledge; and the decree, restraining proceedings at law against the surety, was affirmed in Dom. Proc. *Bank of Ireland* v. *Beresford*, 6 Dow, 233.

11. Where the defendant, in an action of replevin, entered into an agreement with the plaintiff to refer to arbitration a prior action of replevin between them, then entered and standing for trial at the assizes, and also other matters in dispute between them, but not the second replevin suit, and that all proceedings should in the mean time be stayed till the award should be made, and which was stipulated to be published by a future certain time, but afterwards further enlarged by the plaintiff and defendant, all without the concurrence or privity of the surety in the replevin bond, whereby, in point of fact, the suit was delayed, and the surety placed in a different situation by the delay, and which might have been prejudicial to him, whether it actually turn out to have been so or not: held to affect the conscience of the defendant in equity, and therefore the court granted a perpetual injunction to restrain him from proceeding against the surety on an assignment of the replevin bond, obtained upon a return of *eloignment*. *Bowmaker* v. *Moore*, 7 Price, 223.

PRIVILEGE FROM ARREST.

See also Tit. Bankrupt, VIII. (*e*). XVI. (*b*). *ante*.

1. A solicitor arrested on his way from his residence to Lincoln's Inn hall, without deviation, for the purpose of attending a bankrupt petition as solicitor, discharged on personal examination by the Lord Chancellor: the oath administered by the register, but to be entitled in the bankruptcy. *Castle's Case*, 16 Ves. 412.

2. A person arrested on his return from proving a debt, under a commission, will, on petition, be discharged, and also be paid the costs of the application. *Ex parte Bryant*, 1 Mad. 49.

3. A defendant, who had been attending with his solicitor before the Master upon a warrant to produce papers, and was arrested on leaving the Master's office, will be discharged from the arrest upon application to the court. *Franklyn* v. *Colquhoun*, 1 Mad. 580.

4. Costs are given against an officer who violates the privilege of Parliament from arrest, and although the officer had so erred from excusable motives. *Ex parte Wood*, 18 Ves. 3. 1 Rose, 47.

PRIZE.

I. Jurisdiction.

1. Whether the court of Chancery has jurisdiction to determine, whether a ship of war was or was not at the time of the capture, one of the squadron under the command of a particular officer—*Quære*. *Parker* v. *Toulmin*, 1 Cox, 265.

2. A British ship was taken by the Americans, and afterwards retaken by one of the British crew, brought into port and condemned. A writ of prohibition, to enjoin the judge of the prize court from

proceeding, after the termination of the war, at the suit of the American owners, to try the question of the recapture, was refused: it being a case clearly within the jurisdiction of a court of prize, and such jurisdiction not being determined by the cessation of hostilities. *Case of the ship Harmony*, Coop. 325.
S. C. *Ex parte Lynch*, 1 Mad. 15.

II. Property in.

1. Property in prize does not vest it in the captors till condemnation, but after condemnation, it is by relation the property of the captors from the time of the capture. *Stevens* v. *Bagwell*, 15 Ves. 139.

2. The Crown, in cases of prize grants, puts what is matter of bounty upon the footing of matter of right, and the claim is considered transmissible to representatives of the claimant dying before payment, and subject to the same trusts as his other property. *Ibid.*

3. Charter party of affreightment between the owners of a vessel and the commissioners of the Transport Board: while in the transport service, the vessel made a capture, which being condemned and sold, two-thirds of a moiety of the proceeds, upon petition to the Treasury, were ordered, by warrant from the Crown, to be paid to the "owners of the vessel." The commissioners claimed to set off, against the freight due, the amount of what was so received on account of the capture. But the court held that the proceeds of the capture were the undoubted property of the Crown, and disposable by the Crown entirely at its own discretion, and ordered the commissioners to pay the freight due into court, without prejudice to the rights of the parties. *Thurgar* v. *Morley*, 3 Mer. 21.

4. Where satisfaction is made to ship-owners, under a royal proclamation for a distribution of prizes, such of the underwriters as have paid, are entitled to a restitution of the insurance money; but those who have compounded and renounced salvage are not: and the underwriters, who are foreigners, are entitled to the benefit of the proclamation, equally with British subjects. *Blaauwpot* v. *Da Costa*, 1 Eden, 130.

PRO CONFESSO.

1. A bill cannot be taken *pro confesso*, under stat. 5 Geo. 2, c. 25, without an affidavit of the defendant's absconding to avoid process. *Short* v. *Downer*, 2 Cox, 84.

2. The statute of 5 Geo. 2, for taking bills *pro confesso* against defendants, extends to every case where the party has been served with subpœna, but hath avoided the subsequent process, as well as where it has been impossible to serve him with any process at all. *Mawer* v. *Mawer*, 1 Cox, 104.

3. A defendant putting in his answer, after an order to take the bill *pro confesso* against him, will not thereby be entitled to discharge the order, though it may be matter for consideration at the hearing. *Williams* v. *Thompson*, 1 Cox, 413.

4. The authority to take the bill *pro confesso* against a defendant, having privilege of Parliament, standing out process of contempt, under statute 45 Geo. 3, c. 124, s. 5, is confined to bills for discovery only. *Jones* v. *Davis*, 17 Ves. 368.

5. In a subsequent case the court held, that a bill against a member of Parliament, praying relief, may be taken *pro confesso*, under the 45 Geo. 3, c. 124, there being no reason why the construction of the act should be confined to bills of discovery only. *Logan* v. *Grant*, 1 Mad. 626.

6. Time for appearance to a bill of foreclosure, under stat. 5 Geo. 2, c. 25, was enlarged: notice in the parish church having been prevented, by the church being under repair. *Knowles* v. *Broome*, 1 V. & B. 305.

7. The process to obtain a decree *pro confesso*, cannot be applied to a prisoner in Newgate under a criminal sentence, who, if brought up by *habeas corpus*, must be remanded immediately, and cannot, as in a civil case, be turned over to the Fleet *cum causis*, subject to the farther process: *alias Habeas Corpus, &c.* *Moss* v. *Brown*, 1 V. & B. 306.

8. Decree *pro confesso*, which is a mode of obtaining the judgment of the court

prescribed by the legislature, and thus distinguished from a decree *nisi*, will not be opened without a strong ground, and, therefore, not upon a general affidavit by the party himself of derangement, the court requiring evidence more satisfactory, and extending to the whole period. *Knight* v. *Young*, 2 V. & B. 184.

9. The defendant had been removed by *habeas corpus* from the King's Bench to the Fleet prison, for contempt, in not putting in his answer; and afterwards procured himself to be recommitted to the King's Bench, in order to prevent an *alias pluries*. It was ordered on motion, that the bill should be taken *pro confesso* against him, in default of his putting in his answer by the time at which an *alias pluries* might have issued. *Sturges* v. *Brown*, 2 Mer. 511.

10. A cross bill, taken *pro confesso*, will be ordered on motion to be read at the hearing of the original cause. *Cory* v. *Gertcken*, 2 Mad. 43.

11. Where a party withholds his answer to interrogatories, in vexation and delay, the court will order them to be taken *pro confessis*, and will permit the opposite party to make affidavit of the facts inquired of. *Sir Watkin Lewes* v. *Morgan*, 5 Price, 468.

PRODUCTION OF DEEDS, &c.

I. Deeds or Papers.

1. In the case of a bill against a steward for an account of monies received in that capacity, and of the interest made upon it, where he admits, by his answer, having received the money, mixed it with his own, and used it accordingly; this admission will induce the court to direct a production of his banker's books, though they may contain many other private matters. *Earl of Salisbury* v. *Cecil*, 1 Cox, 277.

2 Whenever a plaintiff has established an interest in any instrument in the hands of the defendant, he is in general entitled to a production of it. And where the suit was by a rector, claiming certain land as glebe land in the possession of the defendant, who admitted the tenure and the possession of receipts of rent given by former rectors, and also of an ancient map of the lands of the township, the court thought the defendant was bound to produce them. *Smith* v. *Duke of Northumberland*, 1 Cox, 363.

3. A defendant cannot on motion, without consent, obtain the production of a deed in the hands of the plaintiff, although such deed be referred to in the bill, as in the plaintiff's custody, and ready to be produced as the court shall direct. To obtain a discovery of the deed, the defendant must file a cross bill for the purpose. *Spragg* v. *Corner*, 2 Cox, 109.

4. The general rule of the court is, that a defendant cannot have an order for production of papers by a plaintiff; and where the plaintiff stated certain papers in the bill, without alleging they were in his possession, a motion by the defendant, after answer for their production, was refused, with costs. *Jackson* v. *Sedgwick*, 2 Wil. 167.

5. To a bill for the discovery of a correspondence as evidence in defence of an action at law, the defendants set forth, in the schedule to their answer, a list of all letters, &c. in their possession, and also extracts from the correspondence, stating, in the body of the answer, that such extracts were the only parts which related to the matters in question, and that many of such letters related also to other matters. The court refused a motion for the production of such letters, the defendants undertaking that, on the trial, the plaintiffs might read the extracts from the schedules, without reference to the body of the answer. *Campbell* v. *French*, 2 Cox, 286.

6. There must be a direct admission of an instrument being in the custody or power of the defendant, to entitle the plaintiff to an order for its production: a statement in the answer of the date and contents merely is not sufficient. *Erskine* v. *Bize*, 2 Cox, 226.

7. And though there is such direct admission, yet, without the plaintiff shows he has a common interest in the instrument with the defendant, he will not be

entitled to call for its production. *Burton* v. *Neville,* 2 Cox, 242.

8. Bill by widow, devisee in fee, impeached a mortgage by her while covert, for want of a fine. The answer admitted possession of the will, and the title under it; alleged the loss of the settlement; and stated it differently from the bill by the addition of a power of revocation, and appointment of new uses, by the exercise of which a fine was not necessary: upon this bill and answer, the plaintiff is entitled to the production of the will, on motion, though not offered in the answer. *Bird* v. *Harrison,* 15 Ves. 408.

9. A defendant cannot resist a motion for the production of books or papers, set out in the schedule to his answer. *Somerville* v. *Mackay,* 16 Ves. 382.

10. The plaintiff can compel the defendant to set forth the contents of the books in the answer; and the production of the books is part of the discovery, which the defendant, submitting to answer, submits to make, although by his answer he insists that the plaintiff is not entitled to the account. *Unsworth* v. *Woodcock,* 3 Mad. 432.

11. Where the object of a suit is to set aside deeds, the plaintiff is entitled to have them produced, with the usual liberty to inspect, &c., and for production at the hearing; but the court will not, except in a special case, shewing danger that they will not be produced at the hearing, order them to be deposited with the Master, for safe custody; therefore, where the circumstances chiefly relied upon, viz. variations in two deeds, appeared upon the answer, the order was limited to their production at the hearing. *Beckford* v. *Wildman,* 16 Ves. 438.

12. An order for the production of papers, &c. on a trial at law, is limited to those referred to by the answer of the particular defendant, and will not be extended to any other answer, except upon a trial directed by the court, when the production is more general. *Marsh* v. *Sibbald,* 2 V. & B. 375.

13. An attorney, submitting to produce title deeds of his client, in his possession, as the court shall direct, may be called upon to produce them, where the principal himself could be called upon so to do. *Fenwick* v. *Reed,* 1 Mer. 114.

14. A motion, on the part of a plaintiff, for the production of a deed, alleged to be in possession of the defendant, as tenant in common with the plaintiff, refused, where it appeared by the answer that the defendant had sold his share of the estate, and was in possession of the deed in question, only as mortgagee to the purchaser. *Lambert* v. *Rogers,* 2 Mer. 489.

15. A bill to set aside a partition, on the ground of inequality, as appeared from a valuation and estimate therein set forth, but without particulars; the defendant, by his answer, denied the accuracy of the valuation, but alleged that he was unable to set forth in what particulars it was inaccurate, by reason of such omission in the bill; the defendant cannot, upon motion, call for the production of the valuation, and papers, &c. relative thereto. The usual course is by filing a cross bill; but in the present case, even if a cross bill were filed, it would not suffice to obtain an order for the purpose. *Micklethwaite* v. *Moore,* 3 Mer. 292.

16. Where an agent, defendant to a bill, by his principal, for an account, lived in Liverpool, and there was no affidavit that the books of account were in daily use, he was ordered, on motion, to leave with his clerk in court, books of account, letters, papers, &c. in his possession, containing entries relating to the cause, sealing up entries on other subjects, and making affidavit that he has sealed such entries only. *Gerard* v. *Penswick,* 1 Swan. 533. 1 Wil. 222.

17. A plaintiff is entitled to the production of documents, referred to in the answer, and admitted to be in the custody of the defendant, although an injunction obtained by the plaintiff has been dissolved on the ground that the contract which he seeks to enforce is illegal. *Evans* v. *Richard,* 1 Swan. 7.

18. In ordering the production of documents, the court proceeds on the principle that they are by reference incorporated into the answer and become a part of it. *Ibid.*

19. In a bill against executors, the plaintiff having stated two promissory notes of the same date, one for £15,000 sterling, the other for 15,000 French Louis, given by the testator for securing a sum of £15,000. On an affidavit by one of the executors that he had inspected the first note, and observed, on the face of it, circumstances tending to impeach its authenticity; that he was informed and believed that the second note had been produced by the plaintiff for payment in a foreign country; and that he was ad-

vised and believed that it was necessary, in order that his answer might fully meet the case, that he should before answer have inspection of the second note: it was ordered that the defendant should not be compelled to answer till a fortnight after production of the second note. *The Princess of Wales* v. *The Earl of Liverpool*, 1 Swan. 114. 580. 1 Wil. 113.

20. If a plaintiff makes a demand on written instruments, without stating that they are in his possession, whether the court will infer that fact, unless an affidavit is made to the contrary—*Quære. Ibid*, 1 Swan. 122. 1 Wil. 122.

21. The practice requiring proof, beyond mere reference, of possession by the defendant of a document, previous to an order for production, proceeds upon this consideration, that otherwise, if the defendant refused to produce it, the court would be unable to apply its process for enforcing obedience, because no *constat* appears on the pleadings, that the document is in defendant's possession. *Ibid.* 1 Swan. 123. 1 Wil. 123.

22. Under a subpœna *duces tecum* the party may in court object to produce the documents, but if the objection is overruled, production will be compelled. *Field* v. *Beaumont*, 1 Swan. 209.

23. A defendant admitted by her answer, that at a time past she had a deed in her power, but this is not a sufficient admission to warrant an order for its production, as she did not admit she *then* had the deed in her power. *Heeman* v. *Midland*, 4 Mad. 391.

24. On a motion for the production of a deed, referred to in defendant's answer: held that the plaintiff had no right to the production of a deed not connected with his title, and which gives title to the defendant. *Sampson* v. *Swettenham*, 5 Mad. 16.

25. On a motion for a defendant to produce a deed before the examiner, affidavits cannot be read to prove the fact of its being in his possession, it must appear upon his answer; but leave given, though the cause was at issue, to amend the bill for the purpose of obtaining the admission. *Barnett* v. *Noble*, 1 J. & W. 227.

26. The court will not, on a bill for tithes, praying a discovery of documentary evidence, order a tithe-book of a former rector, shewn to have been in the possession of the defendant's attorney, to be produced, unless it clearly appear, from admissions in the answer, that it would assist the plaintiff's case. But where the court refuse such a motion, for the above reason, they will not do so with costs, if enough be shewn to give color for the application. *Bligh* v. *Benson*, 7 Price, 205.

27. The court will not make an order on plaintiff, where the cause has been by decree referred to commissioners, to produce and leave documents, &c. in their possession, in the hands of their clerk in court, for inspection by defendant. *Governor &c. of Shrewsbury Grammar School* v. *Maddock*, 7 Price, 655.

28. To warrant an application to produce, on the trial of a civil action, a record of the court, sufficient grounds may be required, as the office copy might be evidence. *Stratford* v. *Green*, 1 B. & B. 296.

II. Specific Articles.

1. The court will not grant an application, made on the coming in of defendant's answer to a bill for discovery, that the plaintiff may be permitted to search the boxes of an absent individual, (which have been left in the hands of the defendant as a depositary), for the purpose of ascertaining whether the property of the applicant be there, on a bill filed for that purpose, to aid by such discovery, an information in the nature of an action of detinue, unless good reason be shewn, through the medium of facts disclosed by affidavit, for the supposition that the identical thing sought be there, and that the party applying has an interest in the object of search. *Attorney General* v. *Elliott*, 1 Price, 377.

2. The court will not make an order on a defendant who has answered, in whose hands another of the defendants, who has not answered, has deposited boxes, in which certain specific articles claimed by the plaintiff are said to be believed to be; that he shall be restrained from parting with the subject-matter of such deposit, unless the bill be supported by a positive affidavit, that the contents of the boxes are actually in danger, however strong the inference may be, from the facts stated in the affidavit, that there exists ground for apprehension that it is intended to make an improper use of them, to the injury of the plaintiff. *Ibid*, 2 Price, 48.

3. Nor will they make an order on such depositary, requiring him to produce such boxes, to be left in the hands of his clerk in court for the plaintiff's inspection, in aid of a trial at law, wherein the question of property is in dispute, without a positive statement in the affidavit, that the object of search is or was contained in the boxes. *Ibid.*

RECEIVER.

I. IN WHAT CASES APPOINTED.

(*a*) *Generally.*

1. In a suit for sale of real estate, for the payment of debts, the heir at law being an infant, the parol demurred. The court will appoint a receiver as in other cases. *Sweet* v. *Partridge*, 1 Cox, 433.

2. Whether the court will appoint a receiver of pew rents of a chapel, depends on the circumstances of the case. *Attorney-General* v. *Fowler*, 15 Ves. 85.

3. A receiver may be appointed against the legal title, in a case of fraud appearing upon affidavits; but a motion after answer, for the appointment of a receiver, and an injunction against committing waste, and disposing of the estate, was under the circumstances of the case refused. *Lloyd* v. *Passingham*, 16 Ves. 59.

4. A motion for a receiver, against the legal estate, upon the effect of evidence in a cause before hearing, was refused. *Ibid*, 3 Mer. 697.

5. If a judgment creditor takes execution, and finds the estate protected by circumstances respecting a prior title, he may apply for a receiver; and where the plaintiff was entitled to an equitable charge, and had obtained judgment, but was prevented enforcing execution by circumstances of the title, a receiver was appointed in default of payment into court; and the original right to a receiver was held not to be affected by subsequent alteration of circumstances, as by the defendant having himself become the legal owner of the estate; and the receiver was appointed over the whole estate of great value, compared with the debt, as a reasonable part might be tendered as a security, or the money paid into court. *Curling* v. *Marquis Townsend*, 19 Ves. 628.

6. A receiver ought not to be appointed where there is a trustee with power of entry and distress. *Buxton* v. *Monkhouse*, Coop. 41.

7. If a purchaser of the legal estate in lands, which are subject to an equitable rent charge, refuse to pay the rent charge, a receiver will be appointed. *Pritchard* v. *Fleetwood*, 1 Mer. 54.

8. Motion by a tenant in common, for a receiver, against his co-tenant in possession, was refused, as it did not amount to a case of exclusion or gross misconduct. *Milbank* v. *Revett*, 2 Mer. 405.

9. The court will, upon the application of all parties beneficially interested, appoint a receiver, when any of the trustees refuse to act; and, therefore, a receiver was appointed before answer, by consent, in a case of a devise to four trustees, of whom two declined to act. *Brodie* v. *Barry*, 3 Mer. 695.

10. In favor of equitable creditors the court will appoint a receiver on property, against which a legal creditor might obtain execution. *Davis* v. *The Duke of Marlborough*, 2 Wil. 151. 2 Swan. 132.

11. The court will, on motion, appoint a receiver for an equitable creditor, or a person having an equitable estate, but without prejudice to persons who have prior estates, that is, if the prior estates are legal, so as not to prevent such persons obtaining possession, and if equitable, then the court, settling the priorities among the equitable incumbrancers, takes care not to disturb them. *Ibid,* 2 Swan. 137.

12. Receiver of a lunatic's estate was appointed, where no one would act gratuitously as committee. *Ex parte Radcliffe,* 1 J. & W. 639.

13. An estate was limited by marriage settlement to the defendant for life, subject to a previous limitation for a term of years, to raise portions for younger children. The tenant for life obstructing the execution of a decree for a sale of the term, by refusing to produce the title deeds, the court ordered a receiver of the rents and profits. *Brigstocke* v. *Mansel,* 3 Mad. 47.

14. Where a defendant had absconded to avoid being served with a subpœna to answer; a receiver over his estate was appointed, on the application of the plaintiff. *Maguire* v. *Allen,* 1 B. & B. 75.

(*b*) *Specific Performance.*

1. A receiver was appointed before answer upon the bill of a purchaser, pending a suit by the wife of the vendor claiming under a voluntary settlement. *Metcalfe* v. *Pulvertoft,* 1 V. & B. 180.

2. Receiver was appointed after answer of a purchaser upon the mutual lien for the remainder of the purchase-money or the deposit, there being a mixed possession, and the insolvency of the purchaser and his intention to sell and convey being admitted. *Hall* v. *Jenkinson,* 2 V. & B. 125.

3. Where a specific performance was decreed against a purchaser, upon the ground of long possession and acquiescence in the title, the court refused to dispossess him by the appointment of a receiver: the plaintiff, having obtained a decree, must enforce payment of the purchase-money, not by means of a receiver, but by acting upon the decree. *Margravine of Anspach* v. *Noel,* 1 Mad. 310.

(*c*) *Partnership.*

1. The principle upon which a court of equity interferes between partners, by appointing a manager or receiver, is only with a view to the relief by winding up and disposing of the concern and dividing the produce, but not for the purpose of carrying it on. In the case of the Opera-house, the court refused upon motion to appoint a manager and receiver, upon any other principle than as necessary to the relief prayed, a foreclosure, taking also into consideration the difficulties from the nature of the subject and the contract, an anxious provision for arbitration, and that one party was by express contract the manager. *Waters* v. *Taylor,* 15 Ves. 10.

2. Receiver will not be appointed merely on a dissolution of partnership, but only on breach of the duty of a partner, or of the contract, as by continuing trade with joint effects on the separate account. *Harding* v. *Glover,* 18 Ves. 281.

3. Receiver may be appointed on affidavits before answer. *Duckworth* v. *Trafford,* 18 Ves. 283

4. Motion for a receiver on a mining concern was refused, being made upon a claim of partnership in the equitable interest, not raised until the concern, at a great expense, had become prosperous, and denied by the answer. *Norway* v. *Rowe,* 19 Ves. 144.

5. Where some members of a partnership, either in the ordinary course of trade, or in closing the transactions after a dissolution, seek to exclude others from a just share in the management, the court will appoint a receiver. *Wilson* v. *Greenwood,* 1 Swan, 481. 1 Wil. 234.

6. Receiver appointed of mines in which several persons were interested, the concern, from the nature of the subject, being a species of trade and not a mere tenancy in common in land. *Jeffreys* v. *Smith,* 1 J. & W. 298.

7. The court will not upon motion appoint a receiver of a partnership, unless it appears that the plaintiff will be entitled to a dissolution at the hearing. *Goodman* v. *Whitcombe,* 1 J. & W. 589.

(*d*) *Mortgage.*

1. When a mortgagee is not in possession, the court, upon application of cre-

ditors, will appoint a receiver of the mortgaged premises, but without prejudice to the right of the mortgagee to obtain possession. *Bryan* v. *Cormick*, 1 Cox, 422.

2. Receiver upon a mortgagee in possession, who cannot ascertain the debt due to him. *Codington* v. *Parker*, 16 Ves. 469.

3. When a first mortgagee is in possession, a receiver will not be appointed against him, except on his confession that he has been paid off, or his refusal to accept what is due to him. *Berney* v. *Sewell*, 1 J. & W. 647.

4. Mismanagement of the estates and misapplication of the rent , and collusion with the mortgagor, are not grounds for a motion before answer, to take the possession from him. *Ibid.*

5. When the first mortgagee is not in possession, a receiver may be appointed at the suit of a subsequent incumbrancer, without prejudice to the first mortgagee's taking possession. *Ibid.*

6. A mortgagee who has the legal estate cannot have a receiver. *Ibid.*

(*e*) *Testator's or Intestate's Estate.*

1. Bill by simple contract creditors, against the executrix and devisees of one who had been a trader, but ceased to be so, for some time previous to the time of his death, a motion by plaintiff for a receiver, upon affidavit before answer, refused, the testator not having charged his real estates with his debts, and the case not being within the stat. 47 Geo. 3, s. 2, c. 74. *Keene* v. *Riley*, 3 Mer. 436.

2. Pending a question, whether estates devised were subject to a bond, executed by the testator, for making a settlement on his wife and children, the court refused to appoint a receiver, the devisees in trust consenting to pay the rents into court. *Prebble* v. *Boghurst*, 1 Swan. 313.

3. The court will appoint a receiver, pending a suit in the ecclesiastical court for probate. *Atkinson* v. *Henshaw*, 2 V. & B. 85. *Ball* v. *Oliver*, 2 V. & B. 96.

4. Where a receiver has been appointed, the executor being out of the jurisdiction, on administration afterwards taken out, it may, on motion, be referred to the Master, to reconsider the appointment of a receiver, regard being had to the administration granted. *Faith* v. *Dunbar*, Coop. 200.

5. When the court appoints a receiver of personal estate, pending a suit in the ecclesiastical court, it is upon the ground that the property must remain to a degree unprotected till the determination of the suit; the party applying, therefore, must state such a suit depending, and must be interested in the result of it. *Jones* v. *Jones*, 3 Mer. 175.

6. A receiver will not be appointed merely because an executrix is poor. *Howard* v. *Papera*, 1 Mad. 142.

7. If an executor become a bankrupt, a receiver will be appointed; but if the testator knew the executor was a bankrupt when he constituted him executor, whether a receiver would be appointed---*Quære*. *Gladdon* v. *Stoneham*, 1 Mad. 143 (*n*).

8. Where the bill only alleges, that the defendants oppose the plaintiff's application to obtain letters of administration, without stating the grounds of such opposition, and nothing appears to shew that the plaintiff might not in due course obtain the administration, a court of equity will not interfere by the appointment of a receiver. *Jones* v. *Frost*, 3 Mad. 1.

9. Executor and trustee becoming a bankrupt, a receiver was appointed, although the testator knew, after he had made his will, that a commission had been issued, and although proceedings were pending to supersede it. *Langley* v. *Hawk*, 5 Mad. 46.

10. The court will appoint a receiver of an intestate's personal estate, when the administrator is sworn to be insolvent, before his answer be put in; although the fact of his being abroad, stated also in the plaintiff's affidavit, be denied by an affidavit filed in answer. *Scott* v. *Becher*, 4 Price, 346.

II. Who may be appointed.

1. On motion for a receiver of an estate in India, the Lord Chancellor appointed a person who resided in England, and who was to act by his agent in India, and an inquiry was directed what should be the term beyond which he should not be permitted to let. ——— v. *Lindsey*, 15 Ves. 91.

2. Testator directs his will to be carried into effect, under the direction of the

court of Chancery, and appoints his friend, A. H., to act as solicitor for all parties in the suit, and to be the receiver of his real and personal estates. Testator died, seised of no other real estate than an estate in the West Indies, but having by his will directed a sum of money to be invested in the purchase of lands in England; held that A. H. was well appointed receiver of the West Indian estate; and it being an appointment by the testator, and not by the court, the personal recognizance of A. H. was held to be sufficient security. *Hibbert* v. *Hibbert*, 3 Mer. 681.

3. If the person proposed as a receiver, lives at a great distance from the estate, is a Member of Parliament, and a practising barrister in town, these circumstances must be considerably regarded, though no absolute disqualification, as to the appointment of a receiver. There would be a difference as to these circumstances in the appointment of an auditor. *Wynne* v. *Lord Newborough*, 15 Ves. 283.

4. Considerable attention is to be given, in the appointment of a receiver, to the recommendation of the testator, and the respect due to a large family. *Ibid*, 15 Ves. 283.

5. It is the general rule that a trustee shall not be the receiver of the trust estate with emolument; and a trustee to preserve contingent remainders with powers of leasing, and to sell and exchange, but the latter power not to be exercised during the minority, was held to be within the rule.
Sutton v *Jones*, *Jones* v. *Sutton*, } 15 Ves. 584.

6. A peer cannot be appointed a receiver, as a receiver may be committed. *Attorney-General* v *Gee*, 2 V. & B. 208.

7. The solicitor under a commission of lunacy, cannot be appointed a receiver of the lunatic's estate. *Ex parte Pincke*, 2 Mer. 452.

8. A Receiver-General of a county ought not to be appointed receiver of a charity estate, because of his liability to the prerogative, which might sweep away all his property. *Attorney-General* v. *Day*, 2 Mad. 246.

III. Acts of.

1. The court will not permit a receiver to lay out more than a very small sum at his discretion. *Waters* v. *Taylor*, 15 Ves. 25.

2. The institution of a suit by a receiver, on behalf of persons having a common interest, cannot be directed on motion and affidavit, without a reference to the Master, whether it is for their benefit. *Musgrave* v. *Medex*, 3 V. & B. 167.

3. After an order to elect to proceed at law or in equity, a receiver appointed by this court cannot distrain for rent, without undertaking to proceed in equity only. *Mills* v. *Fry*, Coop. 107.

4. The possession of a receiver or sequestrator is not to be disturbed without leave of the court. *Brooks* v. *Greathead*, 1 J. & W. 178.

5. A second incumbrancer having obtained the appointment of a receiver and a decree for a sale, without making the first incumbrancer a party, a petition by the latter for a reference to ascertain priorities, and for the receiver to keep down the interest, refused on the ground that the petitioner had commenced a suit for the same purpose and had delayed it; but leave was given to bring an ejectment. *Brooks* v. *Greathead*, 1 J. & W. 176.

6. The court will not grant a motion, the object of which is to enable the receiver under a creditor's bill to make leases, which will bind an infant remainderman. *Gibbins* v. *Howell*, 3 Mad. 469.

IV. Accounts and Allowances.

1. By a General Order of the court of Chancery, 23d April, 1796, receivers shall annually pass their accounts, and pay in their balances, or lose their salaries, and be charged with interest at £5 *per cent.* 15 Ves. 278.

2. Under this order, a receiver of the personal estate of the testator was deprived of his salary, and charged with interest, but not upon each sum from the time it was received, according to the strict rule, as a receiver of rents and profits, but as an executor. *Potts* v. *Leighton*, 15 Ves. 273.

3. It is the duty of the receiver, according to his engagement, to pay in his balances even upon his own application. *Ibid.*

4. Formerly a receiver was never permitted to lay out money without a pre-

vious order of the court; but, according to the present practice, where a receiver has laid out money without such previous order, a reference is directed to the Master, to inquire whether the transaction is for the benefit of the parties interested, and if found to be so, the receiver is allowed the money so laid out. *Tempest* v. *Ord*, 2 Mer. 55.

5. Although the manager of a West India estate, to be entitled to commission, must be resident in the island where the estate is situated, yet he is entitled to be allowed what he has really paid to others for the management, provided such payments be reasonable, as to which, if disputed, an inquiry will be directed. *Forrest* v. *Elwes*, 2 Mer. 68.

6. The receiver of the profits of a colliery, paying a creditor on the colliery with a bill of exchange, which was not honored, the colliery remains liable to the payment of the original debt. And the receiver being about to pass his accounts, in which accounts he took credit for the receipt given by the creditor, on the payment by bill, and a balance being due on such accounts to the receiver, who had become a bankrupt, the creditor, on giving up the bill, was ordered to be paid out of the balance payable to the receiver. *Tempest* v. *Ord*, 1 Mad. 89.

7. Receivers, being bound by recognizance to account regularly, or when called on, are considered as officers of the court, and are obliged to account on application by petition or motion. *In the matter of Burke*, 1 B. & B. 74.

8. A receiver is not entitled to any compensation for his trouble in attending a survey of the minor's estates, where no order is made or 1 attendance. *In the matter of Ormsby*, 1 B. & B. 189.

9. When a loss arises from the default of a receiver appointed by the court, the estate must bear it. *Hutchinson* v. *Lord Massereene*, 2 B. & B. 55.

V. Discharge of.

1. A receiver of rents of estates, conveyed to secure an annuity, discharged on payment and acceptance of the original price of the annuity, which appeared to have been granted for the life of the grantor, in consideration of six years purchase, and very extensive and oppressive powers being given to the annuitant and his trustees. *Davis* v. *The Duke of Marlborough*, 2 Wil. 151. 2 Swan. 108.

2. And although defendants, prior incumbrancers, opposed the discharge. *Ibid.* 2 Swan. 168.

VI. Sureties.

1. A surety for a receiver is entitled to stand in the place of the receiver, to be paid sums ordered to the receiver out of funds in court, in respect of disbursements made by him, the money for making such disbursements having been advanced by the surety, and that giving him therefore a lien upon the money ordered to be paid to the receiver. *Glossop* v. *Harrison*, Coop. 61. 3 V. & B. 134.

2. The recognizance of a surety for a receiver being estreated, and an action brought against such surety, an application was made by him for a reference to see what was due, and for an order for payment by instalments, and for an injunction to stay proceedings at law: an order, by consent, was made accordingly, on paying the costs of the application, and of proceedings consequent on the order. *Walker* v. *Wild*, 1 Mad. 528.

VII. Practice.

1. The Master's judgment in the appointment of a receiver is not absolutely conclusive: but the court interferes with reluctance. *Wynne* v. *Lord Newborough*, 15 Ves. 283.

2. The court will not appoint a receiver of an infant's estate, where there is no bill filed. *Ex parte Mountfort.* 15 Ves. 445.

3. A receiver cannot be appointed without mortgagees being before the court, if a mortgage appears upon the face of the pleadings. *Price* v. *Williams*, Coop. 31.

4. The appointment of a receiver is for the benefit of incumbrancers, only so far as expressed to be for their benefit, and as they choose to avail themselves of it. *Gresley* v. *Adderley*, 1 Swan. 579.

5. A receiver, appointed by the court, is appointed on behalf of all parties. *Davis* v. *The Duke of Marlborough*, 2 Swan. 118.

6. A stranger cannot propose a re-

ceiver to the Master; and where the parties interested neglected for a month to propose a proper person, but accounted for such neglect upon exceptions to his report, it was referred back to the Master to review his report, and give the trustees an opportunity of making their proposal. *Attorney General* v. *Day*, 2 Mad. 246.

7. Whether, upon such neglect, the Master himself can appoint a receiver— *Quære.* *Ibid.*

RECOVERY.

I. Where valid.

1. Equitable recovery was held valid, though the tenant in tail was not at the time in the actual receipt of the rents, but which the trustee paid over to other persons under a decree afterwards reversed. *Lord Grenville* v. *Blyth*, 16 Ves. 224.

2. There is no analogy between a legal and an equitable recovery, with reference to possession, either with, or adverse to, the title. To make a legal tenant to the *præcipe*, it is necessary there should be possession by seisin in fact, or in law, otherwise no legal freehold is acquired; but in equitable recoveries, as it is not the object, nor can ever be the effect, of the conveyance to transfer the possession but only to pass the equitable interest, if the tenant has a sufficient equitable interest, viz. an equitable estate tail, the recovery is well suffered. *Ibid*, 16 Ves 230.

3. There may be a good equitable recovery, where nothing but equitable interests interpose between the legal estate and the ulterior equitable interest. *Wykham* v. *Wykham*, 18 Ves. 419.

II. Operation of.

1. Where a father is tenant for life, with remainder to his son in tail, and the son, upon his marriage, by lease and release, conveys his estate to trustees in strict settlement, but sometime afterwards joins with his father in making a mortgage of the same estate, and suffers a recovery to the use of the mortgage; held, that the recovery shall, notwithstanding, enure first to the uses of the marriage settlement. *Cheney* v. *Hall*, 2 Eden, 357.

2. The vill of B. being part of the parish of B., a recovery is suffered of the tithes of the parish, the deed making the tenant conveying the tithes of the vill, the tithes of the vill pass. *Gibson* v. *Clark*, 1 J. & W. 159.

3. Equitable estates may be barred by an equitable recovery, if there is an equitable tenant to the *præcipe*. *Wykham* v. *Wykham*, 18 Ves. 418.

4. Equitable estate in remainder, though united with the legal fee in trust to secure the limitations, may be barred by an equitable recovery. *Ibid.*

III. Where decreed.

1. No case has gone so far as to compel a father to procure his son to join in a recovery. *Howel* v. *George*, 1 Mad. 7.

REMAINDER.

I. Vested or contingent.

1. It is a certain rule of law, that if such a construction can be put upon a limitation, as that it may take effect by way of remainder, it shall never take place as a springing use, or executory devise; and therefore a limitation in a settlement to trustees to the use of A., the settlor for life, remainder to B., his intended wife, for life, except as thereafter

excepted; remainder to the heirs of the body of A. begotten on B.; remainder to A., and his heirs, with a proviso, that if A. should die, and leave such issue as aforesaid, not making otherwise a provision for such child or children in his lifetime, the said trustees should stand seised of one moiety, from and after the decease of A., to the use of such child, or children" was held to be a contingent remainder, and not a springing use, and therefore was barred by a fine levied by A. and B. *Carwardine* v. *Carwardine*, 1 Eden, 27.

2. Limitation of a leasehold estate in a marriage settlement afte the decease of husband and wife, in trust for such child or children as they should appoint; and, in default of appointment, to all and every the child and children equally: held to be a vested remainder, which opened to take in the issue, as they came *in esse*. *Lawrence* v. *Maggs*, 1 Eden, 453.

3. Devise to trustees, and their heirs in trust, to receive the rents, &c. till A. should attain twenty-one; and immediately after he shall attain twenty-one, to convey to the use of A. for life; and from and immediately after the determination of that estate by forfeiture, or otherwise, in his life, to trustees to preserve, &c. and after his decease to the use of his first and other sons in tail male; and for default of such issue, or in case of the death of A. before twenty-one, upon other similar trusts. A. takes a vested remainder for life after an estate in the trustees, for so many years as his minority may last. *Stanley* v. *Stanley*, 16 Ves. 491.

4. A., in a conveyance to uses, reciting that he was desirous that certain estates, derived from his mother's family, should remain in the family and blood of S. R. his maternal grandfather, in consideration of his natural love and affection to his relations, the heirs of S. R. and to the intent that the said estates might continue in the family and blood of his late mother on the side of her father, settles them to the use of himself for life, remainder to the heirs of his body; for default of such issue, as he should appoint; and for default of appointment, to the use of the right heirs of S. R. with a power of revocation and new appointment. The ultimate remainder is contingent, and will vest in the person who happens to be the right heir of S. R. at the expiration of the estates previously limited. *Marquis Cholmondeley* v. *Lord Clinton*, 2 J. & W. 1. Overruling the decision of Sir W. Grant, M. R. S. C. 2 Mer. 173.

5 If the time at which a remainder in a deed is to vest, is not ascertained by the limitation itself, it vests immediately, in consequence of the legal presumption in favor of vesting estates; but that presumption may be rebutted or controlled by intention, collected from the recital of any other part of the deed. *Ibid*, 2 J. & W. 81.

6. The effect of a limitation in a deed which, taken by itself, would, *prima facie*, create a vested remainder, will be controlled, a contrary intention being clearly manifested. *Marquis Cholmondeley* v. *Lord Clinton*, 2 J. & W. 113.

7. The question, whether a power of appointment suspends the vesting of remainders subsequently limited, is set at rest by the later authorities. *Ibid*, 2 J. & W. 131.

8. Limitation in a settlement, declaring the uses of a copyhold to the use and behoof of the first male issue lawfully begotten by the settlor, who should attain the age of twenty-one, and to the heirs and assigns of such male issue for ever, charged and chargeable, &c.; and for default of such male issue, to the use and behoof of all and every the daughter and daughters of the settlor lawfully begotten, and to their several heirs and assigns for ever, to hold as tenants in common, discharged of any further or other limitation over, and for default of such issue, then over. This is a contingent limitation in fee simple to the daughters, which vested on their coming into existence: and, upon their death, the contingent limitation of the inheritance to them descended on their heirs, who were therefore held entitled, in exclusion of the devisees of the settlor. Whether the estate thus vested in the daughter, would have opened again in favor of an after born son—*Quære*. *Hampson* v. *Brandwood*, 1 Mad. 381.

II. When and how barred.

1. *Quasi* tenant in tail of a freehold lease for lives may, by surrendering the old lease, and taking a new one to himself, bar the remainders over. *Grey* v. *Mannock*, 2 Eden, 339.

2. A *quasi* tenant in tail, of a freehold lease for lives, may, by surrendering the old lease, without the trustee's joining, and taking a new lease to him and his heirs, bar the remainderman, notwith-

standing there are prior existing trusts at the time of such surrender, which were not disturbed. *Blake* v. *Blake*, 1 Cox, 266.

3. The case was subsequently brought into the court of Chancery, and argued before the Vice-chancellor, Sir Thomas Plumer who decided it in the same way, dismissing the bill with costs. *Blake* v. *Luxton*, Coop. 178.

4. A *quasi* tenant in tail of a lease for lives, cannot bar the remainders over by will merely. *Ibid*, Coop. 185. *Dillon* v. *Dillon*, 1 B. & B. 77.

5. A tenant for life of an estate *pur auter vie*, and trustee in the will, can by deed, jointly with the remainderman in tail, bar the remainders over. *Osbrey* v. *Bury*, 1 B. & B. 53.

6. Trustees to preserve contingent remainders are honorary trustees; and cannot be compelled to join in destroying them. *Biscoe* v. *Perkins*, 1 V. & B. 492.

7. Trustees, to preserve contingent remainders, will be restrained in Equity from barring the remainders they were appointed to support. *Osbrey* v. *Bury*, 1 B. & B. 53.

REPLEVIN.

1. An application to quash a writ of replevin, issued to try a right to stop goods *in transitu*, refused. *Farrell* v. *Beresford*, 1 B & B. 328.

2. Where a fair legal title is to be tried, a writ of replevin does not improvidently issue. *Ibid*, 1 B. & B. 330.

3. An action of replevin may be maintained for goods distrained under a warrant from commissioners, authorised by act of Parliament to levy rates for specific local purposes with power of distress. *Attorney-General* v. *Brown*, 1 Swan. 304.

SALE UNDER DECREE.

I. Particulars and Conditions.

1. By a General Order of 24th March, 1814, the solicitor for the party prosecuting any decree or order of the court for sale, shall be at liberty, in cases which the Master shall think it fit, to print and disperse as many particulars as shall be thought beneficial under the direction of the Master, in whose office such sale shall be, paying sixpence per side for so many printed copies as there shall have been actual bidders at the sale, and no more, and that such payment shall be allowed the solicitor, upon taxation of his costs. 2 V. & B. 417.

2. At a sale by order of the court a reserved bidding allowed to be made one of the conditions, the Master to fix the amount, and to use his discretion in communicating it to the parties or their solicitors *Jervoise* v. *Clarke*, 1 J. & W. 389.

II. Deposit or Purchase Money.

1. The deposit made upon opening a bidding, is considered as part of the purchase money paid, and not as a pledge, although on the event of the depositor not being reported the best bidder, it must be returned to him; and therefore where the deposit is laid out in the public funds, which rise between the time of the deposit, and the time when the depositor is confirmed the purchaser, the estate will have the benefit of the rise. *Ambrose* v. *Ambrose*, 1 Cox, 194.

2. Nor is such depositor entitled to the dividends accruing between the time of the deposit and the completion of the purchase, but only to interest on the de-

posit at four *per cent.* *D'Oyley* v. *Countess of Powis*, 1 Cox, 206.

3. Ten *per cent.* is to be deposited upon opening biddings. *Anon.* 3 Mad. 494. *Gibbons* v. *Howell*, *Ibid*, (*n*).

4. Certain timber trees were ordered to be sold before the master, the purchase money to be secured by recognizances, and payable by certain instalments at given periods; the purchasers being desirous of paying the purchase money immediately, on being allowed a discount, an order was made for that purpose, the defendants consenting. *Sitwell* v. *Sitwell*, 4 Mad. 183.

III. Opening Biddings.

1. A mere advance of price is not alone sufficient to open biddings after confirmation of the Master's report, but where an advance of £2000 upon £28,500 was offered, and it appeared that a mistake had been made in the particulars before the Master, and that one of the parties confirming the report had been steward of the family, and knew more of the estate than was communicated at the sale, the biddings were opened. *Countess Gower* v. *Earl Gower*, 2 Eden, 348.

2. Biddings may be opened upon a second application by the same person, where the purchaser does not appear upon notice. *Preston* v. *Barker*, 16 Ves. 140.

3. A re-sale, on opening the biddings, producing a considerable increase of price, is no ground for giving costs to the person who opened the biddings. *Trefusis* v. *Clinton*, 1 V. & B. 361.

4. In a creditor's suit, biddings were opened upon an advance of £500 upon £10,000, the advance being paid into court, and the discharged purchaser having his expenses. *Brooks* v. *Smith*, 3 V. & B. 144.

5. A person present at a sale will not be permitted to open biddings, as it would deprive the sales by the court of the full benefit of the spirit of competition. *M'Culloch* v. *Cotbatch*, 3 Mad. 314.

6. If one, who has moved to open biddings, does not draw up his order and pay the deposit, another person may move to open the biddings, upon notice to the party who first moved, but the order cannot be treated as a mere nullity, so as to allow such motion without notice. *Gibbons* v. *Howell*, 4 Mad. 52.

7. Biddings will not be opened, unless an advance is offered of at least £40. *Farlow* v. *Wieldon*, 4 Mad. 460.

IV. Set aside or relieved against.

1. Where a real estate, devised in strict settlement, subject to debts, was sold under a decree, for the payment of debts, and the sale was effected by collusion between the creditors and tenants for life, under a suit instituted by a remainderman, whose estate had since fallen into possession, the sale was declared to be made subject to the trusts of the will. *Manaton* v. *Molesworth*, 1 Eden, 18.

2. If an estate is sold before a Master, when the purposes of the decree did not require it, the sale shall be set aside, although the reports of the several purchasers have been confirmed; but the purchasers must be fully reimbursed all their expenses out of pocket: but whether inadequacy of price alone is a sufficient ground to set aside a purchase under a decree—*Quære*. *Prideaux* v. *Prideaux*, 1 Cox, 34.

3. Where the purchaser of an estate sold before the master, was at the time of the sale insane, and the fact is discovered before the Master's report, declaring him the highest bidder, is confirmed, the parties in the cause cannot move that the next bidder should be declared the purchaser, even if he consents to the motion; but the estate must be resold, and such bidder, if he consents, to stand a bidder at his former bidding. *Blackbeard* v. *Lindigren*, 1 Cox, 205.

4. That an estate was purchased under the directions of the court of Chancery, is a circumstance that cannot affect or prejudice the rights and interests of third persons The court employs its officers to investigate the titles of estates, but does not warrant them. *Toulmin* v. *Steere*, 3 Mer. 223.

5. The value of property sold under a decree would be ruinously depreciated, if after a great length of time, and without establishing a case of fraud or collusion, the title could be shaken, because more of the estate had been sold than was necessary, or because the purchase money, with the consent of the persons interested, had been misapplied. *Burke* v. *Crosbie*, 1 B. & B. 501.

6. A sale under a decree, all necessary parties being before the court, not set

aside after a lapse of time, though the surplus of the purchase money was directed to be paid to the tenant for life, there being no surplus, and the sale appearing to be properly conducted. *Lighthurne* v. *Swift*, 2 B. & B. 207.

7. A sale, under a decree of the reversion to the lessee, at full value, not set aside. *O'Brien* v. *Grierson*. 2 B. & B. 323.

SATISFACTION.

I. Of Debt or Covenant.

See also Tit. BOND, *ante*.
——— COVENANT, *ante*.

1. There is an important distinction between satisfaction and performance; in satisfaction the question is, was the thing done, intended as a substitute for the thing covenanted? but in performance the question is, has the identical act contracted for been done? *Goldsmid* v. *Goldsmid*, 1 Swan. 219. 1 Wil. 140.

2. Bond given to trustees conditioned that executors of the obligor should within six months after his decease pay £500, for the use of his natural son, to be paid at the age of twenty-one, and interest in the mean time for maintenance; afterwards the father gave, by will, £15,000 to trustees, to pay £200 *per annum*, for the maitenance of the son, till twenty-five, and then to pay him the principal, and if he should marry between twenty-two and twenty-five, and die, to pay the whole to the issue; but if he died unmarried before twenty-five, the whole over: this devise not a satisfaction of the bond. *Jeacock* v. *Falkener*, 1 Cox, 37.

3. On marriage, the husband covenanted, that if the wife should survive him, and there should be no issue, his executors should, within nine months after his death, pay to the wife £800 for her own use; but if there should be issue, then the £800 should be laid out by the trustees, and the interest paid to the wife for life, and after her death the principal divided among the children. There was no issue of the marriage: the husband by his will bequeathed one moiety of certain specific articles of his personal estate to his wife, which greatly exceeded in value the sum of £800. This bequest will not amount to a performance, or a satisfaction of the covenant, there being no evidence of such an intention, and it not being a performance in *specie*, and the gift of a residue being never considered as a satisfaction of a certain provision made for a wife on marriage, although it may in the event turn out more beneficial. *Devese* v. *Pontet*. 1 Cox, 188.

4. Implied satisfaction of a debt from a father to his child by a marriage portion of a greater amount. *Chave* v. *Farrant*, 18 Ves. 8.

5. The testator covenanted on marriage to pay £1000 to his wife, if she survived him, within six months after his decease; and by his will he gave her £1000, payable three months after his decease; and after certain specific legacies, directs the residue of his real and personal estate to be sold, and thereout paid all his debts and legacies; and to pay the interest on the residue to his wife for life, or until her second marriage, with a bequest over, on her death or marriage. The legacy is a satisfaction of the covenant; the provision for the wife by the settlement is not a debt within the sense in which the testator must be understood to use the word "debts" in his will.
Wathen v. *Smith*, 4 Mad. 325.

II. Of Portions.

1. A., upon his second marriage, settles land to raise £5000, for the children of the marriage: having four children by that marriage, he by his will, in which he takes no notice of the settlement, gives £1000 to each of them, as his and her portion: held, that they were not entitled to portions under both instruments, and that they were bound by their acceptance of the portions under the will. *Byde* v *Byde*, 2 Eden, 19. 1 Cox, 44.

2. By marriage settlement, settling the real estate to the uses of the marriage, a term was created for raising a sum of £10,000, for younger children, to be taken equally amongst them; four years after the marriage, the husband made his will, by which it appeared, that he had forgotten the existence of the marriage settlement; and then bequeathed to his younger child, if he should have but one, £5000; and if more than one, £2000 a-piece, the interest to be applied towards their maintenance and education; he subjected his personal estate to the payment of such portions, and if the personal estate should prove insufficient, he empowered his executors to raise them by mortgage of the settled premises. The provisions made by the will shall go in part satisfaction of what was provided by the settlement: and only £10,000 shall be raised. *Warren* v. *Warren*, 1 Cox, 41.

3. A bequest of a share in powder-works, to be made up to the value of £10,000, charged with an annuity of £20 for a life, is a satisfaction of a portion of £2,000. *Bengough* v. *Walker*, 15 Ves. 507.

4. Sir William Grant, M. R. doubted whether a portion of £2000 would be satisfied by the bequest of so much of the residuary estate as should be of the value of £2000. *Ibid*, 514.

5. Land will not be a satisfaction for money, nor money for land, not being *ejusdem generis*. *Ibid*, 512.

6. Portion by marriage settlement to be an interest vested at twenty-one, or marriage of the daughters, to be paid at the death of the surviving parent; and if the parents, or either, should in their, or either of their lifetime settle, give, or advance money, lands, &c. in marriage or otherwise, such advancement to be taken as part, or the whole of the portion, unless the contrary was declared in writing. A legacy by the father, payable at twenty-one, and another by the mother, are a satisfaction of the portion *pro tanto*. *Onslow* v. *Michell*. 18 Ves. 490.

7. The rule as to satisfaction of a portion by a legacy is, that there must be some express evidence, or at least a strong presumption, that it was intended as such; but a slight variation in the time of payment, as between twenty-one, and twenty-one or marriage, is immaterial. *Ibid*, 18 Ves. 493.

8. A child's share of personal property, under the statute of distribution, the father dying intestate, will not be considered an advancement by the father in his lifetime; but a provision by the will of the father will be so considered. *Ibid*, 18 Ves. 494.

9. To come within the rule of satisfaction of portion by legacy, the donor must be parent, or in *loco parentis*, and the first gift must be in nature of a portion. *Wetherby* v. *Dixon*, 19 Ves. 411. Coop. 281.

III. Of Legacy.

1. Where testator by his will devised to his niece eight dwelling houses, with remainders over, and gave her two several legacies of £500 each; and afterwards upon her marriage settled five dwelling houses, one of which was one of the eight devised, and the sum of £500, upon the husband and wife successively, and the issue of the marriage, this settlement is not an ademption or satisfaction of the devises and bequests made by the will. *Brown* v. *Peck*, 1 Eden, 140.

2. Testator by his will gave his son £500, and afterwards took him into partnership, giving him half the stock in trade, to the amount of £1,500. This advancement shall not be taken in satisfaction of the legacy. *Holmes* v. *Holmes*, 1 Cox, 39.

3. Where a legacy is given for a particular purpose, as a portion, and another bounty is afterwards given in the testator's lifetime, for the same purpose, it is considered as implying an intention in the testator to satisfy the legacy; but this being only a presumption may be rebutted by evidence shewing a contrary intention. *Debeze* v. *Mann*, 1 Cox, 346.

4. Where a father gives a sum to his daughter by will, and afterwards gives an equal sum as a portion, it is presumed to be an ademption. *Cookson* v. *Ellison*, 2 Cox, 220.

5. Satisfaction of a legacy by a parent to a child by portion of the same amount, with some circumstances of difference. *Hartopp* v. *Hartopp*, 17 Ves. 184.

6. In a case of satisfaction of a legacy by a portion, parol evidence will be admitted to show that the father was the author of the portion by joining in the

marriage settlement of his eldest son, for a charge in favor of his younger son, and giving up interests in consideration of it. *Ibid*, 17 Ves. 192.

7. The presumption of satisfaction of a legacy by a portion to a child, will not be raised upon a legacy not described as a portion, and where the legatee is the testator's natural daughter, but described in the will as the daughter of another man.
Ex parte Pye, } 18 Ves. 140.
——— *Dubost*, }

8. Where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, he is understood as giving a portion; and upon the feeling of leaning against double portions, if the father afterwards advances a portion upon the marriage of that child, it has been held to satisfy the legacy, either wholly or *pro tanto*, and in some cases to satisfy a legacy of a much larger amount *Ibid*, 18 Ves. 151.

9. The doctrine of presumption is, that a subsequent advancement is a satisfaction of a legacy to a legitimate child, but not to an illegitimate child; the latter being considered the case of a stranger. *Ibid*, 18 Ves. 152.

10. Presumption of satisfaction of a legacy, by a portion from a parent or person *in loco parentis*, is not applicable to the case of an illegitimate child, where the testator recognised no relationship between himself and the legatee, or used any expression from which it could be inferred. *Wetherby* v. *Dixon*, 19 Ves. 407. Coop. 279.

11. Upon proof of express declaration on the part of the testator, that a certain gift in his lifetime should be considered as part satisfaction of a legacy, it was held an ademption, notwithstanding the codicil, by which the gift was declared to be in part satisfaction of the legacy, remained unexecuted at his death, but the delay in the execution being accounted for. *Thellusson* v. *Woodford*, 4 Mad. 420.

12. If the gift had been for the absolute benefit of the legatee, and the legacy only of a qualified interest, an intention to adeem *pro tanto* might not have been implied. *Ibid.*

13. Testator bequeathed £400 to trustees, to pay the interest to his daughter, a married woman, for her sole use, during her life, and then to pay the same to her husband for his life, and after his death to pay the principal to their children on attaining twenty-one. It appeared by evidence, that the testator afterwards advanced £100 to the husband of his daughter, and that he gave a receipt for the same, expressing it to be as part of the portion of the wife, though it did not appear that the husband had at that time any knowledge of the legacy; and the testator inclosed the receipt, together with his will, in an envelope; and that since the wife's death, the husband had received interest on only £300 for many years. Held that the gift of the £100 was not satisfaction *pro tanto* of the legacy by the will. *Bell* v. *Coleman*, 5 Mad. 22.

14. Variance in a provision made by a settlement and will, may not amount to evidence of the satisfaction of a debt or covenant, but is always of the satisfaction of a legacy given as a provision. *Monck* v. *Lord Monck*, 1 B. & B. 303.

15. A legacy from a father to his "then unmarried daughter," held to be adeemed by a portion of equal amount, afterwards advanced by him on her marriage; as equity will not, where there is contradictory evidence, reject the presumption arising from the will and marriage settlement, and decide against the legal effect and operation that is to be attributed to them. *Dwyer* v. *Lysaght*, 2 B. & B. 156.

SEISIN.

1. Livery of seisin not having been made according to the terms of a joint power contained in a feoffment; and one of the parties, to whom the power is given to deliver seisin, refuses to execute it; whether authority can be given to deliver seisin as to part of the premises only.—*Quære*. *Attorney General* v. *Pearson*, 3 Mer. 416.

SEQUESTRATION.

I. Order for Sequestration.

1. Copy of order of sequestration. *Pope* v. *Ward*, 1 Cox, 194.

2. In the Irish Chancery, sequestration was the first effectual process, until the practice was in that respect reformed by Lord Redesdale. *Stackpoole* v. *Stackpoole*, 4 Dow, 222.

3. Order for sequestration made upon the return to a single *distringas* issued under a decree against a corporation for payment of costs. *Lowten* v. *The Mayor of Colchester*, 3 Mer. 543.

4. Such an order is only an order *nisi*, in the first instance. *Ibid.*

II. Where suspended.

1. Upon a petition by the defendant, praying that an order made for a sequestration against him for non-performance of a decree might be discharged for irregularity, he positively denying by his affidavit that he had been served with the order *nisi*, the court would not inquire into the alleged abuse of its process, until the defendant professed his readiness to obey the decree; but upon the consent of the plaintiff the sequestration was suspended for a fortnight, to give the defendant an opportunity of complying with the directions of the decree. *Shuttleworth* v. *Earl Lonsdale*, 2 Cox, 47.

2. The court of Chancery refused execution of a sequestration upon mesne process. *Knight* v. *Young*, 2 V. & B. 184.

III. Sequestrators.

(*a*) *Power and Duty of.*

1. As to the authority of commissioners under a writ of sequestration, to seize books and papers, &c. belonging to a corporation—*Quære*. *Lowten* v. *The Mayor of Colchester*, 2 Mer. 397.

2. Semble, that the commissioners, to whom a writ of sequestration is directed, have authority to break open doors in discharge of their office, by comparison with the proceeding under a commission of rebellion. *Ibid*, 2 Mer. 397.

3. A sequestrator being in possession of a rectory under a sequestration, issued by a creditor of the rector, a second creditor having obtained a subsequent sequestration, is entitled to an account in equity against the first sequestrator, and payment of the surplus after satisfaction of the first creditor, nor are prior incumbrancers, who have not obtained sequestration, necessary parties to the suit. *Cuddington* v. *Withy*, 2 Swan. 174.

4. The sequestrator of a benefice is bound to repair the vicarage-house and buildings, and is liable in the bishop's court for dilapidations. *Whinfield* v. *Watkins*, 2 Phil. 1.

5. The possession of a sequestrator is not to be disturbed without leave of the court. *Brooks* v. *Greathead*, 1 J. & W. 176.

IV. Property.

(*a*) *Liable to Sequestration.*

1. A salary to an equerry to one of the Royal Family is not a subject of sequestration. *Fenton* v. *Lowther*, 1 Cox, 315.

2. A sequestration lies against a pension to A., and his assigns, payable at the Treasury, when in the hands of the assignee. *M'Carthy* v. *Goold*, 1 B. & B. 387.

3. A sequestration does not lie against funded property, being a chose in action. *Ibid.*

4. There is a material difference between rents payable by tenants and funded property, as to the effect of sequestration;

in the former case, the order is to put a person into possession as steward or receiver, the tenants being directed to pay to the sequestrators only. *Ibid*,
2 B. & B. 390.

(*b*) *Disposition of, when sequestered.*

1. Goods sequestered on mesne process cannot be sold: but money so sequestered must, as of course, be paid into court. *Hales* v. *Shafto*, 2 Cox, 224.

2. Under a sequestration, the landlord is entitled to be paid arrears of rent. *Dixon* v. *Smith*, 1 Swan. 457.

3. Where lands are sequestered, the rents and profits are not vested in the plaintiff, but are in *custodia legis;* and there must be a further order before they can be applied for the benefit of the plaintiff: and if parties in the mean time come in by petition, and shew that the estate is mortgaged to them, they are entitled to the rents and profits in part discharge of their mortgage debt, after paying the costs of the sequestration, and of the application to the court, and the sequestrators must give up the possession to such mortgagees. *Walker* v. *Bell*,
2 Mad. 21.

4. If tithes are due in respect of the produce of land taken possession of by sequestrators, a motion for payment of the tithes out of the produce of the land paid in by them would be correct, for the sequestrators would not be justified in taking the produce of the land without paying the tithe. But the court refused a motion to pay out of such produce a composition for tithe, that not being a lien upon the land, but a mere personal demand, recoverable as such at law.
Dickinson v *Smith*, 4 Mad. 177.

5. Where the goods of a third person are seised by sequestrators, an order to examine *pro interesse suo*, will be made. And if the goods taken are found to belong to the party so applying, a reference to ascertain his damages will be granted. *Copeland* v. *Mape*, 2 B. & B. 66.

SHIP.

I. Sale or Mortgage of.

1. An assignment of a ship by way of mortgage, which is defective, by not having complied with the Registry Act, cannot be made good in equity. *Ex parte Bulteel*, 2 Cox, 243.

2. Upon the policy of the Registry Acts, the registry of a ship is conclusive evidence of the property, even against the claim of creditors upon a joint purchase and acts of ownership within the stat. 21 Jac. 1. c. 19, s. 10, 11. *Ex parte Yallop*, 15 Ves. 60.

3. There is a distinction between transfers by act of the parties, and by operation of law. *Ibid.*

4. The registry of a ship is conclusive evidence of the ownership, even between creditors, excluding all trusts created by acts of the parties, as payment of the purchase-money, where the purchase is made in the name of another: but there is a distinction as to trusts, arising by operation of law, upon bankruptcy or death.
Ex parte Houghton, } 17 Ves. 257.
——— *Gribble*, }

5. The bill of sale passes the absolute property in the ship at sea, subject only to be divested in case of the endorsement on the certificate of registry not being made within ten days after the return of the ship to port. *Dixon* v. *Ewart*,
3 Mer. 333. Buck, 94.

6. If, on the sale of a ship, there is no bill of sale or endorsement on the certificate of registry, no relief can be given in equity on the ground of accident or fraud. *Thompson* v. *Leake*,
1 Mad. 39.

7. The power of mortgaging a ship exists as fully since the registry acts as it did before, provided the requisites prescribed by the registry acts are observed; and where the ship was at sea at the time of the mortgage, an injunction was granted to prevent an improper endorsement on the certificate of the ship's registry. *Thompson* v. *Smith*, 1 Mad. 395.

8. The mortgage of a ship will be made by the usual bill of sale, containing in the same instrument a defeasance, or condition of retransfer on payment of the mortgage money. This bill of sale must contain the recital of the certificate as the act directs; must be fully endorsed on the certificate of registry, if the ship be in port; or if at sea, a full copy of it must be transmitted to the Custom-house. The form of endorsement will be the one prescribed by the act, but with the addition of the defeazance to express the true nature of the contract between the parties. There is nothing in the act to prevent such an addition being made to meet the exigency of the case. In the subsequent forms to be observed at the Custom-house, the defeazance will probably not be noticed either in the entry endorsed, or the oath, or in the memorandum made in the book of registers; but adhering simply to the form prescribed by the act, it will be registered as an absolute bill of sale: but neither the mortgagor nor mortgagee can suffer by that omission. *Ibid.*

9. Where the vendor of a share in a ship has executed a bill of sale and a receipt for the purchase-money, without its being in fact paid, a court of equity will give relief as well as discovery. *Ryle* v. *Haggie*, 1 J. & W. 234.

II. Stores or Repairs, Liability for.

See also Tit. Lien, *ante.*

1. Where mortgagees of a ship have their names inserted, with the real owners, in the registry, and without which their security could not be effectual, they are liable to creditors in respect of stores supplied for the use of the ship; and the possession of one owner is the possession of all. *Ex parte Mitchel,* 2 V. & B. 216. 1 Rose, 447.

2. For the repairs of a ship, the creditor has the liability of the master, who gives the order, and also of the owners, for whom the master is considered as the agent, unless such liability be excluded as to the one or the other of them by the express terms of the contract; and if a part owner gives the order, the liability attaches against them all, unless expressly provided against. *Ex parte Bland,* 2 Rose, 91.

See also *Stewart* v. *Hall,* 2 Dow, 29.

III. Freight or Cargo.

1. Where the master of a ship lets it on charter party to A., on behalf of the owner, who becomes bankrupt, and his assignees give notice to A, not to pay any further sums of money on account of freight to the master, this notice will affect A., as to all sums paid afterwards by him to the master, beyond what the master had actually paid, or stood engaged for on account of the ship at the time of the notice. *Wilkins* v. *Mure,* 1 Cox, 150.

2. Under an assignment of a ship, and her present and future cargo, freight, and earnings, by the owner, for securing to the assignees all monies which they had advanced, or might become liable to pay on account of the vessel and her cargo, which they had furnished the means of purchasing; the assignees, who were also the ship's agents, held entitled to retain a bill, which was given for the purchase of part of the homeward cargo, and was remitted, but not endorsed to them by the owner; notwithstanding he denied, that it was remitted in payment, and stated that they had not paid, and (contrary to the express understanding) had left him personally liable to some of the debts incurred in fitting out the vessel; and an injunction, which had been obtained by the assignees, restraining an action of trover for the bill, was continued until the hearing. *Curtis* v. *Auber,* 1 J. & W. 526.

SLAVE.

1. Bill by administrator for an account of personal estate, given by the intestate as a *donatio causa mortis* to a negro, who had been brought to England as a slave, was dismissed with costs. *Shanley* v. *Harvey,* 2 Eden, 126.

SOLICITOR AND CLIENT.

I. CONFIDENCE BETWEEN.

(a) *Communicating Client's Secrets.*

1. The court will prevent an attorney from communicating his client's secrets, or giving evidence of them, and if otherwise unable, even by striking him off the rolls. *Earl Cholmondeley* v. *Clinton,* 19 Ves. 268.

2. As to preventing the clerk of an attorney or solicitor from giving evidence of facts, come to his knowledge in that service—*Quære.* Distinction where he afterwards becomes partner. *Ibid,* 19 Ves. 272.

3. Whether the executor of an attorney can avail himself of the attorney's privilege, not to disclose the concerns of his client—*Quære. Fenwick* v. *Reed,* 1 Mer. 114.

4. The privilege of not answering facts, communicated by the client confidentially, is not the privilege of the attorney, but of the client; and if the client waves the privilege, the attorney cannot refuse to answer. *Moss* v. *Brander,* 1 Phil. 266.

5. A solicitor may, by his answer to a bill against him and his clients, refuse to discover any deeds or facts confidentially communicated to him; therefore, exceptions to his answer for insufficiency, in not making such disclosure, and relying on such defence, were overruled. *Stratford* v. *Hogan,* 2 B. & B. 164.

(b) *Solicitor acting for adverse Parties.*

1. The reason of the practice for one solicitor and clerk in court to be concerned for all parties, which practice is not to be approved of, is that it would tear the estate to pieces, for every creditor or legatee to interpose himself; but which cannot be done now without leave of the court. *Dyott* v. *Anderton,* 3 V. & B. 177.

2. A solicitor for one of the parties in a suit, cannot become the solicitor for the opposite party, though he is separated from the partnership which was so employed on the other side, and the remaining partner still continued so employed, and the deed of dissolution stipulated that he should not act as solicitor for the party he had left: so held on motion for an injunction to restrain such solicitor who had gone over from so acting. *Earl Cholmondeley* v. *Lord Clinton,* 19 Ves. 261. Coop. 80.

3. A solicitor who has acted for parties, defendants in a suit in Chancery, will not be restrained from acting in a cause by bill filed by some of those defendants, on behalf of themselves against others of them, the solicitor making affidavit, that he is not possessed of any secrets, which might be used to the prejudice of such other defendants, or knowledge of any facts unknown to his clients. *Robinson* v. *Mullett,* 4 Price, 353.

4. It appears to be necessary, that a solicitor in such a case should be shown to be possessed of knowledge of matters which might give him undue advantage, to found such a motion. *Ibid.*

(c) *Dissolving the relation.*

1. A client at law cannot change his attorney without leave of the court; but it is doubtful whether the solicitor can relinquish the suit, though not paid. *Cook* v. *Broomhead,* 16 Ves. 201.

2. Solicitors in partnership cannot dis-

solve their partnership as against their client, without his consent. *Earl Cholmondeley* v. *Clinton*, 19 Ves. 273. Coop. 87.

Cook v. *Rhodes*, 19 Ves. 273 (*n*).

II. CONVEYANCE, OR SECURITY TAKEN FROM THE CLIENT.

1. Purchase from his client by a solicitor, who was also trustee for the sale of the estate for payment of debts, confirmed upon the ground of his having attempted ineffectually to sell, of there being no fraud in the transaction, and of the purchase having been recognised and approved of by the *cestui que* trust. *Clarke* v. *Swaile*, 2 Eden, 134.

2. A court of equity, upon general principles of policy, will set aside any gift made by a client to an attorney, during the time when the attorney has in his hands the transaction of the client's affairs, and without any proof of actual fraud. *Welles* v. *Middleton*, 1 Cox, 112.

3. Upon principles of policy, no attorney shall be permitted to purchase any thing in litigation, of which litigation he has the management. *Hall* v. *Hallet*, 1 Cox, 134.

4. The court refused to set aside voluntary leases, obtained by an agent and attorney without fraud or misrepresentation, and dismissed complainant's bill with costs, as to those which were intended as a provision upon, and inducement to the marriage of defendant, and without costs as to others; the relation of the parties and circumstances, upon the general principles of public policy and utility, justifying inquiry. But where upon an issue it was found, that the full consideration was not paid for a lease, the court decreed it to be delivered up. *Harris* v. *Tremenheere*, 15 Ves. 34.

5. Beneficial contracts and conveyances, obtained by an attorney from his client, during the subsistence of such relation, and connected with the subject of the suit, and being also liable to the charge of champerty, were decreed to stand as security for what was actually due; and purchases from other persons as for the client, but conveyed beneficially to the attorney, were declared a trust for the client, although confirmed by a subsequent deed, such subsequent deed being executed under the same pressure, and called for under the covenant for further assurance. *Wood* v. *Downes*, 18 Ves. 120.

6. An attorney cannot take any thing for his own benefit from his client, save his demand, neither pending the suit nor at its close, nor until the relation and influence have ceased.

Wood v. *Downes*, 18 Ves. 127.
Montesquieu v. *Sandys*, 18 Ves. 313.

7. A reversionary interest was purchased by an attorney from his client, the proposal to purchase coming from the client, and there being no confidence between the parties upon that subject. The answer directly denied every charge of fraud and misrepresentation, confidence and knowledge on one side or ignorance on the other; although in the event the purchase proved advantageous, yet it is not such a purchase as the court of Chancery will set aside, and a suit for that purpose was dismissed, but without costs, the only incorrect circumstance, viz. that the receipt was taken as for money paid, though the consideration was by deduction from a bill of costs, not being relied upon by the plaintiff. *Montesquieu* v. *Sandys*, 18 Ves. 304.

8. In cases of purchases by attornies from their clients, upon representations on the part of the attorney, which, from knowledge acquired in the client's transactions, he knew to be false, or which he rashly made, not knowing to be true, relief is given upon the principle of misconduct or gross negligence. *Ibid*, 18 Ves. 308.

9. Whether a deficiency of one-third of the value, with a plain breach of duty as an attorney, &c. is not sufficient to set aside a purchase from his client—Quære. *Ibid*, 18 Ves. 312.

10. Though the court of Chancery will open a solicitor's bill, and order taxation, after several years, and a security given or even payment made upon gross errors, fraud, or under pressure; yet where nothing appears but a trifling inaccuracy, and under other favorable circumstances, the court would not restrain proceedings upon a security, obtained while the business was depending. *Cooke* v. *Setree*, 1 V. & B. 126.

11. Generally, a bond, taken by a solicitor from the client, in the progress of a cause, is a security only for what may be found justly due on taxation of the bill. *Plenderleath* v. *Fraser*, 3 V. & B. 174.

12. An attorney may contract with his client, provided no advantage be taken

of the confidential relation. If he be employed to sell, and chooses to deal for the estate to be sold, he must withdraw from the connexion, or put himself completely at arm's length, and show, if the contract be questioned, that he has given the same advice for the benefit of his client, as he would have done if the sale had been to a third party. If employed as a general land agent, he is bound, if he purchases any of the estates, in respect of which he is agent, to communicate to his principal all the knowledge acquired by him as agent, of the real value of the estate. But the mere circumstance of his being the attorney, does not prevent his entering into a valid agreement with his client; and, therefore, a bill for specific performance having been dismissed by the Irish court of Exchequer, apparently on the ground that the agreement was one between attorney and client, the decision was reversed on appeal. *Cane* v. *Lord Allen*, 2 Dow, 289, 296, 299.

13. Where trust money was to be laid out in the purchase of lands in fee simple, to be conveyed to a father for life, remainder in tail to his first and other sons; the father purchased a leasehold interest, and obtained money from the trustees, out of the trust fund, to pay for it, and afterwards leased part of the purchased premises to the attorney, who managed the purchase for him, and had notice of the misapplication of the trust money. This is a fraud in the attorney, who took advantage of the situation of the father with respect to the property, and the son shall have the premises discharged of the lease. *Phayre* v. *Peree*, 3 Dow, 117.

14. A solicitor takes a mortgage of his client's estate in litigation, as a security for costs. This is a transaction which courts of justice will look at with great jealousy. *Daly* v. *Kelly*, 4 Dow, 430.

15. Grant of a leasehold interest from client to attorney, a near relation, in consideration of money secured by bond afterwards released, and in consideration of being indemnified from all costs, &c. if the title should be impeached, the attorney re-demising to the client at a nominal rent, for the lives of the client and his wife. This is not such a dealing between attorney and client, as can be impeached by the next of kin of the client, who acquiesced in it, and in an answer recognised as being fair. *Bellew* v. *Russell*, 1 B. & B. 96.

16. Equity will not permit an attorney to purchase from his client while the relation subsists. *Ibid*, 1 B. & B. 104.

17. All dealings between attorney and client are anxiously scrutinised in equity, in order to protect the client from his own acts, done under the influence or ascendency, which an attorney acquires over him. *Ibid*, 1 B. & B. 107.

18. An attorney, having himself, in quality of banker to his client received money, which he has procured to be advanced to such client, on mortgage of his estates, by a term of years assigned, for which he gives his accountable receipts, and from which he discharges himself by money actually paid to, and on account of the principal, and which appears by an account settled and signed by both parties, will yet not be allowed to charge the mortgaged estates with any sum, *ultra* what has been actually advanced by the mortgagees in money, although he seek to charge the estates with no larger sum than the express amount which the term is created to raise, and although there are unsatisfied judgments recovered by him against his client, outstanding at the time when the mortgagor seeks to have the possession of the mortgaged premises delivered up to him, such judgments being held not to be tackable to the mortgages. *Sir Watkin Lewes* v. *Morgan*, 5 Price, 42.

Morgan v. *Sir W. Lewes*, 4 Dow, 29.

19. The attorney not allowed to take timber felled on the mortgaged estates in execution for his private debt, the timber being part of the security of the mortgagee's, and the produce goes in discharge of the mortgage account. *Ibid.*

20. Instruments, as bonds, will not, under such circumstances, be permitted to stand as a charge on the mortgaged estates, although expressly made part of the consideration in the mortgage deed, unless it can be shewn that the consideration of such bonds have been actually paid in money by the mortgagee to the mortgagor. *Ibid.*

21. Under a decree for an account of all transactions between the parties, the court, if the circumstances developed in the course of the investigation appear to warrant it, will order that the deputy remembrancer take a separate account, and report it specially, as to the mortgage transactions; and if the mortgage be found to have been satisfied, however less

the amount may be than the money actually advanced by the attorney, the mortgagor will be admitted to redeem; or where the whole mortgage money had not been satisfied, then upon paying what shall not have been already paid. Baron Wood, *contra*. *Sir W. Lewes* v. *Morgan*, 5 Price, 42.

III. Solicitor, Misconduct of.

(a) *Acting without Authority.*

1. Where the name of a plaintiff is made use of without authority, he must nevertheless remain liable to the costs; but the solicitor will be ordered to repay such plaintiff his costs and expenses. *Dundas* v. *Dutens*, 2 Cox, 235.

2. If the name of a party is made use of as a petitioner, by the solicitor, without his knowledge, the party cannot insist upon it at the hearing, as a reason for not going into the matter of the petition; the proper course is to move against the solicitor as for a misdemeanor: and the court intimated in this case, that if the party did not apply against the solicitor criminally, his affidavit would not be attended to. *Ex parte Stuckey*, 2 Cox, 283.

3. If a solicitor files a bill, without authority from his client, the client may have the bill dismissed, and the solicitor will be ordered to reimburse him the expenses occasioned by its being so filed. Though a general authority is sufficient for a solicitor to defend a suit, there must be a special authority to institute one, and such authority must be in writing. *Wright* v. *Castle*, 3 Mer. 12.

4. The names of persons made plaintiffs in a bill, without their authority, ordered to be struck out with costs, to be paid by the solicitor; their application, after they were apprised of the fact, having been made without delay. *Wilson* v. *Wilson*, 1 J. & W. 457.

5. Semble, that where persons have been made plaintiffs without their consent, and after the fact has come to their knowledge, have acquiesced for a considerable period, their names will not, on their application, be struck out of the bill. *Ibid.*

(b) *Breach of Duty.*

1. Where a solicitor refuses to appear for the defendant, at the hearing of the cause, pursuant to his undertaking, he will be ordered to pay all costs occasioned by such refusal, and of the application to the court. *Cooke* v. *Broomhead*, 16 Ves. 133.

2. A solicitor, falsely representing that an injunction was granted, would be liable to damages, an indictment, and to be struck off the roll. *Kimpton* v. *Eve*, 2 V. & B. 352.

3. In a cause which has been much delayed, the court will not, at the expense of further delay, relieve the plaintiff from the consequences of the gross neglect of his solicitor. *Turner* v. *Turner*, 1 Wil. 472. 1 Swan. 156.

IV. Solicitor's Accounts.

(a) *Taxation of.*

See also Tit. Bankruptcy, VII. (*n*). *ante*.

1. In a suit against an attorney, for the purpose of having his bills of costs on the plaintiff taxed, and for an injunction against his proceeding at law in the mean time; defendants moved that the costs might be taxed as between attorney and client, but the court said that the rules of taxation of costs, as between attorney and client, did not apply, when they appear in the court as party and party in a cause; and that these costs, therefore, must be taxed as between party and party. *Spelman* v. *Woodbine*, 1 Cox, 49.

2. A solicitor in the cause may move for an order to tax his own agent's bill. *Conner* v. *Hake*, 2 Cox, 173.

3. The taxation of a solicitor's bill, in the House of Lords, is through recognizance. *Ex parte Wheeler*, 3 V. & B. 22.

4. The court of Chancery has not jurisdiction to order the taxation of a solicitor's bill of costs for obtaining an act of Parliament, there being a difference between the costs of soliciting a bill, which any one may do, and the costs of an appeal to the House of Lords. *Ex parte Wheeler*, 3 V. & B. 21.

5. The court will not direct the taxation of a solicitor's bill, after payment and long acquiescence, unless there are very gross charges, and distinctly pointed out; and therefore, when a bond was given, and the money paid under a judgment upon a verdict, taxation was refused, though there were charges improper, but not

amounting to fraud. *Plenderleath* v. *Fraser*, 3 V. & B. 174.

6. The court of Chancery has no jurisdiction to order the taxation of a solicitor's bill of costs, for business done in a cause in the court of Great Sessions in Wales, where there is no detention of title deeds, nor any other matter besides costs in dispute. *Ex parte Partridge*, 2 Mer. 500.

7. A solicitor will not be allowed to interpose the payment of his bill of costs by a trustee or executor, between himself and the *cestuis que* trust, when he was at the time aware that the person paying was only trustee; and the *cestuis que* trust, whose funds are to bear the expenses of the suit, have a right to the use of the name of their trustees and executors, giving them proper indemnity, to obtain a taxation of the solicitor's bill; and a release to the executors cannot avail against the right of the party to have the bill taxed under the statute. *Hazard* v. *Lane*, 3 Mer. 285.

8. Pending an order for the taxation of a solicitor's bill, and staying proceedings at law till the report was made, the solicitor died; and no measures having been taken for continuing the taxation, his administratrix, proceeding at law against the client, was held not to have committed a contempt. *Houlditch* v. *Houlditch*, 1 Swan. 58. 1 Wil. 17.

9. Solicitor's bill for superseding a commission of bankruptcy was filed and afterwards referred to the Master for taxation; if more than one-sixth is taken off by the taxation from the bill, as delivered to the Master, the solicitor must pay the costs of taxation. *Ex parte Heatherway*, 2 Mad. 329.

See also *Ex parte Inman*, Buck, 129.

10. Whenever items in a solicitor's bill of costs would be properly taxable, if the facts alleged by the solicitor were true, and the items are deducted because he has not established these facts, the amount will reckon as a deduction in the question of costs of taxation; therefore, where items were charged in respect of the defence of a third person at the plaintiff's request, and the solicitor not showing that he was employed in such defence by the plaintiff, the items were struck out: held, that such items were to be computed among the deductions, for the purpose of determining upon whom the costs of the taxation were to fall. *Rigby* v. *Edwards*, 5 Mad. 20.

11. A party, who by agreement has paid the bill of costs of another party, cannot apply for a taxation. *Langford* v. *Nott*, 1 J. & W. 291.

12. A settlement of a bill of costs, during the continuance of the suit, while the client has no professional adviser except the solicitor himself, is not a bar to its taxation. *Crossley* v. *Parker*, 1 J. & W. 460.

13. Charges by a country solicitor for attending the cause in London, are to be allowed in some cases, but the circumstance of their being undertaken by the direction of the client is not alone a sufficient ground for allowing them, as the solicitor himself is better able to judge of their necessity. *Ibid.*

14. Solicitor's bill of costs for business done wholly in the house of Lords, cannot be referred for taxation, the officer of the court having no means to enable him to tax such a bill. *Williams* v. *Odell*, 4 Price, 279.

(*b*) *When opened and relieved against.*

1. Objection on appeal against a decree made in 1812, that it ordered payment of a sum found due and directed to be paid with interest by a decree made in 1766 on the foot of accounts settled 1756 and 1761, between attorney and client, in which the attorney charged interest upon interest, with interest upon the consolidated sum from 1766 to 1812; that sum acknowledged by the objecting party, by solemn deed in 1783, to be due with interest; held that the objection came too late, though if it had been recently made for the purpose of opening the accounts, it could hardly have failed of being effectual. *Rosse* v. *Sterling*, 4 Dow, 442.

2. Where an attorney procured money from others, for his client, on mortgage, and had dealings on his own account with his client, ordered first a separate account to be taken between the client and mortgagees, and then a general account between the attorney and client. *Morgan* v. *Sir Watkin Lewes*, 4 Dow, 29.

Sir Watkin Lewes v. *Morgan*, 5 Price, 42.

3. Settlement of accounts between solicitor and client not conclusive, the nature of their connection excepting their accounts from the operation of the general rule in equity. Therefore, accounts settled and signed, and where vouchers are de-

livered up and a note given for the balance, will be re-opened at a very considerable distance of time after such settlement, where the parties stand in the relative situation to each other of solicitor and client, agent and principal, and where the balance is in favor of the former. *Ibid.*

4. On taking such re-opened accounts before the Deputy-Remembrancer, it will not be sufficient, between such parties, that bonds are produced in evidence to prove that the debt for which they were executed, existed; and the obligee will be required to give evidence of the actual payment in money of the full consideration expressed. But in a case of so great length of time, the party will be allowed to make oath of the existence of any voucher which may not be forthcoming on re-opening such accounts. *Ibid.*

V. Lien for Costs.

1. An order was obtained, establishing the solicitor's lien for costs, upon assets appropriated to the client, but subject to securing a debt which was afterwards paid by the real estate of the testator. This order was reversed, being inconsistent with the decrees in the cause.

Taylor v. *Popham*, } 15 Ves. 72.
Monke v. *Taylor*, }

2. In equity, where costs may be due to both parties, and sums to be paid to each, the demands of both parties are arranged according to their equities, and the lien of the solicitor is only upon the balance under such arrangement. *Ibid.*

3. In bankruptcy, as in a cause, the court does not interpose the lien of the solicitor further than upon the clear balance, which is the result of the equity between the parties. *Ex parte Rhodes*, 15 Ves. 541.

4. An agent in town has a lien upon the papers in his hands for what is due to him, as agent in the cause, from the solicitor in the country. *Ward* v. *Hepple*, 15 Ves. 297.

5. Attorney has a general lien on papers in his possession; and such lien is limited to the occasion on which papers were delivered, only upon special agreement. *Ex parte Sterling*, 16 Ves. 258.

6. Where a solicitor enters into a special contract, or takes security for the payment of costs, he loses his lien on the papers. *Cowell* v. *Simpson*, 16 Ves. 275.

7. It is the established rule of lien, and the practice, that the attorney may give notice to the defendant not to pay over money, under a decree or judgment, without satisfying his costs. *Ibid.* 16 Ves. 281.

8. Deeds delivered to a solicitor for a particular purpose, and, after that had failed, permitted to remain in his hands, will be subject to the general lien. *Ex parte Pemberton*, 18 Ves. 282.

9. An attorney's general lien does not extend to the original will of his client; and he cannot refuse to produce it for the purpose of establishing the character of all persons claiming under it. *Georges* v. *Georges*, 18 Ves. 294.

10. A solicitor is bound to produce the papers of his client, for him, or, in case of his bankruptcy, for his assignees, (though not employed by them in the cause,) for the purpose of which such solicitor received them; but he may refuse, without payment, to part with them, or produce them in any other matter. *Ross* v. *Laughton*, 1 V. & B. 349.

11. A solicitor refusing to proceed in a cause, and having possession of the papers, notwithstanding his lien for costs, must allow the new solicitor to see them at all reasonable times, and must himself attend with them before the Master, or suffer the new solicitor to have them for that purpose. A solicitor cannot, by virtue of his lien, prevent the king's subject from obtaining justice. *Commerell* v. *Poynton*, 1 Swan. 1.

12. The court will not order the personal representative of a deceased solicitor to deliver the papers in the cause to another solicitor, without payment, or security for payment, of the solicitor's bill. Semble, that the summary jurisdiction of the court extends to the representatives of a solicitor. *Redfearn* v. *Sowerby*, 1 Wil. 96. 1 Swan. 84.

13. Where an executrix having an annuity under the will, was indebted to the estate, the court held that the solicitor had a lien for his taxed costs upon any payment of the annuity to which the executrix might be entitled after payment of what was due by her to the estate. *Skinner* v. *Sweet*, 3 Mad. 244.

14. Semble, a solicitor has no lien

on a fund decreed to his client, beyond his costs in that suit. *Lann* v. *Church*, 4 Mad. 391.

15. A solicitor has a lien upon costs ordered to be paid to his client personally upon a petition in bankruptcy, although there be no fund in court; nor can the client release the benefit of the order to the prejudice of the solicitor. *Ex parte Bryant*, 1 Mad. 49. 2 Rose, 237.

16. The lien of a solicitor for his costs is upon the balance between the parties. *Shine* v. *Gough*, 2 B. & B. 34.

17. Where the town agents of a country solicitor (since a bankrupt), had received papers from him belonging to his client, for the purposes of the client's business, they have a lien on them as against the client or his assignees, for the amount of money due from him to the solicitor, and from the solicitor to them on account of business done in the cause. *Bray* v. *Hine*, 6 Price, 203.

STATUTE.

I. Construction or Operation of.

1. General words in a statute must receive a general construction, unless there is in the statute itself some ground for limiting and restraining their meaning by reasonable construction, not by arbitrary addition or retrenchment. *Beckford* v. *Wade*, 17 Ves. 91.

2. The preamble of an act of Parliament, though it may assist ambiguous words, cannot control a clear and express enactment. *Lees* v. *Summersgill*, 17 Ves. 508.

3. The construction of acts restraining alienation, must be the same in courts of law and equity; but there may be a peculiar principle which the court of Chancery will apply to the acts, though it agrees in the construction with the court of law. *Davis* v. *The Duke of Marlborough*, 2 Swan. 133.

4. Where a general act of Parliament confers immunities which expressly exempt certain persons from the effect and operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law; *expressio unius est exclusio alterius*. *Warden of St. Paul's* v. *The Dean of St. Paul's*, 4 Price, 65.

5. Courts of Equity acknowledge distinction between acts of Parliament, denying legal effect to instruments, as the act for enrolling bargains and sales, and the registry act (7 Anne, c. 20); and acts declaring instruments void to all intents and purposes, as the annuity and the ship-registry acts. Notwithstanding the former, the conscience of party is bound by the contract. *Davis* v. *The Earl of Strathmore*. 16 Ves. 428.

6. Effect of a private act of Parliament, declaring an estate vested in trustees and their heirs in trust to sell, discharged from a trust of settlement, divests the legal fee outstanding under a prior settlement. *Bullock* v. *Fladgate*, 1 V. & B. 471.

See also *Hansard* v *Kemeys*, 2 Wil. 106.

TENANT FOR LIFE.

I. Interest of.

(*a*) *When commencing.*

1. Testator, after devising lands to uses in strict settlement, gives the residue of his personalty to be invested in lands to be settled to the same uses; the tenant for life is not entitled to the interest of the residue till one year from the testator's death. *Taylor* v. *Hibbert*, 1 J. & W. 308.

2. The general rule fixing the end of the first year as the period at which the enjoyment of the tenant for life is to commence is not to be departed from, unless it appears that the testator's intention is incompatible with it. *Ibid.*

3. Tenant for life of a residue is not entitled to the enjoyment of the interest until a year after the testator's death, as it is a legal presumption that until the end of the year the residue cannot be ascertained. *Stott* v. *Hollingworth*, 3 Mad. 161.

(*b*) *Extent of.*

1. Certain estates by marriage settlement were limited to I. B. for life, remainder to W. B. for life, remainder to I. B. in fee: insurance money paid to I. B., in respect of houses on the estate burnt down, was invested by him in his name; I. B. afterwards devises the estate to I. & W. in fee, and his personal estate to W. B. and dies: W. B. applies part of the insurance money in repairing another house upon the estate, and then dies, having by his will described the unapplied part of the fund as part of, and belonging to the real estate of his brother I. B.: held that the insurance money formed part of the real estate of I. B.; and that I &W. were entitled to the unapplied part of it, but not to that expended by W. B., as it was laid out for the purpose to which it was originally destined, the amelioration of the real estate. *Norris* v. *Harrison*, 2 Mad. 268.

2. The purchaser of a life interest in stock, sold before a Master, is entitled to a dividend becoming due on the day following the sale. *Anson* v. *Twogood*, 1 I & W. 637.

3. It is error in a decree to direct the surplus money after a sale to be paid to a tenant for life. *Lightburne* v. *Swift*, 2 B. & B. 212.

II. Contribution to Incumbrances, and Charging or Exonerating the Estate.

1. Where a leasehold estate for lives is settled upon the husband for life, remainder to the wife for life, with remainders to the children, the husband having renewed by putting in the wife's life, is to be considered as a creditor upon the estate for the fine and charges of renewal. *Lawrence* v. *Maggs*, 1 Eden, 453.

2. Where a trust was created for the payment of incumbrances out of the rents and profits of real estate, part of which, being subject to the arrears of a rent charge to the crown, was discharged by a privy seal, provided £5000 be paid, as therein mentioned, for securing which a term was created by act of Parliament: held that this was a debt affecting the estate, and not within the trusts of the deed, and therefore that the tenants for life must keep down the interest. *Earl of Peterborough* v. *Mordaunt*, 1 Eden, 474.

3. A lease for lives, bequeathed to testator's wife for life, with remainders over, and the wife, who was the last life, paid a fine for the renewal, such was held to be a charge upon the estate, the remainder-men taking the chance of its being beneficial. *Adderley* v. *Clavering*, 2 Cox, 192.

4. Contribution of the tenant for life to the fine on renewal of a lease, is in proportion to his enjoyment; not, as formerly, one third; nor, as upon a mortgage, confined to keeping down the interest. *Allan* v. *Backhouse*, 2 V. & B. 65.

5. Wife having had an estate which had been devised to her in fee before her marriage, subject to a mortgage, the husband and wife are not bound to keep down the interest of the mortgage during the wife's life, but the arrear of interest becomes at her death principal, and a charge on the estate. But after her death, the husband, tenant for life by the curtesy, is bound to keep down the interest. *Ruscombe* v. *Hare*, 6 Dow, 21.

6. Where a term for years, was, by a settlement, vested in trustees to raise, by sale or mortgage, money to discharge the debts of the tenant for life, who soon after with his own money pays the debts, without taking assignments of the securities; a mortgage of this term by the trustees, several years after, by the direction of the tenant for life, was held to be a due execution of the trust. *Redington* v. *Redington*, 1 B. & B. 131.

7. The tenant for life has, during his whole life, a right to call for an execution of the trust, and to stand in the place of creditors. *Ibid.*

8. After an express declaration of the tenant for life to charge, it cannot be presumed, either from debts being paid by him, from no assignment of the securities

being taken, or from length of time, that he intended to exonerate the estate. *Ibid.*

9. It will not be presumed, from a tenant for life paying off a charge, that he meant to exonerate the estate. *Ibid,* 1 B. & B. 141.

10. It is not necessary for a tenant for life, in order to keep alive a charge on the estate, which he had paid off, to take an assignment from the creditors of their securities. *Ibid,* 1 B. & B. 142.

11. The presumption that a tenant for life did not mean by paying of debts to exonerate the estate, may be rebutted and disproved. *Ibid.*

III. Custody of Title deeds.

1. Title deeds will be delivered out of court to tenant for life, except when brought into court under an order for safe custody. *Webb* v. *Lord Lymington,* 1 Eden, 8.

2. Semble, a bill does not lie by a purchaser from a contingent remainderman, for an inspection of title-deeds in the hands of tenant for life. *Noel* v. *Ward,* 1 Mad. 322.

IV. Production of cestui que vie.

1. Upon petition under the stat. 6 Anne, c. 18, by the owner of an estate held by a tenant, under a lease for lives, and supported by an affidavit as to belief that the *cestui que vie* was dead, the court ordered the tenant to produce the *cestui que vie* before two persons named in the order, at the porch of the parish church, where the estate was situate, on a day and hour mentioned, which was a fortnight after the making the order. *Ex parte Sir John St. Aubyn,* 2 Cox, 373.

TENANT IN TAIL.

1. A person may be tenant in tail, after possibility of issue extinct, of an estate in possession, remainder, or reversion. *Williams* v. *Williams,* 15 Ves. 423.

2. *Quasi* entail of an estate for lives may be barred by release. *Moody* v. *Walters,* 16 Ves. 313.

3. Whether there is an obligation on an infant, tenant in tail, to keep down the interest of incumbrances out of the rents and profits of the estate, is a question which can be agitated by a reversioner or remainderman only; and therefore where such tenant in tail, on coming of age, suffered a recovery, and resettled the estate, there was no party to raise the question. *Bertie* v. *Lord Abingdon,* 3 Mer. 560.

4. A tenant in tail is not obliged to keep down the interest on a charge affecting the estate; but should he do so his personal representative will not be allowed it out of the estate. *Redington* v. *Redington,* 1 B. & B. 143.

TIME.

I. Time (how computed.)

1. Our law rejects the fraction of a day more generally than the civil law does; there is no general rule, in computing time from the event, that the day of the event happening should be exclusive or inclusive, it depends upon the reason of the thing or circumstances of the case. *Lester* v. *Garland,* 15 Ves. 248, 257.

2. The day on which the *habere* is executed on an eviction under the ejectment statutes for non-payment of rent, is not to be included in the calculation of the six months given to the tenant to redeem. *Dowling* v. *Foxall,* 1 B. & B. 193.

3. Where a right would be divested, or a forfeiture incurred by including the day of the act done, the computation will be made exclusive of it. *Ibid,* 1 B. & B. 196.

4. The six months given to tenants evicted under the Irish ejectment statutes for non-payment of rent, to redeem, are calendar months. *Ibid,* 1 B. & B. 193.

TITHES.

I. TITLE TO, AND HEREIN OF CLAIMS BETWEEN RECTOR AND VICAR.

1. The statute of 32 Hen. 8, is silent as to the manner in which a person must make out his right to tithes against the church, or patentees standing in the place of the church; it only provides for the assurance and recovery of them, like temporal possessions in the King's court. *Fanshaw v. Rotheram*, 1 Eden, 295.

2. A vicar, founding his claim to agistment tithe, by showing that he alone has taken the other small tithes, held to have made out his title to that tithe, although never, till of late, received or demanded by him or his predecessors, and although in ancient times the crown had conveyed by grant to lay impropriators, tithe, not only of grain and hay, but of herbage, ("*decimas fæni et herbagii*"). "Herbage does not *ex vi termini* necessarily mean or cover tithe of agistment, unless perception be proved.—Wood, B. *dissentiente*. *Byam* v. *Booth*, 2 Price, 231.

3. A vicar proving perception of small tithes, (where the crown and those claiming under it, have never received or dealt with other tithes than those of corn and grain,) held entitled to demand tithes of agistment, turnips and potatoes; although such tithes have never before been received by his predecessors; and that although the documentary evidence adduced in support of the vicar's claim refer to "small tithes" and not "all small tithes", and although it appear that a pension or portion is payable out of the vicarage to the superior. Semble, there must be an express grant of such small tithes to the impropriator, or an express exemption of them out of the vicarage, or an actual perception of them by other persons, proved to take away the vicar's right. *Kennicott* v. *Watson*, 2 Price, 250 (*n*).

4. Endowment produced, showing the vicarage expressly endowed of hay, is not sufficient, without usage, to support a bill against evidence of an immemorial money payment to the rector, in lieu of corn and hay. *Manby* v. *Curtis*, 2 Price, 284.

5. A particular and minute enumeration of the several articles of endowment in the instrument, does not preclude the vicar's right to other small tithes not mentioned therein. *Ibid.*

6. Grant from the crown, subsequent to endowment, of lands, including in the general words, all the tithes, &c., not sufficient to overturn the vicar's right, without proof of perception. *Ibid.*

7. The lessee of a rector, in whose lease there is an exception of various small tithes, *nominatim*, and of all the tithes belonging to the vicar, is not entitled to tithe of potatoes, although he has always received some of the small tithes in kind, not mentioned in the lease *specialim*, either as demised or excepted, and particularly for geese and pigs; his general right being abridged by the operation of the particular exceptions in the lease, which was held to carry the tithes of articles of modern introduction to the vicar, for that it was not to be inferred from the lessee of the rector having received certain articles of small tithes that he is entitled to take tithe of potatoes, although the vicar was

not entitled to all the small tithes, nor had enjoyed the tithe in dispute. *Cunliffe* v. *Taylor*, 2 Price, 329.

8. The ecclesiastical surveys aided by perception of small tithes, though not of all, will give a vicar a right to tithes of articles of modern introduction, against the lessee of the rector. *Ibid.*

9. Evidence of retainer only is not sufficiently strengthened to support a presumption of a grant of tithes, by its being shewn that a former impropriator had declared the lands in question to be exempt from the payment of tithes, or by instances of exception of the tithes, in leases by the impropriate rector. *Meade* v. *Norbury*, 2 Price, 338.

10. The word "gardens" in an endowment, will not give a vicar the tithe of articles of modern introduction, although they might have been originally usually grown only in gardens. *Williams* v. *Price*, 4 Price, 156. Dan. 13.

11. "*Alteragium*" is a word explicable only by the usage shewn to have been established under it. *Ibid.*

12. The word "*curtilage*," in an endowment, will not *per se* give the vicar the tithe of all articles originally grown in *curtilages*. *Ibid.*

13. A rector, claiming tithe of seeds against a vicar endowed of all small tithes except hay, on the ground of a presumption that, as the former had had perception of the tithe of seeds, notwithstanding the terms of the endowment of the latter, who had also had immemorial perception of the tithe of corn of certain lands, *ultra* his endowment, an ancient exchange must be presumed of vicarial for rectorial tithes—will be held to strict proof of his title to the tithes sought; and he must show by satisfactory evidence that the vicar has granted them back to him, or made the alleged exchange. Nor is his perception of the tithe in question available against perception by the vicar, if the subject matter of dispute be one of those which were formerly doubtful, as to their being a rectorial or vicarial tithe. *Dorman* v. *Curry*, 4 Price, 109.

14. Nor can the rector insist on an issue in such a case; for no presumption will be raised in his favor, because he is in the situation of a claimant, contesting his own grant, and has clothed the vicar, whom he has endowed, with his inherent common-law right. The bill in this case was dismissed with costs. *Ibid.*

15. Usage is the broad ground of presumption in favor of the vicar's endowment; and if there be an endowment in proof, expressing of what tithes his vicarage shall be endowed, if any tithes received by the vicar be not among them, a subsequent endowment will be presumed. *Williams* v. *Price*, 4 Price, 156. Dan. 13.

16. A vicar claiming tithe of hay may establish his right by sufficient proof of perception during living memory, where none can be shown to have been enjoyed by the rector, although his endowment actually negative his right to that tithe expressly, and state it to belong to the rector, on the presumption of a subsequent endowment, which the court is bound to adopt. *Parsons* v. *Bellamy*, 4 Price, 190.

17. Perception by means of a composition, which has always been understood by the parties to have been paid for tithe hay, is as strong evidence as if it had been paid in kind. *Ibid.*

18. Perception of tithes by a vicar for any considerable number of years, where its inception cannot be shown, if it is not met by proof of perception by the rector, or any other person, is a sufficient proof of usage to ground a presumption of perception long anterior, and of its having been founded on an endowment; nor will the court grant the rector an issue in such a case. *Ibid.*

19. It is not sufficient that a vicar, who rests his case on presumption of an endowment from evidence of perception, prove that he has received the tithes claimed from the rest of the parish generally, and even from part of the district in which the defendant's lands are situate, unless he carry it to the parts for which the exemption is claimed by the defence; and the vicar not doing so, proof on the part of the defendants, that no tithe has ever been paid for their lands, will entitle them to an issue. *Armstrong* v. *Hewitt*, 4 Price, 216.

20. Nor will the ecclesiastical survey (stating the vicar to be entitled to tithe-hay in the parish generally), supply the absence of proof of perception from the particular lands. *Ibid.*

21. Clear documentary evidence of the existence of an ecclesiastical rectory in support of a rector's title, and proof of the performance of ecclesiastical duties, held to prevail in a suit to establish his

right against perception by the patron of the advowson, who also by documentary evidence proved himself entitled to a sum of money, in respect of the tithes arising within the parish, and a general non-perception of tithes by any former ecclesiastical rector. *Boulton* v. *Richards*, 5 Price, 483.

22. The rector's right in such a case, established by mere proof of the existence of the rectory, of his being *de jure* and *de facto* rector by presentation, &c., and therefore entitled at common law, and by inference from the ancient valuation of the rectory as proved by the old surveys and other documents being shewn to be much larger than the contemporary valuation of the adverse right to the tithes claimed by the defendant, (on which proof the court held the adverse claimant to be a portionist); although there was no evidence given of the extent of the claims on either side, in respect of the particular tithes demanded by each. *Ibid.*

23. An old grant from the crown, of grain, hay, and herbage, not shewn to have been acted upon, and under which no enjoyment or perception of the specific tithe claimed, (agistment), was proved, held not to be sufficient proof of a title in a person claiming under the grantee to the tithe of agistment. Wood, B. *dissentiente*. *Scott* v. *Lawson*, 7 Price, 267.

24. Whether a tithe be great or small is determined by the nature of it, and not by the mode or place of cultivation, or the use to which it is applied; and therefore the tithes of beans and peas, though gathered green by the hand for the food of man, are great tithe, and included under the term *decimæ garbarum*. *Sims* v. *Bennett*, 1 Eden, 382.

II. What things are or are not titheable.

1. An account of tithes decreed as to two pair of new stones added to an ancient corn-mill rebuilt. *Manby* v. *Taylor*, 3 V. & B. 71.

2. Agistment tithe is not claimable for after pasture, where the lands have been mown in the same year, and paid tithes. *Batchelor* v. *Smallcombe*, 3 Mad. 12.

3. In general, consumption of titheable articles in the family of the land occupiers, is not a ground of exemption; so potatoes and turnips consumed in the family of the grower are titheable; but whether green peas so consumed, or sheep eaten in the family of the feeder are titheable—*Quære*. *Williamson* v. *Lord Lonsdale*, 5 Price, 25. Dan. 49.

4. Semble, a farmer claiming exemption, under the custom, from tithes for green-cut food, applied for foddering husbandry horses, must shew that such horses were *bona fide* used in husbandry, and that he had no other sustenance of any sort for them on his farm. *Stevens* v. *Aldridge*, 5 Price, 334.

5. Lucerne, tares, clover, and other artificial grasses, cut green, and given severed, to husbandry horses and cattle employed on the farm, on which they are grown, are not exempt by general custom from the render of tithes, unless, the farmer have no other fodder or sustenance of any sort on the farm, on which such horses and cattle may be subsisted, without necessarily having recourse to such green food.
Dorman v. *Sears*, 6 Price, 338.
S. C. *Dorman* v. *Currey*, Dan. 194.

III. Exemption or discharge from.

(a) *Generally.*

1. At common law, no man could avail himself of a discharge from tithes by grant, but by producing it. *Fanshaw* v. *Rotheram*, 1 Eden, 295.

(b) *Prescription in non decimando.*

1. There cannot be prescription *in non decimando*, against a lay impropriator; but it is not necessary to produce the deed of severance, it is sufficient to shew that it existed; and where defendant, and those under whom he claimed, had been in the pernancy of the tithes upwards of one hundred and thirty years, during which the tithes had been bought and conveyed many times, a bill by impropriator was dismissed with costs. *Fanshaw* v. *Rotheram*. 1 Eden, 276.

2. To a bill for tithes, even by a lay impropriator, prescription *in non decimando*, or presumption from mere retainer without color of title, is no defence, and will not be sent to law. *Berney* v. *Harvey*, 17 Ves. 119.

3. Where no tithes have been paid, a title, founded upon the mere non-payment, is simply a prescription *in non decimando*. Such a prescription, is simply unlawful.

and cannot be maintained. Evidence of length of possession the court can pay no regard to, for the possession must have been unlawful, and the court is bound to decree in favor of the common right. No presumption can be admitted to support a mere simple prescription *in non decimando*; but there is an essential distinction between a claim, founded on mere non-payment, and a claim supported by evidence of actual enjoyment of the pernancy of the tithes. In the latter case, the title not being simply unlawful, long possession is evidence of the title, and the rule applies as well to lay as spiritual rectors; therefore, a plea of title, from mere length of possession, to a bill for tithes, was overruled. *Heathcote* v. *Aldridge*, 1 Mad. 236.

4. A grant of the tithes of land will not be presumed from long non-payment, although the lands be shewn to have been once in the possession of a former lay impropriator, unless some evidence of the existence of a grant be offered, or enjoyment of the tithes be shewn by at least something like actual pernancy, or a dealing with the tithes as owner. *Meade* v. *Norbury*, 2 Price, 338.

(c) *Composition, real.*

1. In order to establish a real composition for tithes, the evidence must be such as to distinguish it clearly from a prescriptive payment. *Hawes* v. *Swaine*, 2 Cox, 179.

2. A deed, creating a composition real, will not be presumed from the fact of pecuniary payment alone; for if there be no other evidence of composition than mere payment, the legal inference and presumption is, that the composition originates without deed. *Estcourt* v. *Kingscote*, 4 Mad. 140.

3. The court will not direct an issue to try a composition real, where the defendant has by his answer only alleged a modus. *Bennett* v. *Neale*, Wigh. 324.

4. Composition real by grant of land in lieu of tithe is not proved by reputation of the fact of such an agreement having existed, and being the origin of the exemption claimed, although corroborated by evidence of non-payment of tithe of the district claiming the exemption, unless a deed or evidence of one having once existed be put in proof. *Chatfield* v. *Fryer*, 1 Price, 253. See also *Bennett* v. *Neale*, Wigh. 324.

5. The objection to a composition real being presumed from usage, is founded on the maxim *nullum tempus occurrit ecclesiæ*. *Ward* v. *Shepherd*, 3 Price, 607.

6. To make out a defence to a bill for tithes of a composition real, it is not enough to shew that the same money-payment has been constantly received in satisfaction of the tithes, for a considerable period before the 13th Eliz.; but evidence must be given of the existence of an agreement in writing, and that it was made between all the proper parties interested.* *Bennett* v. *Sheffington*, 4 Price, 143. Dan. 10.

7. A composition real or grant of tithes made by a vicar to the lord of a manor, in consideration of his finding a priest to officiate in a chapel, &c., previously to the 32d Hen. 8. c. 7, and supported by evidence of constant perception, and compliance with the conditions on which it was made, held to be valid. *Ridley* v. *Storey*, 1 Dan. 157.

(d) *Allotment under Inclosure Act.*

1. Under an act for inclosing lands in the townships of A., S., and W., directing the commissioners to allot to the rector of the parish of W., in lieu of the tithes of the townships of S. and W., so much of the lands to be inclosed in the township of S., and the titheable parts of the township of W., as should, quantity, quality, and situation considered, contain, or be equal in value to two-fifteenth parts of the titheable places thereof; and to make to the rector of W., and the vicar of B., in lieu of the tithes of a part of the lands in the townships of S. and A., to which they were entitled, a like allotment, equal to two-fifteenths of such lands; and declaring that, after the enrolment of the award of the commissioners, all tithes arising within the lands inclosed should cease. The commissioners, by their award, allotted to the rector of W., "in lieu of the tithes of S. and A.," lands more in quantity than two-fifteenths of the lands inclosed in S. and A., but less than two-fifteenths of the lands inclosed in S., A., and W.; without any allotment in lieu of the tithes of W. upon a bill by the rector of W., claiming tithes, in respect of land inclosed in W. Held, that after a lapse of fifty years the judgment of the commissioners could not be called in question, but on clear indisputable evidence of error; and that error

in the allotment, as to quantity alone, could not vitiate the award, the commissioners being directed by the act, in estimating the proportion, to have regard to quality and situation; and even if error were proved in the omission of the proper allotment, yet by the construction of the act, an independent substantive bar was created to the claim of tithes in kind for ever, not conditional but positive. The bill was dismissed, but without costs, as the apparent deficiency in quantity, and a former submission of the defendants to pay tithes in kind, justified the rector in the institution of the suit. *Cooper* v. *Thorpe*, 1 Wil. 55. 1 Swan. 92.

(c) *Agreement between Parson and Parishioners.*

1. An agreement was made between the rector and inhabitants of a parish, alloting lands in lieu of the ancient glebe, and providing an annual pecuniary compensation in lieu of tithes; afterwards, in a suit in Chancery, to which the ordinary but not the patron was a party, the parishioners agreeing to increase the stipend, a decree was made by consent to ratify the agreement: held that this agreement, though acquiesced under for eighty years, forty of which, however, the rector, against whom the decree was made, had remained incumbent, was not binding on the future incumbents, as to the pecuniary composition, the patron not having been a party, and the composition having been made only with regard to the past, and not to the future increasing value of the tithes. *Attorney-General* v. *Cholmley*, 2 Eden, 304.

See also *Jenkinson* v. *Royston*, 5 Price, 495. Dan. 121.

2. A church being void and dilapidated, is no ground of discharge from the payment of small tithes to the impropriate rector, as being evidence of an agreement having been entered into between the rector and the parishioners, by which the ecclesiastical duties have been dispensed with, in consideration of an abandonment of the small tithes. *Meade* v. *Norbury*, 2 Price, 338.

3. Notice to determine a composition should be reasonable in point of time, and suited to convenience of the farmer; a notice given by parol, at the time of [illegible] the annual amount of the tithes [illegible] the tithe-owner telling the farmer, that "for the time to come" he requires the tithes to be paid in kind, is sufficient. *Leech* v. *Bailey*, 6 Price, 504.

IV. Modus, or Customary Payments.

(a) *Valid or Void.*

1. Whether a modus of 1*d.* for tithe of all hay is good—*Quære.* *Blackburn* v. *Jepson*, 17 Ves. 473.

2. Modus of 4*d.* by each occupier having lands cultivated by the plough by three or more horses, usually called a plough, in lieu of all small prædial tithes of all such lands so cultivated, is bad for uncertainty as to the quantity of land. *Ibid.*

3. Annual payment of 1*d.* by each occupier for tithe of hay is a good modus; but a modus for turnips is bad, they having been introduced into this country, too recently to be the subject of immemorial usage. *Leyson* v. *Parsons*, 18 Ves. 173.

4. Account of vicarial tithes was decreed against a modus of 1*s.* per acre, for "each and every acre of marsh land for tithes of hay, and all other vicarial and small tithes:" the vicarage appearing to have been established by endowment in 1367, which is within legal memory. *Scott* v. *Smith*, 1 V. & B. 142.

5. Modus for pasture land, stated to be in lieu of the tithes of all titheable matters yearly arising, &c. covers too much. *Lake* v. *Skinner*, 1 J. & W. 9.

6. Modus of 1*d.* for each lamb, where the number did not exceed four; 1*s.* where the number did not exceed five; 1*s.* 8*d.* where the number did not exceed six; 1*s.* 9*d.* where the number did not exceed seven; 1*s.* 10*d.* where the number did not exceed eight; 1*s.* 11*d.* where the number did not exceed nine; and 2*s.* where the number did not exceed ten, held not rank, and sent to an issue. *Askew* v. *Greenhow*, 2 Price, 314.

7. A modus pleaded of a sum of money anciently and uniformly paid for tithes, within a certain part of a parish, held good, although it far exceed the sum which such part should have paid, if it had contributed its due proportion with reference to the rest of the parish, measuring the share of such part, according to its extent, with respect to the whole parish, and although some witnesses show it to have been broken in upon, and one,

that be remembered (as appeared from depositions in an old cause) the origin of the payment. *Byam* v. *Booth*, 2 Price, 231.

8. Modus of 3*d.* a-year for every cow, and 6*d.* for every calf, in lieu of the tithe of cows, calves, and milk, is good. *Prevost* v. *Benett*, 2 Price, 272.

9. Modus of a 1*d.* a year, in lieu of tithes of gardens, is good. *Ibid.*

10. A modus may exist for artificial grasses used in the improvement of hay. *Bertie* v. *Beaumont*, 2 Price, 303.

11. Modus of 3*d.* for a lamb is not rank. *Ibid.*

12. Modus of 1*s.* for every seventh pig on the 9th day, held good after some doubt. *Bertie* v. *Beaumont*, 2 Price, 307.

13. Modus of 10*d.* a score of agistment of sheep, bad. *Mytton* v. *Harris*, 3 Price, 19.

14. A modus of £2 : 8 : 1, payable for certain tithes within a township, the occupier of each farm or tenement within the said township, respectively, paying his rateable proportion, is bad for uncertainty, even in an answer: it is defective in form and substance. Neither can it be treated as a composition for the same reason. *Wolley* v. *Hadfield*, 3 Price, 210.

15. Modus of 1*s.* for a milch-cow, in lieu of the tithe of milk of such cow, sent to an issue. *Leathes* v. *Newitt*, 4 Price, 355.

16. A modus of 5*s.* for every ten calves, where there happens to be ten, in lieu of the tithe of such calves, and also of the tithe-milk of the cow belonging to such calves, called renew cows, or cows having had each a calf within the year; preceded by a modus of three-halfpence for every cow, called a renew cow, or a cow that has had a calf within the year, and is full of milk, in lieu of the tithe of the milk of such cow, cannot be supported on the ground of inconsistency.—Wood, B. *dissentiente*. *Layng* v. *Yarborough*, 4 Price, 383.

17. The latter standing alone, would also be objectionable, because it is not stated what is to be paid for the number of calves under five or between ten and five. *Ibid.*

18. One shilling for every tenth fleece, in lieu of the tithe of the ten fleeces, rank; it is also bad on the second ground taken to the preceding modus.—Wood, B. *alter* *Ibid.*

19. One shilling for every tenth pig, in lieu of the tithe of such ten pigs, rank, and not sufficiently particular as to intermediate numbers, and therefore bad.—Wood, B. *contra*. *Ibid.*

20. So as to geese. *Ibid.*

21. A modus for tithes of articles of modern introduction cannot be supported because of the anachronism. *Ibid.*

22. Eighteen-pence in lieu of tithe of rape-seed, when sold in the seed, is bad, for uncertainty, and being capable of fraud.—Wood, B. *dissentiente*. *Ibid.*

23. The following moduses held good, and issues decreed as to them:—4*d.* for messuage and garth.—2*d.* for every cottage and garth.—1*d.* for every strip cow.—4*d.* for every foal.—2*s.* 6*d.* for every tenth lamb, in lieu of the tithe of such ten lambs. *Ibid.*

24. Three-pence for a lamb, or 2*s.* 6*d.* for every tenth lamb, in lieu of the tithe of such ten lambs, not so rank as to be decided without an issue.—Graham, B. *dubitante*. *Ibid.*

25. A modus of one penny, payable at Martinmas, by every owner of a garden or garth within the parish, called a garth-penny, in lieu of tithes of articles produced in such garden, as covering potatoes and turnips grown in gardens, is a good modus. *Williamson* v. *Lord Lonsdale*, 5 Price, 25. Dan. 49.

26. A modus of one penny, commonly called a plough-penny, payable, &c. by the several occupiers of lands in tillage within the said parish, for and in lieu and satisfaction of all small prædial tithes, arising, &c. upon lands so in tillage, as covering fields with turnips and potatoes, is bad. *Ibid.*

27. A modus of fifteen shillings, payable on Easter Monday by all the occupiers of land in the township, &c. or some or one on behalf of all, in lieu of the tithe of grass growing within the same township, whether the same be mown or made in hay, or eaten by barren and unprofitable cattle, covering the tithe of agistment, if there be evidence given of its having been paid, and for the tithe of agistment, will be sent to an issue; for, notwithstanding that species of tithe has not been demanded or recognised till of very late years, yet as it is in fact as old as that of hay, *non constat*, that it may not have been so neglected before time of memory; and there is therefore no ground for saying that it may not so long ago have been compounded for; for which

reason the court will not decree an account of such tithe, on the ground of the anachronism, without further inquiry, where there is strong evidence of the payment. *Ibid.*

28. A payment of three-pence a head for tithe of lambs, not rank, and is issuable where supported by proof; but *terriers*, stating the vicar to be entitled to "tithe of lambs," are sufficient to destroy the presumption that such payment is a modus. *Drake* v. *Smyth*,
5 Price, 369. Dan. 104.

29. Payments professing to cover articles stated in terriers *nominatim* to be titheable, held not to be moduses. *Ibid.*

30. A measure of oatmeal payable in lieu of the tithes of corn and grain, is a good modus. *De Whelpdale* v. *Milburn*,
5 Price, 485.

31. A custom to pay for every foal a penny; for every milch cow two-pence; and for every heckforth or heifer that had had but one calf, a penny, for and in lieu of milk and all profit arising by such cow or heifer, except the calf, good; notwithstanding it be not accurately laid, the redundant words at the end being rejectible as surplusage. *Jenkinson* v. *Royston*,
5 Price, 495. Dan. 121.

32. Calves in kind to be delivered at the will of the owner after they are three weeks old, and at such time of the year as the owner might think best to spare them, not hindering his breed; the parson, if he delayed the fetching, to pay for the keeping: Pigs, in their kind, to be delivered at the will of the owner after they are nine days old; and if the parson delayed to fetch them, to pay for the keeping afterwards, as reason should require, or the parties could agree—bad, for uncertainty and unreasonableness, being vitiated by the qualification of the delivery at will, and the parson to pay for the keep until delivered. *Ibid.*

33. Lambs in their kind to be delivered the first day of May; and, if under seven, to pay for every lamb a halfpenny; and if seven lambs and under ten, to pay one lamb, and to be allowed for every lamb that wanted of the ten a halfpenny; and so likewise for any odd number of lambs, and so likewise for calves; but that if any person had under seven calves, or an odd number of calves under seven, and sold any of them to the butcher, he was to pay to the parson the tenth part of the money which they were sold for; and that tithe of lambs was to be paid in kind, as well those that fell after, as those that fell before the first of May, respect being always had to the number of lambs, according and pursuant to the above prescription or modus, save that those that fell after May-day were to be kept by the owner until a month old; and, if longer, he was to be paid for keeping; and so of lambs that fell within a month before May-day, which were to be kept by the owner until a month old, and, if longer, he was to be paid for keeping—is bad; because unintelligibly laid, and binding the parson to pay for keeping the tithe animal beyond a month old. The farmer is in general bound to keep it till it be able to live without the mother: though an established custom may control that rule. *Jenkinson* v. *Royston*, 5 Price, 495.
Dan. 121.

34. Geese and pigs in kind to be delivered before Midsummer; and if any person should have under seven pigs or geese, he was to pay for every pig or goose a halfpenny; and if he should have seven and under ten, he was to pay one, and to be allowed for them that wanted of ten a halfpenny a piece for every one, and so for any odd number of pigs or geese—good. *Ibid.*

35. Bees: for every stock driven or smothered, whereof profit is taken, two-pence—*Quære.* *Ibid.*

36. Wool: the tenth stone or tenth pound to be paid presently after the sheep were clipped; and if any person should sell sheep after Candlemas, and before clipping, to pay for the wool for every sheep a penny, if he sold them out of the parish—good. *Ibid.*

37. Hemp and femble: the tenth sheaf when pulled, withered, and threshed; the withering and threshing of hemp and femble, to be considered, deemed, and taken for and in lieu of the seed—good. *Ibid.*

38. Rape seed: the tenth bushel ready dressed, the parson allowing for the dressing a penny the bushel—bad, for omission of fractional proportions. *Ibid.*

39. For onion-seed, the tenth bed if more than half a pound sown: for less, none—bad. *Ibid.*

40. For every acre of reed-ground broken, cropt, or mown in the year, a penny—good. *Ibid.*

41. Eggs: for every hen or duck, two

eggs; and for every cock or drake, either of them, three eggs, are bad, the consideration being deficient, and *ejusdem generis*. *Ibid.*

42. The inhabitants to pay to the parson yearly for every acre of fed ground in the parish for herbage a penny or the fall, at the parson's election—bad. *Ibid.*

43. A custom, that the land-owner should take the two best out of every ten lambs, and the tithe-owner the next best, held bad. *Hall* v. *Maltby*, 6 Price, 240.

44. Modus of a penny a cow for milch cows summered on lands within a parish, disallowed, because of the uncertainty of the word summered.

Rumney v. *Beale*, } Dan. 35.
Rumney v. *Morgan*, }

45. An issue directed to try a modus of twelve-pence an acre in lieu of tithe hay; moduses of 1*s.* 6*d.* and 2*s.* per acre for tithe hay, held to be rank. *Heaton* v. *Cooke*, Wigh. 281.

(*b*) *Pleading.*

1. Modus for every garden and orchard in lieu of all tithes of all titheable matters or things arising therein, sufficiently laid, without stating them to be ancient gardens, and not too extensive. *Blackburn* v. *Jepson*, 17 Ves. 473.

2. Where a defendant, in his answer, states that a modus has been immemorially paid to the vicar in lieu of tithes, and the vicarage be shewn to have been established and endowed within time of legal memory, the court will, notwithstanding the modus be so incorrectly laid, permit it to be re-stated, for the purpose of taking issue to try the true modus, if an immemorial payment in lieu of tithes has been proved. *Prevost* v. *Benett*, 1 Price, 236.

3. Modus of a penny a-year in lieu of the tithes of gardens, may be so pleaded without laying it to be payable for ancient gardens. *Ibid*, 2 Price, 272.

4. In pleading a modus, the titheable article intended to be covered by it must be expressed, or clearly to be collected from the whole answer, without having recourse to external evidence. *Bourke* v. *Isaac*, 2 Price, 299.

5. It seems to be no objection to pleading a modus, that it is laid with an exception of articles of modern introduction *speciatim*. *Jee* v. *Hockley*, 4 Price, 87.

6. Where a modus, set up by way of defence to a bill for tithes against the occupier of a certain farm, was pleaded thus:—"that the said farm is parcel of the demesne lands of a certain mansion-house, called, &c. and which comprises, &c.; for which, from time, &c. the modus has been payable by the proprietor of the said mansion-house and demesne lands." It was held to be ill laid for want of a sufficient description of the lands claiming to be protected by it: and that although the payment was clearly proved; for pleading a modus for a whole district, and then averring that the particular lands are part of such district, without describing it by metes and bounds, is insufficient and bad, and cannot be aided by the evidence supplying the description by its boundaries. *Gillibrand* v. *Scotson*, 4 Price, 267. Dan. 27.

7. A modus laid as being "payable by certain occupiers," is insufficient and bad for uncertainty. *De Whelpdale* v. *Milburn*, 5 Price, 485.

8. A defence to a bill for tithes of a district modus, where the defendants do not state on the record, and prove by evidence, an occupation therein, must fail. *Jenkinson* v. *Royston*, 5 Price, 495. Dan. 121.

9. Semble, moduses introduced by stating that they are payable "by the occupiers, in lieu of the tithes within and throughout the parish, except the occupiers of several other farms and lands," not otherwise described than by their respective names, are ill laid for uncertainty. *Wright* v. *Southwood*, 5 Price, 607.

10. A money-payment, alleged to be a modus in lieu of the tithe of lambs, and of the wool of the first shearing of such lambs, or in lieu of the tithe of such lambs, is ill pleaded in the alternative. *Leech* v. *Bailey*, 6 Price, 504.

11. So also if pleaded as a composition. *Ibid.*

12. Such money-payment may be relied on, at the hearing, as a composition, if it be charged to be so in the answer, in case it should not be a modus; but the defendant cannot, after having so set it up as a modus, defend himself on the ground of no notice having been given him to determine the composition, because he is in the situation of an occupier denying the owner's tithe. *Ibid.*

13. In laying a parochial modus, for instance, of so much per acre of meadow

land, it seems not to be necessary to state particularly what lands in the party's possession it covers, for if it is laid as a parochial modus it covers the whole parish. *Blake* v. *Veysie*, 3 Dow, 190.

14. Where a modus is pleaded, it ought to be stated for what period it is paid. *Ibid.*

15. A modus, established by evidence, held to be good, (*sed dubitanter*,) although laid as payable by the owners of a particular estate, for all the lands within a certain district. *Driffield* v. *Orrell*, 6 Price, 324.

(c) *Proving*.

1. Modus, supported by the evidence in part, not as to the rest, and capable of division, is void *in toto*; as of so much for every calf up to seven proved, and different sums proved from those laid as to other numbers. *Blackburn* v. *Jepson*, 17 Ves. 478.

2. A defendant insisting on a modus, as an outner, must prove himself to have been such at the time his lands became titheable, his being so described in the bill is not sufficient. *Lake* v. *Skinner*, 1 J. & W. 9.

3. Terriers alone are not sufficient to prove a modus. *Ibid*, 1 J. & W. 20.

4. Proof of a fixed payment for a farm during a long period, even without mention of a modus, is evidence of a modus. *White* v. *Lisle*, 4 Mad. 214.

5. The validity of a farm modus is not to be tried by a comparison of value with the whole tithe at any remote period, because other motives than those of a pecuniary bargain might influence a particular proprietor to make a grant to the church; and the relative state of cultivation and produce at the time of the contract could not be ascertained. Ancient documents cannot prevail against all proof of usage, unless they are consistent with each other, and exclude not merely the probability, but the possibility of the modus. *Ibid.*

6. Modus of 4*d*. laid to be for every cow, in lieu of the tithe of milk, will not be supported by proof of a modus for every cow with calf. *Bertie* v. *Beaumont*, 2 Price, 303.

7. Old terriers, recording that tithe of hay is payable in kind, signed by the rector, churchwardens, overseers, and some of the resident parishioners, are good evidence to rebut the presumption of a farm modus, attempted to be established by proof of a money payment having been uniformly rendered beyond living memory, in the absence of any evidence, even of reputation, that the tithe had ever been taken in kind from the farm, and that although such terriers are not proved to have been signed by any person interested in the farm.—Wood, B. *dissentiente*. *Mytton* v. *Harris*, 3 Price, 19.

8. Money-payments, in lieu of tithes, although made as far back as living memory can reach, held not to be moduses, where many of the witnesses state that such payments were apportioned by reference to the poor's rates. *Walter* v. *Holman*, 4 Price, 171.

9. Nor will an issue be granted to try the character of such payments so described by the witnesses' depositions. *Ibid.*

10. Modus "of 1½*d*. for every calf fallen or dropt in the parish, in lieu of the tithe of such calf," is not proved, if the evidence add a qualification to the custom; as if proof is that where such calf shall be sold within the first year after being calved, a further sum, after the rate of 1*s*. in every 10*s*. of the price at which the calf was sold, is to be paid to the vicar. *Leathes* v. *Newitt*, 4 Price, 355.

11. Other money-payments put in evidence by a vicar, than those set up by the occupier, cannot be considered moduses, unless he also shew by the evidence, that such payments have the requisites of moduses in point of fact, as that they are of immemorial origin, and invariable amount. There is otherwise no ground for saying that the defendants are entitled to have an issue to try them. *Ibid*, 4 Price, 371.

12. Proof of payment, as a modus, of 8*d*. per acre, for hay, by parol testimony and receipts, was held strong enough to induce the court to send the payment to an issue, although such evidence was opposed by an extract from the ecclesiastical survey, valuing the tithe hay of the vicarage at 3*s*.; by a terrier recording that all tithes, except a moiety of the corn tithe, belonged to the vicar; by several others stating the vicar to be entitled to the tithe of hay, or a modus of 8*d*. per acre; and by an entry in the parish register, of a memorandum that the vicar had in a certain year taken the tithe in kind of some of the occupiers, and agreed with the rest

for compositions exceeding that sum. *Drake* v. *Smith*, 5 Price, 369. Dan. 104.

13. The same evidence in support of a sum of 5*s.* in lieu of tithe of hay, payable by all and every the occupiers of lands and tenements within a certain township, outweighed by terriers stating that sum to be payable "for all the hay in their crofts, and nothing paid for all other except herbage." *Ibid*

14. A modus of a sum of money, laid as payable in lieu of tithe of hay, and all small tithes, is not supported by proof of the payment for hay, and non-payment of hay in kind, or any small tithes, either in kind or *sub modo;* and therefore an account was decreed, of all the other articles said to be covered by such payment so failing the defendants as a modus; the prescription having been pleaded more generally than proved. *Driffield* v. *Orrell*, 6 Price, 324.

15. Payments laid as moduses, and proved to have been always paid within memory, and not opposed by evidence of their origin, held to be sufficiently proved to establish them on a defence of moduses, although all the witnesses called them compositions. *Ibid.*

16. Where one sort of modus is laid and another is proved, the party cannot succeed though the case made out in evidence might be a good one if it had been so laid. *Blake* v. *Veysie*, 3 Dow, 189.

V. Apportionment of.

1. Where the parson had entered into agreements with occupiers of lands, to receive compositions payable at Michaelmas, in lieu of tithes, and died in May, and the tithes due in Michaelmas following were received by his successor: held that the representatives of the first incumbent were entitled to an apportionment, with reference to the period of time during which he lived. *Aynsley* v. *Wordsworth*, 2 V. & B. 331.

2. In the case of a rector having established his title, if there be a third person clearly entitled to a sum of money, payable in respect of the tithes, as a portionist, and it be not proved by what specific tithes the portion is to be paid, the court cannot decree an account until the right of the rector shall be specifically ascertained, as such a case bears no analogy to that of a lessee's confounding boundaries. To that end the court will order a reference to the Deputy Remembrancer, as being more advantageous and less objectionable than a commission for that purpose. *Boulton* v. *Richards*, 6 Price, 483.

VI. Fraudulent Abstraction of.

1. It is a fraud in contemplation of a court of equity, to remove sheep fed in one parish to another place, just before the shearing and lambing seasons, and then driving them back again, without accounting for the tithes in the parish where they were dispastured. *Hall* v. *Maltby*, 6 Price, 240.

VII. Tithes in London.

1. Decree was made for tithes in London, at 2*s.* 9*d.* in the pound, under the statute 37 Hen. 8, c. 12. The occupiers not proving any certain customary payment in lieu of tithes; which payment would exempt an individual house, if usually made a sufficient time to acquire the characters of customary, though within time of memory, and not general through the place or parish. *The Warden and minor Canons of St. Paul's* v. *Kettle*, 2 V. & B. 1.

2. Mere non-payment of the tithes in London, under the stat. 37 Hen. 8, c. 12, is not an answer to a suit for tithes, as it would not be to the claim of tithes at common law. *Ibid.*

3. The dwelling-house, &c. of the deanery of St. Paul's in London, is not exempt from the payment of tithes to the warden and minor canons, under the 37 Hen. 8. c. 12. *Warden, &c. of St. Paul's* v. *The Dean*, 4 Price, 65.

4. The rate, according to the amount of which the payment for such tithes is to be computed, is 2*s.* 9*d.* in the pound, on the fair yearly rent, or actual annual value of the premises to be let, as in the case of all other houses paying tithes. *Ibid.*

5. The maxim *ecclesia ecclesiæ decimas solvere non debet*, does not apply to the circumstances under which the dean of St. Paul's is connected with the warden and minor canons, as parson of St. Gregory: it is confined to the clergy of the same church. *Ibid.*

6. Where there has been no new lease granted for many years, the clergy of London are to be paid for their tithes, on the expiration of the old one, according to the improved annual value: and when any fine is paid on taking a new lease, in consideration of which the annual rent is reduced, the amount of such fine is to be taken into the calculation of the estimate of the yearly value. New houses on old sites are liable, according to the actual annual value. *Ibid.*

7. New houses built on old sites, which have never paid any tithes, are liable to pay tithes after the rate of 2*s*. 9*d*. in the pound, on the improved annual value. *Kynaston* v. *The East India Company*, 4 Price, 84 (*n*).

8. The legal rate of the tithes payable to the London clergy, is 2*s*. 9*d*. in the pound, on the rent reserved. *The minor Canons of St. Paul's* v. *Crickett*, 5 Price, 14. Dan. 37.

9. The term, rent, as used in the decree made under the stat. 37 Hen. 8. c. 12, relating to tithes in London, means the rent, properly so called, actually and *bona fide* reserved without fraud or covin, and not the annual value of premises let—the rack rent. *Ibid.*

10. And fines to whatever amount, paid on the renewal of leases of dwelling-houses, are not to be considered as increase of rent, or to be taken in calculation, in estimating the amount of the tithes due, provided the rent reserved is equal to that at which the houses have been at any time before let. *Ibid.*

11. Bill filed for tithes in London, after the rate of 2*s*. 9*d*. in the pound, under 37 Hen. 8. in respect of buildings belonging to the East India Company. No present rent paid for these buildings; rents and tithes paid at various periods since 1660, for some of the houses that formerly stood on the site of the present buildings, set forth in the pleadings; and as to other former buildings, no rents, nor payments of tithes, could be shewn. No specific invariable customary payments alleged, and none of the stated payments carried up to the time of the act and decree. Held, that 2*s*. 9*d*. in the pound must be paid on the improved value of the premises. *East India Company* v. *Antrobus*, 1 Dow, 464.

VIII. Pleading.

1. Decree for tithes was declared to be without prejudice to the right, where the party appeared to have failed in establishing a modus, by the mismanagement of his suit. *Lake* v. *Skinner*, 1 J. & W. 9.

2. On a bill being filed in the Exchequer for tithes, the defendant filed a cross bill in the court of Chancery, for a discovery of the plaintiff's title to the tithes, and whether he had not conveyed them away; and on demurrer, it was held, that the defendant was not entitled to a discovery of the plaintiff's title to the tithes, but was entitled to a discovery whether he had conveyed them away. *Glegg* v. *Legh*, 4 Mad. 193.

3. A decree in a former suit cannot be pleaded in bar, to a bill for the tithes of any subsequent year. *Minor Canons of St. Paul's* v. *Crickett*, Wigh. 30.

4. In a plea of payment to a bill for tithes, it is not necessary to set out the time when, or place where the agreement was made. *Mytton* v. *Harris*, Wigh. 111.

5. The defendant was permitted to go into the evidence of his right to the tithes, where his title appeared likely to be clearly established, although he had inaccurately stated the subject-matter of his defence in his answer. *Wilmot* v. *Hellaby*, 5 Price, 355.

6. A decree, professing to establish customs of tithing, and modes of payment, some of which being obviously not legal moduses, founded on agreements not ratified by the ordinary and patron, and not on a *bona fide* adverse suit to establish the moduses, and pronounced in a cause to which the patron and ordinary were not parties, held to be not conclusive or binding, either on the church or the court. *Jenkinson* v. *Royston*, 5 Price, 595. Dan. 121.

7. Where defendants had described their farms by so many acres, and an objection was taken at the hearing to a want of sufficient description of the local situation, the court permitted the cause to proceed, suggesting, that if the objection were insisted on, leave would be given to the defendants to exhibit interrogatories, for the purpose of enlarging the description. *Wright* v. *Southwood*, 5 Price, 607.

8. It is most material in equity plead-

ing, that all the evidence intended to be relied on at the hearing, should be founded on some allegation, distinctly put on the record, of the fact which it is calculated to support, or otherwise it will not be admitted on the hearing. Thus, proof of a declaration by the defendant, that "he would endeavour to prevent the tithe owners from getting their tithes," was rejected wholly, because the plaintiff had not, in his bill, charged such declaration to have been made by the defendant. *Hall* v. *Maltby*, 6 Price, 240.

9. A bill to establish a modus, should be filed by certain owners and occupiers of land within the parish, on behalf of themselves, of all other owners, occupiers, &c. and the ordinary should always be a party.

Hales v. *Pomfret*, } Dan. 142.
Pomfret v. *Hales*, }

See also Tit. PLEADING III. (*t*) *ante*.

IX. EVIDENCE.

(*a*) *What Admissible.*

See also Tit. EVIDENCE, *ante*.

1. The answer to a bill for an account of tithes, having insisted upon what was equivalent to a prescription *in non decimando*, and the evidence going to the same point, the court would not permit the evidence to be read to support a different defence, as a presumption that the tithes had been granted to the owner. *Nash* v. *Thorn*, 2 Cox, 197.

2. An entry in a parish register of different moduses, the sum total of which was in the hand-writing of a deceased vicar, admitted in evidence. *Perigal* v. *Nicholson*, Wigh. 63.

3. It is no objection to evidence of reputation of a modus, that the deceased person, from whom it came, was liable to pay tithes. *Harwood* v. *Sims*, Wigh. 112.

4. In a suit, instituted by the rector, for an account of great tithes, the evidence of the vicar to prove payment of the small tithes to himself is admissible. *Barker* v. *Baker*, Wigh. 397.

5. A receipt, even more than fifty years old, offered to be put in to prove a money payment, purported by it to have been received in lieu of tithes, is not admissible evidence of the fact of such customary payment having been acted upon, so as to establish the defence of a modus, unless it can be also proved who the parties to the receipt were, and in what characters they stood; and unless proof be given of the hand-writing or death of the party giving it. Wood B. *dissentiente*. *Manby* v. *Curtis*, 1 Price, 225.

6. An old receipt of a former rector, in the hands of a defendant, for a money-payment, in lieu of tithes, where there was a probability that it had come to him from an ancestor of the same name, admissible evidence to support a modus. *Bertie* v. *Beaumont*, 2 Price, 307.

7. A valuation of tithes made by a surveyor, at the instance of the rector, with reference to certain money-payments reputed to have been always made in lieu of such tithes, not evidence to fix the rector with an acknowledgment of such money-payments, unless it be distinctly proved that the surveyor was expressly required by the rector to make the valuation with reference to such payments. *Ibid*, 2 Price, 310.

8. Ecclesiastical surveys are admissible to prove an ancient endowment. *Cunliffe* v. *Taylor*, 2 Price, 329.

9. Entries, supposed to be a copy of, or extract from an endowment, (the original endowment being lost,) in a book called a Chartulary of an Abbey, containing along with entries relative to the concerns of the abbey, much miscellaneous matter, and found in the custody of an individual having lands which had belonged to the abbey, read as evidence of the value of the vicarage at the time of the endowment, for the purpose of proving rankness on an issue between a vicar and a parishioner, respecting a farm modus. The entries were without date, but were proved to be of the hand-writing of the 13th or 14th centuries. *Bullen* v. *Michel*, 2 Price, 399. 4 Dow, 320.

10. An endowment, stating the portions of tithe assigned to the vicarage, and the value of each particular, held to be proper evidence on the trial of an issue as to a farm modus. *Ibid*, 4 Dow, 332.

11. On the trial of an issue, modus or no modus, for a particular farm which had paid a certain rate for tithes during seventy years, a general rate paper from which the rates in lieu of tithes for the whole parish had been collected, read as evidence, to show that the whole parish had paid certain rates in lieu of tithes, in the same manner as this particular farm,

and for the same period, in order to raise the inference, that all the payments were moduses, or that none was so; and that as the total amount of the payments was sunk, the payment for the particular farm could not be a modus. *Ibid*,

2 Price, 486. 4 Dow, 328.

12. A receipt for payment (by a person sued by a vicar for tithes), of the plaintiff's bill of costs, is evidence of the suit having resulted in favor of the vicar; so is an entry to that effect in a former vicar's books. *Parsons* v. *Bellamy*,

4 Price, 190.

13. The vicar's books are evidence to show, that the money payments received in lieu of tithes are founded on and regulated by a criterion not in existence beyond legal memory. *e. g.* the poor's rates. *Walter* v. *Holman*, 4 Price, 171.

14. A copy of lost terrier not admissible in evidence. *Leathes* v. *Newitt*,

4 Price, 355.

15. Non-perception of vicarial tithes by either vicar or rector, (the latter admitting the vicar's right, except as to certain titheable articles, there being no third claimant), in certain parts of the parish throughout which the vicar receives some small tithes, is negative evidence in favor of the vicar's right to all other than the excepted articles. *Leathes* v. *Newitt*, 4 Price, 374.

16. A book from the Registry of Lincoln, called Archbishop Wells's book of endowments, and containing, *inter alia*, what were called copies of endowments of certain vicarages, was received as evidence of an endowment of a vicarage in Northamptonshire, by the Lord Chief Baron, giving up considerable doubt, on the production of cases wherein it had been received before. *Leonard* v. *Franklin*,

4 Price, 264. Dan 34.

Halse v. *Eyston*, 4 Price, 417.

Hebden v. *Freeman*, 4 Price, 420.

But see *Harwood* v. *Sims*, 4 Price, 427.

17. Terriers are of the highest order of evidence in tithe causes, and semble, paramount to usage: and where they record tithes to be payable for certain articles *specialim*, are presumptive proof of such tithe being payable in kind. Where also they state any fact concerning the mode of rendering the tithe, such statement is evidence of that fact, and is allowed to qualify the render, and to define in great measure its legal character. *Drake* v. *Smyth*, 5 Price, 369.

18. The more ancient documents, as the ecclesiastical survey, are only *prima facie* evidence, requiring to be supported by proof of usage or other confirmation, and may be rebutted. *Drake* v. *Smyth*.

5 Price. 369. Dan. 104.

19. A memorandum entered by a former vicar in an old book, called a parochial register, the common property of the parishioners, and kept in an iron chest at the vicarage, was held admissible evidence on behalf of the vicar. *Ibid*.

20. Evidence of reputation is admissible in cases of individual right, where a class or district of persons is concerned, and is evidence as to a parochial modus; but not as to a farm modus, or to support a prescriptive right, except as to a right of way. *White* v. *Lisle*, 4 Mad. 214.

21. On the trial of an issue, directed to ascertain whether a modus was payable in respect of a certain part of a farm; the rejection of evidence of a lease, made in 1704, was held to be immaterial, as it only carried back some few years farther the fact of payments, which had been established for a period sufficiently long by other evidence. Semble, that reputation in this case was not evidence, and therefore the lease was not, it being in effect the declaration of the lessor of his own right; but if a reputation had been evidence, the lease would be evidence of a fact of reputation. *Ibid*.

(b) *Custody of.*

1. An ancient document produced by a party as evidence in a tithe cause, must be accompanied by proof of the custody from whence he derived it, to satisfy the court of its authenticity; and if no such proof is given, it will not be permitted to be read, for want of its being shewn to have come from such proper custody as would make it evidence. *Randolph* v. *Gordon*, 5 Price, 312. Dan. 88.

2. The custody of an individual owner of lands, which formerly belonged to an abbey, held to be the proper custody for the Chartulary, or Ledger Book of that abbey, with reference to the admission of the Chartulary as evidence in a tithe cause. *Bullen* v. *Michel*, 4 Dow, 333.

2 Price, 399.

3. The registry of the bishop, of the archdeacon of the diocese, and the church chest, are the proper repositories of terriers and vicars' books to make them

admissible as evidence. *Armstrong* v. *Hewitt*, 4 Price, 218. See also *Leonard* v. *Franklin*, 4 Price, 264.

4. An old book, called a parochial register, the property of all the parishioners, kept in an iron chest at the vicarage, was held to be in proper custody to make it admissible evidence in a tithe cause. *Drake* v. *Smyth*, 5 Price, 369. Dan. 104.

X. Practice.

(*a*) *Generally*.

1. Semble, the owner of the land may distrain tithes as damage-feasant, after a reasonable time. *Baker* v *Leathes*, Wigh. 113.

2. The court will not dismiss the bill of a vicar, by which he claims tithes throughout a whole parish, upon the ground of his proving his claim in part of it only; nor if the issues directed as to the parts wherein he has not made out his title, should be found against him on the trial. Wood, B. *dissentiente*. *Byam* v. *Booth*, 2 Price, 231.

3. A defendant in a tithe cause having set up a defence of composition real, cannot afterwards rely on its being in fact a modus. *Ward* v. *Shepherd*. 3 Price, 607.

4. Courts of equity are not bound in tithe causes to any limitation in point of the time for which the tithes are sought, although, *a conveniente*, it has been usual to confine the account to a period of six years, where the court sees no reason to depart from such usage. *Warden &c. of St. Paul's* v. *The Dean*, 4 Price, 86.

5. An old former decree in favor of a predecessor of a rector, and a verdict obtained by him on an issue under it, will not assist a suit by him for tithes in kind arising from lands not within his parish, founded on the receipt for many years, of a money-payment in lieu of such tithes by way of composition, (and not pretended, by the defence, to be a modus), or preclude the necessity of a new trial at law, if, ever since that decree and verdict, the succeeding rectors have neglected to take advantage of the result of the former suit, and received the same payment as before. On such a claim a rector has no common-law right. *Sanders* v. *Longden*, 4 Price, 117.

(*b*) *Issue*.

1. Issue directed to try moduses, alleged variations in some of the payments appearing to be only irregularities in the collection. *Blackburn* v. *Jepson*, 17 Ves. 473.

2. In a cause where the defendants had mispleaded, by not stating customary payments of tithes by their answer, but adopting *ore tenus* payments, disclosed by the answer to their cross bill, instead of moving for leave to file a supplemental answer, and there being great improbability of establishing those payments after two unsuccessful trials at law in another cause, an issue was refused. *The Warden and Minor Canons of St. Paul's* v. *Kettle*, 2 V. & B. 1.

3. A rector is not entitled to an issue where the defendant sets up a grant of a portion and constant non-payment of tithes, which defence is not impeached by the plaintiff. *Barker* v. *Baker*, Wigh. 397.

4. Where an exemption from payments of tithes is claimed for a grange, formerly belonging to a priviliged order, (*quamdiu manibus propriis*), the court will direct an issue to try the exemption, and also to ascertain the extent of such grange, if doubtful, from the depositions in the cause. *Byam* v. *Booth*, 2 Price, 231.

5. Where an issue is granted to try a modus laid for gardens generally, the court will order that the jury be directed to say, whether they find a modus to have been paid for gardens generally, or for ancient gardens, and the judge to endorse the *postea* accordingly. *Prevost* v. *Benett*, 2 Price, 272.

6. Where the defendants set up to a bill for tithes, a claim of exemption under the 2d and 3rd Edward 6, cap. 13, and produced much evidence of the land in question requiring to be cleared and levelled; and that it gave more than usual trouble in ploughing, and cost more than the customary expense in manuring it with lime, the court ordered an issue to try whether the lands, of which the tithes were demanded, were of such a nature as (exclusive of the labor and expense of clearing the same from furze or whims, and preparing the same for ploughing), necessarily required extraordinary expense of liming and manuring, or labor to bring them into a proper state of cultivation. *Kingsmill* v. *Billingsley*, 3 Price, 465.

7. A rector is entitled to an issue, as matter of right, in cases where he sues

only, not where he is defendant. *Williams* v. *Price*, 4 Price, 156. Dan. 13.

8. The court will not grant an issue to a rector defending a suit for tithe of hay against a vicar who has constantly proved perception, notwithstanding his endowment contains an exception of that tithe as due to the rector, where the latter cannot show perception. *Parsons* v. *Bellamy*, 4 Price, 190.

9. An issue will not be granted to try the character of money-payments set up as moduses, where the witnesses state that such payments were apportioned by reference to the poor's rates. *Walter* v. *Holman*, 4 Price, 171.

10. Where the value of a vicarage, as estimated by the usual ancient documents, is inconsistent with the probability of the money-payments set up as moduses, being so old as legal memory, such inconsistency is not sufficient to enable the court to dispense with an issue, because those documents are not evidence so conclusive as to warrant a decree in the absence of other evidence. *Jee* v. *Hockley*, 4 Price, 87.

11. The court will not make a decree in favor of a rector claiming tithes in kind of lands not within his parish, for which he has for many years received a money-payment by way of composition, which the defendant does not pretend to insist on as a modus; nor will they grant a commission to ascertain the boundaries of such lands without a previous inquiry, whether the plaintiff is entitled to any, and what tithes on such lands, by a trial at law on an issue; because such a claim is not within the recognised common law right of a rector. *Sanders* v. *Lougden*, 4 Price, 117.

12. An issue will not be granted to try part of a custom, as where a payment has been pleaded by way of modus, and it be proved to be liable to certain modifications, not stated to belong to it. *Leathes* v. *Newitt*, 4 Price, 370.

13. Disclaimer of a rector binds his lessees. *Ibid*, 4 Price, 374.

14. Where an adverse title to the tithes is set up, and established against a demand by a rector, who offers no evidence to impeach such title, he is not entitled to an issue. *Wilmot* v. *Hellaby*, 5 Price, 355. Dan. 116.

15. Where tithe of corn has never within memory been payable in a parish, and a contributory payment exempting the whole parish is paid by certain, though not all, of the owners and occupiers of estates, the question of whether farm or district modus must go to an issue. *De Whelpdale* v. *Milburn*, 5 Price, 485.

16. Where one sort of modus was laid in an answer to a bill for tithes, and another modus was given in evidence, the court refused even to direct an issue, for a party must succeed *secundum allegata et probata*. *Blake* v. *Veysie*, 3 Dow, 189.

17. Whether a vicar is entitled to issues where there is conflicting testimony, except on a case of weightier evidence—*Quære*. *Petch* v. *Dalton*, 6 Price, 232.

(c) *Costs*.

1. In a suit for apportionment of tithe, it having been a fair subject of doubt, an account was decreed without costs. *Aynsley* v. *Wordsworth*, 2 V. & B. 33.

2. Where a defendant states in his answer to a suit for tithes, and proved that, previously to the filing of the bill, he had rendered an account of the tithes due, and was ready to correct the account, if wrong, and to pay what was due; or if defendant had proved a tender of tithes and costs up to such tender, even after bill filed, it would save costs; but a mere tender in the answer is not sufficient for that purpose. *Milnes* v. *Davison*, 3 Mad. 374.

3. Costs of a motion for a new trial of an issue, directed in a tithe cause, refused, the finding at law being confirmed. *White* v. *Lisle*, 4 Mad. 226.

4. Semble, the court will not give a vicar costs, where by his bill he seeks tithes generally and recovers only in part. *Byam* v. *Booth*. 2 Price, 231.

5. Where a modus was ill laid for want of sufficient description of the lands, alleged to be covered by it, costs were refused on an account being decreed for plaintiff. *Gillibrand* v. *Scotson*, 4 Price, 267. Dan. 27.

6. Costs of issues to try moduses reserved. *Layng* v. *Yarborough*, 4 Price, 383.

7. Where one of several co-defendants in a suit for tithes, wherein a general decree of costs had been made, survived the rest, the court refused to order the costs to be apportioned, so as to relieve the survivor from the effect of such decree. *Mickel* v. *Bullen*, 6 Price, 87.

8. Where a defendant in a tithe cause examines many witnesses, whose testi-

mony is inadmissible to any considerable extent, the court will give the plaintiff his costs of the rejected depositions independently of the result of the cause. *Petch* v. *Dalton*, 6 Price, 282.

TOLERATION ACT.

1. The object of the toleration act, was only to repeal certain penal laws therein mentioned, leaving the common law as it stood, with respect to all common law offences against religion. *Attorney-General* v *Pearson*. 3 Mer. 405.

2. And the act 53 Geo. 3. c. 160, extends only to the repeal of the clause in the toleration act, and the other statutes therein referred to; but leaves the common law exactly where it was. *Ibid*, 3 Mer. 408.

3. Where there was a clause in a trust deed, bearing date in 1701, for establishing a place of religious worship, relating to the possible future prohibition of the worship thereby intended to be established, it afforded an inference that the worship was such as, at the time of the execution of the deed, was not excepted out of the benefit of the toleration act. A clause in the same deed enabling the trustees to make orders, &c. upon matters relating to the meeting-house, cannot be construed as enabling them to change the objects of the charity, as by introducing a new form of worship and new doctrines. *Attorney-General* v. *Pearson*, 3 Mer. 411.

TOLLS.

1 The question of plaintiff's title on a bill for tolls, is a question purely legal, and must be decided at law, before a court of equity can make an effectual decree; but where the plaintiff has succeeded at law, the court will entertain a bill for an account. *The Mayor &c. of Reading* v. *Winkworth*, 5 Price, 423.

See also *Duke of Norfolk* v. *Myers*, 4 Mad. 447.

TRUST.

I. Uses and Trusts.

(a) Analogy or Difference between.

1. The analogy between uses and trusts, must be confined to those cases where they are considered as distinct from the legal estate; in other cases, uses and trusts both fall within the rules of law. *Burgess* v. *Wheate*, 1 Eden, 195.

2. The opposition between uses and trusts does not consist in any material difference in the essence of the things themselves; but in the difference of the practice of the court of Chancery. And that part of the old law of uses, which did not allow any relief to be given for or against estates in the post, does not now bind by its authority in the case of trusts. *Ibid*, 1 Eden, 217.

3. In the case of uses before the statute where the confidence was to an intent that could not be executed, it never was settled what should be done with the estate. *Ibid*, 1 Eden, 219.

4. The forum, where they are adjudged, is the only difference between trusts and legal estates: trusts are considered in a court of equity, as between *cestui que trust* and trustee, and those claiming under them, as the ownership or legal estate; and, except where it can be pleaded in bar of the exercise of the jurisdiction, whatever would be the rule of law if a legal estate, is applied in equity to a trust estate. *Ibid*, 1 Eden, 223, 249.

5. *Cestui que* trust being in the consideration of a court of equity, actually and absolutely seised of the freehold, the legal consequence of an actual seisin of the freehold shall follow for the benefit of one in the post. *Ibid*, 1 Eden, 226.

6. The difference between uses and trusts does not consist in the principles and rules applied to them; but in the extent of the application of those principles and rules. *Ibid*, 1 Eden, 248.

(b) Estate, Executed or Executory.

1. There is no instance where equity has considered an estate as not executed at the same time that law would have considered it as executed. *Carwardine* v. *Carwardine*. 1 Eden, 35.

2. Limitation to trustees to stand seised, and receive rents and profits to the use of A., is an estate executed in A. *Ibid*, 1 Eden, 36.

3. A trust cannot be executed where no intent appears to create it, except by operation of law. *Burgess* v. *Wheate*, 1 Eden, 207.

4. Devise in trust subject to the charges to permit and empower A. to receive and take the rents and profits during her life, whether this is not an use executed— *Quære*. *Brydges* v. *Wotton*, 1 V. & B. 137.

See also *Lord Deerhurst* v. *The Duke of St. Alban's*. 5 Mad. 232.

Jervoise v. *The Duke of Northumberland*, 1 J. & W. 559

(c) Springing use.

1. There is no case of a springing use introduced in the middle of a limitation, but it always comes in afterwards, and determines the first gift in fee; and whenever it happens to arise, it displaces the first gift, and changes the uses in favor of other persons. *Carwardine* v. *Carwardine*, 1 Eden, 34.

II. Creation of, and what Estates are bound thereby.

1. A trust is collateral to the land, and created by contract of the party, and therefore one who comes in, in the post, shall not be liable to it; but an equity of redemption is inherent in the land, and binds all persons in the post or otherwise. *Burgess* v. *Wheate*, 1 Eden, 206.

2. Trust of the legal estate can only be co-extensive with the legal estate. *Ibid.*

3. Limitation of a trust to the lord, failing the heirs of *cestui que* trust, would have been good; because such limitation would have been good at law, and is implied in the conveyance of every legal fee. *Ibid*, 1 Eden, 237.

4. In freehold manors the form of the lord's concurrence not being necessary, he is always considered as much bound as if he were a party to the deed of alienation, which makes the trust; because the power which the tenant now has by law is equivalent to the lord's consent to the

grant, when it was a strict reversion. *Ibid,* 1 Eden, 232.

5. Though trusts as between the trustee *cestuis que* trust, and those claiming under them, are considered as imitating the possession, it does not follow that a court of equity considers the creation and instrument of trust, a nullity. *Ibid,* 1 Eden, 250.

6. The creation of a trust cannot affect the right of a third person. *Burgess* v. *Wheate,* 1 Eden, 251.

7. Though a use or trust must arise out of the original feoffment to uses, yet they need not be specifically created at the time of the execution of the deed. *Wright* v. *Lord Cadogan,* 2 Eden, 256.

8. The statute of frauds has only imposed a form in declaring the use, the control of the use remains as it was before the statute, the absolute will and declared intent of the owner. *Ibid,* 2 Eden, 257.

9 There is a distinction between express trust for an indefinite purpose, and where, from the indefinite nature of the purpose, the court concludes, that a proper trust could not be intended, though the words import trust. The principle of the latter case not applied to express trust. *Gibbs* v. *Rumsey,* 2 V & B. 298.

III. By Implication or Construction.

(a) *Words of Confidence.*

1. Testator having, by his will, made his daughter tenant for life of his general real estates, and of lands to be purchased with his personal estate, and also with the profits arising from sale of timber, devises his collieries, &c. upon trust, to dispose and convey the same in such manner as she, whether sole or covert, should direct or appoint; and in default of appointment, to apply the money produced by the collieries, after paying the expenses, to the same uses as the residue of his personal estate; the testator then, after declaring that though his meaning was to give his daughter the absolute disposal of the said collieries, &c. to prevent the expenses and trouble that must attend the management of affairs of such a nature, under the direction of the court of Chancery, requested her to direct the money arising therefrom to be applied in such a manner as he had directed the same, in default of appointment. From the intention of the testator, as expressed through the whole will, it was held that the daughter was not entitled to the absolute disposal of this property, but that her interest was confined to a disposition by sale. *Earl of Bute* v. *Stuart,* 2 Eden, 87.

2. The testator, by a deed-poll, bearing even date with his will, declared a legacy he had given by his will was so given upon special trust and confidence, that the legatee, his executors, &c. as soon as he or they received the same, should pay it over to his kinsman therein named. The deed-poll was not proved as a testamentary paper. This is a legacy to the kinsman, and does not lapse by the death of the legatee named in the will, in the testator's lifetime. *Inchiquin* v. *French,* 1 Cox, 1.

3. Testatrix, by will, gave all her real and personal estate to her son, his heirs, executors, &c. chargeable with debts and legacies, and expressed her "earnest request to her son, the devisee, that on failure of issue of his body, he would sometime, in his lifetime, either by will, or any other writing, settle the said premises, or so much thereof, as he should be seised of at the time of his decease, so, and in such manner, as that, on failure of issue of his body, the same might come to the testatrix's daughter, and the heirs of her body." These words of request are not imperative on the son; for words of request, to amount to a legacy, must be limited to some certain thing, or certain part of a thing, and not left absolutely to the pleasure of the person to whom the request is made. *Bland* v. *Bland,* 2 Cox, 349.

4. Words of confidence, if the object be certain and the subject ascertained, always create a trust in equity.

Dashwood v. *Peyton,* 18 Ves. 41.
Tibbitts v. *Tibbitts,* 19 Ves. 664.
Wright v. *Atkyns,* Coop. 115.

5. Devise to a nephew in fee, "not doubting, in case he should have no child, but that he will dispose and give my said real estate to the female descendants of my sister, in such part or parts and manner as he shall think fit, in preference to any descendant on his own female line." These words create a trust in the event described for the sister's children. *Parsons* v. *Baker,* 18 Ves. 476.

6. Devise to a son, recommending him to continue his cousins, A. and B., in the occupation of their respective farms in the county of W. as heretofore, and so long as they continue to manage the

same, in a good and husbandlike manner, and to duly pay their rents: held to be a trust for the cousins, who had been tenants at will, and the son being the heir, was put to his election. *Tibbits* v. *Tibbits*, 19 Ves. 656.

7. No trust under words of recommendation and confidence applied to an uncertain subject; as what shall be left after the death of a person to whom the property is given in the first instance. *Tibbits* v. *Tibbits*, 19 Ves. 664.

8. The testator by a codicil, required and entreated the executor, who was also residuary legatee, by will or deed, to settle and secure £500, to be paid at his decease; and declaring that he had omitted to express it in his will, not doubting that the executor would readily comply with the request: this is a trust by way of legacy out of the assets, not a condition imposed independent of them. *Taylor* v. *George*, 2 V. & B. 378.

9. Testator expressed his will and desire, that one-third of the principal of his estate and effects should be left entirely to the disposal of his wife, among such of her relations as she may think proper, after the death of his sisters. This is a trust for her next of kin at the time of her death, she having made no disposition. *Birch* v. *Wade*, 3 V. & B. 198.

10. Devise and bequest of real and leasehold estate to the defendant "and her heirs for ever, in the fullest confidence that after her decease she will devise the property to my family," create a trust as to the inheritance. *Wright* v. *Atkyns*. 17 Ves. 255. Coop. 111.
Affirmed on appeal. 19 Ves. 299. Coop. 111.

11. A gift to testator's wife, A. C., £500, "and it is my will and desire that A. C. may dispose of the same amongst her relations, as she by will may think proper," held a trust for the relations of A. C.; and the power to dispose of the £500 was well executed by the will of A. C., giving the same to her sister, and her sister's children, though such will made no reference to the will of the first testator. *Forbes* v. *Ball*, 3 Mer. 437.

12. Words of entreaty in a bequest, will create a trust, although there may be a power of selection among those in whose favor the entreaty is made. *Prevost* v. *Clarke*, 2 Mad. 458.

13. Bequest of residue to testator's wife "requesting she would at her death leave £200 to each of the Miss Nortons, and leave the remainder of her property to my nephews G. and Wm. Eade." It was referred to the Master to inquire who were the persons meant by the Miss Nortons, and on his report, and on further directions, the legacies were secured to the three persons proved to have been intended by the testator; but as the "remainder of her property" must be understood to be the property the wife might possess at her death, it was held too uncertain to raise a trust in favor of the nephews. *Eade* v. *Eade*, 5 Mad. 118.

14. Where a testator, having bequeathed personal estate to trustees, recommends them to lay out the money in lands, it is imperative, and raises a trust which must be carried into execution. *Kirkbank* v. *Hudson*, 7 Price, 212.

(*b*) *Securities descending to the Heir.*

1. Where English bonds, and, as further security, heritable bonds, were given in a loan of money to a domiciled Englishman, who bequeathed the former to his executors in trust, held that when there are several securities for the same debt, an assignment or gift by the creditor of one security is an assignment or gift of the debt, and neither the creditor nor his representatives can afterwards set up the other securities for the purpose of defeating the assignment or gift, and consequently that as to the securities not given by the will, the heir of the testator was a trustee for the legatee. *Dutchess of Buccleugh* v. *Hoare*, 4 Mad. 467.

(*c*) *Purchase in, or Transfer to the name of another.*

1. A copyhold was granted for three lives, the purchaser, his wife, and son, to take in succession; no custom was stated, and the purchase-money was all paid by the father: held, the son is not a trustee of his life interest for the father, but takes it beneficially as an advancement. *Dyer* v. *Dyer*, 2 Cox, 92.

2. Where an estate is purchased in the name of another person, it is a trust for him who pays the consideration, unless the purchase is by a parent in the name of a child, which will be presumed an advancement. *Finch* v. *Finch*, 15 Ves. 43.

3. The presumption of such advancement is capable of being rebutted, but will not give way to slight circumstances. *Ibid.*

4. Where the purchase money of an estate is paid by A. and the estate is conveyed to B., B. is a trustee for A.; and C., purchasing with notice of the trust, will also be a trustee for A. *Mackreth* v. *Symmons*, 15 Ves. 350.

5. Where there is a joint advance of the purchase money, but the purchase is made in the name of one only, there is a resulting trust for the other in proportion to his advance. *Wray* v. *Steele*, 2 V. & B. 388.

6. The general rule that, on a purchase by one man in the name of another, the nominee is a trustee for the purchaser, is subject to exception where the purchaser is under a species of natural obligation to provide for the nominee; as where a father purchases in the name of his son, and no act is done to manifest an intention that the son shall take as trustee, this will be presumed an advancement, unless there is a custom controlling that doctrine, or a contemporaneous evidence of a different intention. In this case a father purchased the reversion of a copyhold estate, and took the estate to hold, to his three sons successively, for life; he afterwards, under a license, demised the estate to other uses. It was held that the sons took successively as advancement, as there was no custom to control the effect of the original purchase, and the estate being in reversion, the possession of the father did not afford the necessary contemporaneous evidence of his intention to make his sons trustees. *Murless* v. *Franklin*, 1 Swan. 13.

7. The presumption arising from the circumstances of the purchase of one estate cannot be qualified by transactions relative to other estates. *Ibid*, 1 Swan. 19.

8. A transfer of stock of an intestate, into the name of himself jointly with that of the husband of one of two nieces, accompanied by proof of his having said in his lifetime, that it was his intention to give the husband the stock at his death, in consideration of affection for him and his wife, and that he had transferred it for that purpose, if not repelled by counter testimony, held to be sufficient proof of a gift of such stock, and the court refused to continue an injunction granted to restrain the husband, who had administered, from disposing of it. Such evidence is strong enough to destroy the otherwise equitable presumption that the transferee is a mere trustee for the transferror, without a reference or an issue; for, however weak the defendant's equity be, the plaintiff had not shewn any, and slight circumstances are sufficient to rebut the *prima facie* presumption. *George* v. *Howard*, 7 Price, 646.

(d) *Renewing Leasehold Interests.*

1. Bequest of leaseholds for years, determinable upon lives, for life, with remainder over, for all the residue of the term and interest the testator should have to come therein at his decease. The term expired in the lifetime of the testator, who continued to hold as tenant from year to year, and paid half a year's rent before his death. The executrix, who was the widow and tenant for life, renewed the lease and died. Upon the general words unrestrained, comprising the interest from year to year, and the intention upon the whole will, the renewed lease was held subject to the uses of the will, as the residue of the term at the testator's death, however short, would have been. *James* v. *Dean*, 15 Ves. 236.

2. A church lease for lives to the lessee and her heirs, and another to her and her executors. As to the effect in equity of a declaration of trust for A. simply—*Quære*. But if the leases were merely renewals by a guardian, the trust must follow the actual interest of the infant, as to one estate to the heirs, and as to the other to the executor. *Milner* v. *Lord Harewood*, 18 Ves. 274.

3. Where a testator had a devisable interest, as in a renewable lease held under a corporation, and the devisee renews, such renewed lease becomes subject to the trusts on which the interest was originally devised. *Randall* v. *Russell*, 3 Mer. 190.
Hardham v. *Johnson*, 3 Mer. 347.

4. But the reversion in fee of such a lease is a totally different subject, which the testator had it not in his contemplation to acquire or dispose of, and therefore will not be subject to the trusts of the will, if purchased by the devisee of one to whom the corporation had conveyed it, although the benefit of the tenant's right of renewal with a public body is thereby gone. *Randall* v. *Russell*, 3 Mer. 190.

5. But whether if the purchase had been from the corporation itself—*Quære*. *Ibid*.

And see *Hardham* v. *Johnson*, 3 Mer. 347.

6. The testator being seised in fee of a moiety of an estate, and holding the other moiety as tenant from year to year of a college, his college lease having expired, gives it to his widow *durante viduitate*: held that a new lease, obtained by the widow after testator's death, was subject to the trusts of the will; and that those in remainder should contribute to the fine of renewal in proportions to be settled by the Master. *Randall* v. *Russell*, 3 Mer. 190.

7. A tenant for life of a leasehold interest, the subject of settlement, surrendering the lease and taking a new one for his own benefit, is a trustee for those entitled to estates in remainder under the settlement; and an accumulation of rent, from the death of the tenant for life to the expiration of the new lease, belongs not to his devisee but to the person next entitled under the settlement. A mortgagee, with notice of the settlement, cannot protect himself as a purchaser, or be distinguished from the tenant for life, the mortgagor. *Eyre* v. *Dolphin*, 2 B. & B. 290.

8. Trustee of a lease, renewing for his own benefit, considered in equity as still holding for his *cestui que* trust, even when clear that lessor would not have renewed for the benefit of the *cestui que* trust. *Fitzgibbon* v. *Scanlaw*, 1 Dow, 261, 269.

IV. Resulting.

See also Tit. Executor V. (*b*) *ante*.

1. A trust cannot result by operation of law, except for those for whom it might have been declared by the party executing it. *Burgess* v. *Wheat*, 1 Eden, 207.

2. No trust can result to the lord, as a trust can only result in lieu of the inheritance conveyed without consideration. *Ibid*, 1 Eden, 245.

3. Testator devised certain estates to his wife for a term of 14 years, in trust, to raise portions for his younger children, and to pay his debts, &c., and when such portions, &c. should be raised, the said term to cease, and from and after the expiration of the said term, he gave the said lands, &c. to trustees, until his son J. had a son of the age of 21 years, to whom they should deliver up the possession of all his real estate, comprised in the said term, with the arrears that should have accrued before that time, with a proviso that his son J. should entail all the said estates on such of his brothers, if he should have no son who should attain 21 years, who should come next to the title; and he directed that his said estate should not be put in the power of his son J., but be preserved for the use of the eldest and other sons of J., in tail male, and then to the use of his, (the testator's) son H., in like manner. Held that the surplus of the rents and profits during the term of 14 years, and until J. has a son, who attains 21 years, was undisposed of by the will, and belonged to the heir at law. *Bland* v. *Bland*, 2 Cox, 349.

4. Rents and profits under a trust to accumulate, being in the event not disposed of, will result to the heir at law. *Stanley* v. *Stanley*, 16 Ves. 491.

5. A devise to convey to the devisor's son from and after his age of thirty, which he did not attain, with a declaration that he should have no power over the estate until his age of thirty: this is a resulting trust for the heir. *Nash* v. *Smith*, 17 Ves. 29.

6. Where a residuary bequest is cancelled, as by striking it through with a pencil, it will be a resulting trust for the next of kin. *Mence* v. *Mence*, 18 Ves. 348.

7. Devise and bequest upon trust, the devisee cannot take beneficially the real estate not exhausted, but a trust results for the heir; nor can the executor, whether himself or another is the trustee, take beneficially the surplus of the personal property. *Dawson* v. *Clarke*, 15 Ves. 416. 18 Ves. 255.

8. Devise when the devisee attains twenty-one, a resulting trust for the heir until that period, and by the previous death of the devisee the remainder is accelerated. *Chambers* v. *Brailsford*, 18 Ves. 368.

9. Bequest of accumulated fund from real and personal estate, when the legatee attains twenty-one. Upon his death under that age, it is a resulting trust for the respective representatives of testator. *Ibid.*

10. A devise "after payment of debts, legacies, &c., of specific freehold and leasehold estates to A., subject to mortgages and incumbrances, and of all other testator's freehold and leasehold estates, together with all his personal estate to trustees to sell; and out of the money, in the first place, to pay their expenses in the execution of the will or trust, and without further disposition, appointing the trustees executors. This is a resulting trust as to

the produce of the real estate, for the heir at law. *Hill* v. *Cock*,
1 V. & B. 173.

11 A devise in fee, subject to and chargeable with annuities, upon the intention collected from the whole will, was held a beneficial devise, and not a resulting trust for the heir, as to the surplus beyond the annuities. *King* v. *Denison*, 1 V. & B. 260.

12. There is a difference between a devise charged with debts, and a devise upon trust to pay debts, the former being a beneficial devise subject to the particular purpose, the latter limited to a particular purpose; and therefore, if such purpose does not exhaust the interest, the residue will be a resulting trust for the heir. *Ibid*, 1 V. & B. 272.

13. Devise of freehold estate in trust, to sell and apply the money towards the payment of the legacies; and the residue of personal estate after payment of debts, legacies, &c. upon trust to convert all the said residue of his personal estate into ready money to be laid out in the purchase of freehold property to be settled. The personal estate leaving a residue beyond the charge of debts and legacies, the real estate will be a resulting trust for the heir at law, and is not charged with the legacies as a primary fund, but only as auxiliary to the personal estate. *Maugham* v. *Mason*,
1 V. & B. 410.

14. Legatee, tenant for life of a renewable college lease, with power of appointment, appoints to one who dies in her lifetime: this is a resulting trust by lapse, for the representatives of the author of the power; nor does the renewal in the life of the tenant for life, operate as an appointment in her own favor, so as to prevent the lapse. *Brookman* v. *Hales*,
2 V. & B. 45.

15. Money produced by the sale of real estates, bequeathed for charitable purposes, is a resulting trust for the heir. *Gibbs* v. *Rumsey*, 2 V. & B. 294.

16. A general devise and bequest to executors, who took also equal legacies of stock for mourning, their heirs, executors, &c., on the special trust to devote all, both real and personal, to debts, legacies, and annuities: held to be a resulting trust of the residue. *Southouse* v. *Bate*,
2 V. & B. 396.

17. Where a term was created and no trust of it declared, but the estate devised to tenants for life, with remainders over, the court decided that there was no resulting trust as to the term, but that it attended the inheritance. *Sidney* v. *Shelley*,
19 Ves. 352.

S. C. *Sidney* v. *Miller*, Coop. 206.

18. The question of a resulting trust can arise between the real and personal representatives of the testator only, and not between the representatives of a party taking under a will. *Ashby* v. *Palmer*,
1 Mer. 296.

19. Testator gives to A. £10,000, together with the furniture in his houses, (plate only excepted,) and appoints him his executor. Although the legacy constitutes a violent presumption in law, that the testator meant to exclude him from the beneficial interest in the residue, the exception out of the bequest of furniture is not a circumstance to confirm that presumption, so as to preclude him from giving parol evidence of intention in his favor; such evidence being also liable to be repelled by evidence of a contrary intention. In this case the evidence not amounting to a direct intention in the executor's favor, and being met by contrary evidence tending to confirm the legal presumption against him, he was declared to be a trustee of the residue for the next of kin. *Langham* v. *Sanford*,
17 Ves. 435.

The decree at the Rolls was affirmed upon appeal. *Ibid*, 2 Mer. 6.
19 Ves. 641.

20. Whether to rebut the presumption of law, it is enough to allow evidence of an intention to exclude the next of kin, without any evidence of direct intention in favor of the executor—*Quære*. *Ibid*.

21. Under a devise of all the residue of the testator's estate and effects, whatsoever and wheresoever, of what nature or kind soever, to trustees, upon trusts referrible to the personal property only; held that the real estate passed with a resulting trust for the heir. *Dunnage* v. *White*, 1 J. & W. 583.

22. Devise of an estate in trust, to sell, without fixing any time for that purpose, and to apply the interest on the monies to arise by the sale, to the use of the plaintiff for life, and then over: the estates continued unsold, and the plaintiff, as the heir at law, held entitled to the rents and profits of the estate, for the first year after the death of the testatrix, as being undisposed of. *Fitzgerald* v. *Jervoise*, 5 Mad. 25.

23. A specific legacy, bequeathed to a residuary legatee, of the testator's per-

sonal property, directed to be paid out of his real estate devised to be sold for that and other payments, (the overplus to be paid to another legatee), becoming lapsed by the death of the residuary legatee in the testator's lifetime; held not to be a resulting trust for the benefit of the heir at law, nor to be applicable in exoneration of the personal estate, for the benefit of the next of kin, but to discharge the devised estate again in favor of the legatee of the residue of the produce of the sale. *Noel v. Lord Henley*, 7 Price, 241.

24. The application of the personal estate by the heir in completing a contract entered into by the ancestor, but not binding on him, raises no trust in the lands for the next of kin. *Savage* v. *Carroll*, 1 B. & B. 265.

25. Whether the case of resulting trust arise between the heir and next of kin, or heir and residuary legatee, the question is, what is the residue? *Kellett* v. *Kellett*, 1 B. & B. 545.

26. When the intention of the testator is to provide an auxiliary fund for legacies, and not a complete conversion out and out, the residue of the real estate, after making good the deficiency of the personal in payment of legacies, is a resulting trust for the heir at law; notwithstanding a legacy is given to him, and the testator has "appointed and devised residuary legatees." *Kellett* v. *Kellett*, 1 B. & B. 533.

27. Decree affirmed in Dom. Proc. upon the principle, that, though the intention was very doubtful, the heir at law could only be disinherited by express words or necessary implication. *Ibid*, 3 Dow, 248, 254.

28. Where land or any interest in land, which would descend to the heir, is devised for purposes which the law will not permit to take effect, the interest results to the heir at law as undisposed of; therefore, where a testator created a term upon certain trusts, and after the execution of the trusts, or expiration of the term, devised the lands over, and the trusts of the term were void, it was held that the estate did not go immediately to the subsequent devisee, but that the benefit of the trusts resulted to the heir at law. *Tregonwell* v. *Sydenham*, 3 Dow, 194.

V. Construction and Execution of.

(a) Generally.

1. The intention of a person creating a trust, chiefly governs in its construction, where not against good policy; for, though at law, the legal operation controls the intent, in equity the intent controls the legal operation of the deed. *Burgess* v. *Wheate*, 1 Eden, 195.

2. Where a court of justice takes cognizance, and compels the execution of trusts, in substantial ownership, the trust becomes the mere form of a legal conveyance. *Ibid*, 1 Eden, 218.

3. Where the assistance of the trustees is necessary to complete a limitation, it is sufficient evidence of the testator's intention, that the court should model the limitations; but where they are already declared, the court has no authority to alter them. *Austen* v. *Taylor*, 1 Eden, 368.

4. No difference between marriage articles and executory trusts in wills, except that the former afford *prima facie* evidence of intent, which does not belong to the latter. *Jervoise* v. *The Duke of Northumberland*, 1 J. & W. 559.

5. In executory trusts the court considers the intention of the testator, and acts according to it. *Ibid*, 1 J. & W. 570.

6. There is a distinction between trusts executory and executed; in the latter a court of equity follows the law. *Ibid*.

(b) To convey or settle Lands.

1. Where testatrix by will directed a sum of money to be laid out in land, and settled, after some previous limitations, on her own right heirs, and afterwards made a general residuary devise of all her real and personal estate; from the evident intention of the testatrix to exclude the residuary devisee, the heir at law was held entitled to a remainder in fee, in the lands to be purchased. *Robinson* v. *Knight*, 2 Eden, 155.

2. Devise to trustees of money to be laid out in land, and settled as counsel should advise, in trust for A., and his issue in tail male, to take in succession and priority, and the interest of the money, till laid out, to be paid to A., his sons, and issue; the court will execute this trust by giving A. an estate for life only, in the lands to be purchased, with remainder to his first and other sons, in strict settlement. *White* v. *Carter*, 2 Eden, 366.

3. A devise of testator's estates to trustees "upon trust, as counsel should advise, to convey, settle, and assure the said premises to, or for the use of, or in trust for, his daughter J. for her life, and after her death, then on the heirs of her body," &c. The court directed the estates to be settled upon J. for her life, with remainder to her first and other sons in tail general, with remainder to her daughters in tail general, &c.; the limitation being to both sons and daughters in tail general, there is no necessity for a subsequent limitation to J. and the heirs of her body. *Bastard* v. *Proby*, 2 Cox, 6.

4. Testator directs his executors to invest personal estate in the purchase of real estates, which, when purchased, he devises to A. "to him and the male heirs of his body for ever; and if A. should die without issue male, then he devised the same to the heir male of the body of B." This being an executory trust, the court will insert, after the estate tail to A., a limitation to trustees to preserve contingent remainders. *Harrison* v. *Naylor*, 2 Cox, 247.

5. A direction to trustees to correct any defect or incorrect expression in the will, and to form the settlement from what appears to them to be the testator's real meaning, is not an authority to them to change the limitations. *Stanley* v. *Stanley*, 16 Ves. 491.

6. In the case of a legal devise by a will, containing also an executory trust to settled lands, to be purchased in the execution of the trust; in the construction of the trust, the actual intention, if it is to be collected, is regarded in a much greater degree than in the construction of the legal devise. *Green* v. *Stephens*. 17 Ves. 76.

7. A devise to trustees in trust to sell and purchase other estates to be settled; those entitled under the limitations directed of the estates to be purchased have equitable interests of the same extent in the trust estates until sale; therefore, a fine levied by a person who would have been tenant in tail of the estates to be purchased, will bar such estate tail, the effect being an election to keep the estate, binding the trustees, though it may be questionable, whether the trustees could take upon themselves to convey in fee to a person entitled to an estate tail only. *Pearson* v. *Lane*, 17 Ves. 101.

8. Where money is given to be laid out in land to be conveyed to A., or land upon trust to sell, and the produce to be paid to A.; though in the one case the money is not given to him, and in the other no interest expressly in the land, he is in equity the owner, and may elect to have the money, or the land conveyed as he shall direct. *Ibid*, 17 Ves. 104.

9. Directions to settle, construed with reference to a preceding power of sale. *Allan* v. *Backhouse*, 2 V. & B. 78.

10. There is no distinction between executory trusts by marriage articles and by will, except the inference of intention from the object of the former, to provide for the issue, that the father should not have the power to defeat it; therefore, an estate for life, with remainder to the heirs of the body, is a strict settlement in the one case, and an estate tail in the other, unless clearly not meant in their strict technical sense. *Blackburn* v. *Stables*, 2 V. & B. 369.

11. A testator, having devised his real estate to be settled on his two daughters, in equal proportions, undivided, for their lives, with remainder to their issue severally and respectively, in tail general, with cross remainders over; the court thought that the settlement should contain not only cross remainders, as between the children of the two daughters, but also, as between the two families. *Horne* v. *Barton*, 19 Ves. 398. Coop. 257.

12. Testator by his will devised his freehold and copyhold estates in trust, to convey to his son in strict settlement, with remainder to his nephew, and by the first codicil, directed a power to be inserted, enabling the trustees, with the consent of the son, to sell one of the estates to the nephew, on his agreeing to assume the testator's name; and by a second codicil the testator directed that the settlement should contain usual powers to the trustees, with the consent of the tenants for life and guardians of infants, tenants in tail in possession, to sell "all or any part" of the estates: held that the conveyance by the trustees must contain both the particular and the general power of sale. *Greene* v. *Wiglesworth*, 1 Wil. 313. 1 Swan. 2[illegible].

13. Devise of copyhold estates, the legal estate being outstanding, "to my son, R. W. G., to be entailed upon his male heirs, and failing such, to pass to his next brother, and so on, from brother to brother, allowing £25,000 to be raised upon the estates for female children each;" whether this is a trust executed or executory, and if the latter,

[illegible] estate [illegible] W. [illegible]—*Quære.* The point was held to be too doubtful to compel a purchaser to take the title. *Jervoise* v. *The Duke of Northumberland,* 1 J. & W. 559.

(c) For Payment of Debts, Portions, or Legacies.

1. Devise in trust to sell in such manner, and at such time as the trustees shall think proper; the period of conversion, as between those entitled for life and in remainder, depends not upon an arbitrary discretion, nor even a sound discretion in each case, but upon some fixed rule ascertaining a given period, as upon a trust to sell with all convenient speed, controlled in this instance by consent. *Walker* v. *Shore,* 19 Ves. 387.

2. The parties interested in money to be produced by the sale of land have the option to keep the land. *Ibid,* 19 Ves. 392.

3. A gross sum to be paid out of rents and profits, the trustees, if the trust requires payment, are not confined to annual profits. *Bootle* v. *Blundell,* 19 Ves. 528.

4. Construction of deeds of trust: first, that a provision for payment of "the just proportion or share" of all debts owing from one partner jointly and as a partner, referred not to the contribution as among the partners, but to what, with reference to the state of the partnership funds and the ability of the other partners, he may eventually be called on to contribute to the joint debts, so that they may be fully paid. Secondly, that, under a provision for debts of various descriptions, no preference was intended; which must be clearly shown, otherwise the court of Chancery favors equal payment. Thirdly, a reference to a deed of a specified date, there being two of the same date, one executed at that time, the other subsequently, was, in the absence of positive evidence, and aided by circumstances, applied to the former. *Wadeson* v. *Richardson.* 1 V. & B. 103

5. The words "rents and profits," will be extended beyond their admitted natural meaning, annual profits, to a mortgage or sale, when necessary to effect the object, as raising a gross sum to be paid without delay; and thus, as well for fines and reimbursement for portions, and although there is an apparent intention to preserve the estate entire. *Allan* v. *Backhouse,* 2 V. & B. 65.

6. The testator devised lands to his children, being infants, "the same to be sold when the trustees and executors of his will shall see proper to dispose of it; and the money arising out of the lands and tenements to be equally and severally divided among my above-named children." Held, that the trustees had an immediate power of sale; and some of the children being infants, it must be inferred that the testator intended to give the trustees the power to sign receipts, being an authority necessary for the execution of his declared purpose. *Sowarsby* v. *Lucy,* 4 Mad. 142.

7. Real estate being devised in trust, to sell at such time or times after the testator's decease as should seem most advisable, either together, or in separate parcels, by auction or private contract, the trustees to stand possessed of the produce of the sale and the rents and profits accruing in the mean time, upon the trusts of the will: held, not to invest the trustees with an unqualified discretion in respect of the sale, or to entitle them to retain the accumulation of the rents and profits in their hands, to answer the exigencies of the will; but that the residuary *cestuis que* trust were entitled to receive their respective proportions of the accruing rents and profits from the end of the year after the death of the testator, the words, "as should seem most advisable," being held to be equivalent to "with all convenient speed." *Noel* v. *Lord Henley,* 7 Price, 241.

8. If a testator's personalty be clearly more than sufficient for payment of the debts, legacies, funeral, and other expenses, &c. so that there be no occasion to resort to the produce of the real estate, devised to be sold for the purpose of creating a subsidiary fund for the exigencies of the will, the court will proceed to decree execution of the trusts in exoneration of the fund, without waiting for a final report, which would, in strictness, be necessary, or until all the devised property should be sold. *Ibid.*

(d) Rents and Profits to accumulate.

See also *Lord Southampton* v. *Marquis of Hertford,* 2 V. & B. 61.

1. The testator, after making a provision for the maintenance of his children, gives "all the rest, residue, and remain-

der of his real and personal estate," to his son, "to be a vested interest, on his attaining the age of twenty-one," and, "if he shall happen to die before twenty-one," then to his daughter, with remainders over. The rents and profits are to accumulate until the son attains twenty-one, or dies under that age. *Glanvill* v. *Glanvill*, 2 Mer 38.

2. A trust of rents of leasehold estates, to accumulate and be laid out in freehold estates to be settled, ceased upon the first tenant in tail having attained his age of twenty-one, and such leasehold estates vested in him absolutely. *Phipps* v. *Kelynge*, 2 V. & B. 57.

(c) *Where Trustee is dead.*

1. Power, by will, to the devisees for life, when in possession, to cut down timber, as the trustees, the survivors, or survivor of them should assign, allow of, or direct. In the event of the death of the trustees, the court will execute the trust, by referring it to a master to see what timber is fit to be cut down, and ordering the same to be felled, from time to time, for the benefit of such devisees. *Hewett* v *Hewett*, 2 Eden, 332

2. A residuary devise and bequest for each of the testator's relations and kindred, in such proportions, manner, and form, as his executors should think proper, recommending and advising his said trustees and executors to give the greater share thereof to such person or persons, who, in their opinion and judgment, should appear to them to be his nearest relations, and the most deserving, declaring his intention not to control their discretion, but that every thing relative to that disposition, who were his relations, and the proportions, should be entirely in the discretion of the said trustees and executors, and the heirs, executors, and administrators of the survivor of them. This is a trust, and a power; and as the foundation of the power is personal confidence, it is, *prima facie*, limited to the original trustees; and without express words cannot pass to others, to whom, by legal transmission, the same character may happen to belong; and therefore cannot be executed by the devisees and executors, for that specific purpose only, of the surviving trustee; but it is a trust to be executed by the court for those who were the next of kin at the death of the testator, according to the statute of distributions. *Cole* v. *Wade*, 16 Ves. 27.

VI. Illegal or Void.

1. Before the statute 39 and 40 Geo. 3, c. 98, a trust of accumulation might have been directed, so long as an estate may be kept from vesting, that is, until an unborn child of a person in being attained twenty-one, but not longer: but a limitation to vest only in the first descendant of a person in being, who might attain twenty-one, would be too remote, as that descendant might be the child of an unborn child. *Lord Southampton* v. *Marquis Hertford*, 2 V. & B. 61.

2 Where an accumulation exceeds the limits of the statute 39 and 40 Geo. 3, c. 98, it is void only for the excess. *Ibid.*

3 Devise in trust for a son of the testator's nephew, A., at the age of twenty-four, if he has no son, to the son of the testator's great nephew, B., but if neither have a son, then to a son of the testator's great niece's daughter, with a direction to take his name; whoever should take, not to be put in possession of any of the testator's effects until twenty-four, nor the executors to give up their trust, "till a proper entail be made to the male heir by him." This is an executory trust in tail for an only son of A., *in ventre* at the testator's death, and is not void for uncertainty, nor too remote. *Blackburn* v *Stables*, 2 V. & B. 367.

4 Where a penalty is annexed to an offence against a statute, prohibiting a certain act, a trust, in contravention of the provisions of it, cannot be enforced. *Ottley* v. *Browne*, 1 B. & B. 360.

VII. Trustee.

(a) *Appointment and Removal.*

1. A trustee, by his answer, declined to act; and on the hearing, it was referred to the Master to appoint new trustees. The original trustees afterwards agreed to act, and on application to the court that the trustee might be at liberty to amend his answer in this respect, so as to enable the court, on a rehearing, to vary that part of the decree, the court hesitated in altering an answer after a decree; and in this case thought it unnecessary, as the Master might report the cir-

circumstances, and decline the appointment of new trustees. *Miles v. Neave*,
1 Cox, 159.

2. A petition under the statute 36 Geo. 3, c. 90, stating, that one trustee was abroad, an absconding bankrupt, and not likely to return, and praying that the remaining trustee should transfer stock into the names of himself and another person, appointed a co-trustee, the Lord Chancellor made the order upon the affidavit of the facts by the solicitor to the commission. *Williams* v. *Bird*,
1 V. & B. 3.

3. A joint purchase, to hold to the purchasers, their heirs, successors, and assigns, for ever, in trust for erecting a Protestant dissenting chapel: the regulation of such an establishment, with no fixed revenue, but supported only by voluntary contributions, is the proper subject of a bill, and not of an information. The appointment of a minister in the congregation generally' is not in the heir of the surviving trustee: the number of trustees must be kept up; but the mode of appointing them and the minister, whether by the majority simply, or in any more limited way, being uncertain, an inquiry was directed by a Master, who, according to the nature of the establishment, were entitled to propose trustees, and to elect and approve a minister. *Davis* v. *Jenkins*, 3 V. & B. 151.

4. When trustees have a power to appoint new trustees, the court will not on their application direct an appointment without a reference. —— v. *Roberts*,
1 J. & W. 251.

5. On a bill, filed for the substitution of new trustees, a decree was made accordingly, and for a conveyance to them; the court refused to admit a clause in the conveyance, to enable the new trustees to appoint, if necessary, others in their stead, there being no provision in the trust deed for that purpose. *Bayley* v. *Mansell*,
4 Mad. 226.

6. The appointment of a trustee by creditors, to receive rents for the payment of debts, discharges the estate from any loss arising from the failure of the trustee. *Hutchinson* v. *Lord Massereene*,
2 B. & B. 49.

(b) *Estate and Interest.*

1. The transmutation of possession to a trustee conveys to him the legal burthens, and invests him with the legal privileges. *Burgess* v. *Wheat*,
1 Eden, 251.

2. It is held at law that a trustee has, in respect of the legal interest in a ship, an insurable interest, as the *cestui que* trust has in respect of the equitable interest. *Ex parte Yallop*,
15 Ves. 60.

3. Both trustees and *cestui que* trust have an insurable interest.

Ex parte Houghton, } 17 Ves. 253.
———— *Gribble*, }

4. If a trust is imposed, the trustee cannot take beneficially, though the trust be too indefinite for execution. *Gibbs* v. *Rumsey*, 2 V. & B. 297.

5. That a trustee cannot in all matters of trust, or in the nature of trust, be allowed any compensation for his trouble, is a settled rule in equity. *In the matter of Ormsby*, 1 B. & B. 189.

6. Testator by his will gives an annuity to his wife, and legacies to children, and knowing that his personal estate was insufficient to answer these purposes, says nothing about his real estates, but appoints certain persons "trustees of inheritance for the execution of his will"; held that the words meant the same thing as if testator had appointed them "trustees to inherit his estates for the execution of his will." *Trent* v. *Trent*, 1 Dow, 102.

(c) *Power and Duty.*

1. Trustee can transmit no benefit, his duty is to hold for the benefit of all who would have been entitled, if the limitation had not been by way of trust. *Burgess* v. *Wheate*, 1 Eden, 227.

2. A trustee cannot, by delaying a conveyance, create a benefit for himself. *Ibid*,
1 Eden, 238.

3. Where, by a marriage settlement, the trustees were enabled to lend the trust money to the husband, a clause giving the trustees liberty to forbear enforcing payment must be construed for their indemnity, for if inserted with a view to the husband's insolvency, it might amount to fraud. *Ex parte Alcock*,
1 V. & B. 179. 1 Rose, 324.

4. The discretion of trustees having power to change securities, but not without consent, will not be controlled by a court of equity, unless mischievously and ruinously exercised. *De Manneville* v. *Crompton*, 1 V. & B. 354.

5. A power to lend trust money upon real or personal security, does not enable trustees to accommodate a trader with a loan upon his bond. *Langston* v. *Ollivant*, Coop. 33.

6. A., by marriage settlement, covenants for payment within four years of a sum of £4000 to trustees, the dividends whereof, and of other funds thereby settled, are made payable to himself for life. He afterwards granted annuities, and to secure them, assigned, without notice to the trustees, the dividends receivable under the settlement. It was held that the trustees might, at any time after the £4000 became due, have stopped the dividends in satisfaction of the debt under the covenant, and that in case of bankruptcy the trustees would have the same equity against the assignees. *Priddy* v. *Rose*, 3 Mer. 86.

7. A trustee cannot by any act of his own, without communication with his *cestui que* trust, denude himself of that character, till he has performed his trust. *Chalmer* v. *Bradley*, 1 J. & W. 68.

8. Trustee of a settlement not entitled by an agreement with the husband before the marriage to a lien upon the fund settled to the separate use of the wife, with remainder to the survivor, in opposition to a joint appointment made by them, under a power reserved to them in the settlement. *Morris* v. *Clarkson*, 1 J. & W. 107.

9. Trustees, agents, &c. are expected to take the same care of the trust funds, as a reasonable attention to their own affairs would dictate to them to take of their own property. *Massey* v. *Banner*, 1 J. & W. 241.

10. Where the trustees under a settlement are to renew leases, "as occasion may require or they may think proper," it is to be understood as they may think proper for the interest of their *cestui que* trust; the exercise of such a power requires a discretion, but not an arbitrary and capricious discretion. *Milsington, Lord*, v. *Earl Mulgrave*, 3 Mad. 491.

11. Equity will not permit a trustee to evict his *cestui que* trust. *Shine* v. *Gough*, 1 B. & B. 445.

12. Testator by his will devises and bequeaths certain real estates and sums of money to trustees, for the uses of his will, the money to be laid out either in the purchase of lands, or at interest, as the trustees should think most fit and proper. Held that notwithstanding the unlimited discretion given to the trustees by this particular passage of the will, the discretionary power must be governed by the intention of the testator, as collected from the whole of the will taken together. *Cowley* v. *Hartstonge*, 1 Dow, 361.

13. If testator's intention to give an unlimited discretion to his trustees be clearly manifested on the face of the will, the court will not control that discretion. *Ibid*, 1 Dow, 378.

14. A mistake of the trustees shall not be allowed to prejudice the *cestui que* trusts. *Willan* v. *Willan*, 2 Dow, 281.

15. It is now a settled general rule that a trustee to sell cannot purchase the estate of his *cestui que* trust. *Cane* v. *Lord Allen*, 2 Dow, 300.

16. Trustees must not deal with a trust fund for their own benefit. *Phayre* v. *Peree*, 3 Dow, 128.

VIII. Breach of Trust, and herein of Liability of Trustee.

1. Trustees lending money on personal security, is not of itself such gross neglect as to amount to a breach of trust; and the legatee, and afterwards his assignee, having acquiesced in such loan, a bill to charge the trustees was dismissed. *Harden* v. *Parsons*, 1 Eden, 145.

2. A trustee, whether a private person or body corporate, must see to the reality of the authority empowering him to dispose of the trust-money, for if such authority is forged, it is in consideration of law and equity a nullity, and the right remains as before. So where a joint stock company had permitted a tranfer of stock under a forged letter of attorney, it was held, that the company, and not the fair purchaser, should bear the loss. *Ashby* v. *Blackwell*, 2 Eden, 299.

3. Trustees taking upon themselves to lend an infant's money on a private security, must in all cases be responsible for principal and interest, in case of the failure of the security. *Holmes* v. *Dring*, 2 Cox, 1.

4. Where a trustee for the sale of estates for payment of debts, purchased them himself, by taking undue advantage of the confidence reposed in him, and previously to the completion of the con-

tract, sells them at an advanced price, he will be considered a trustee, as to the sums produced by such last mentioned sale, for the original vendor. *Fox* v *Mackreth*, 2 Cox, 320.

5. The failure or negligence of the trustees will not disappoint the objects of the trust. *Ba xv. Whitbread,* 16 Ves 26.

6. Trustees, to preserve contingent remainders, joining in a recovery, was held to be under the particular circumstances of the case no breach of trust. *Moody* v. *Walters,* 16 Ves. 283.

7. In general, trustees, by joining to destroy the contingent remainders before the tenant in tail is of age, commit a breach of trust. *Ibid,* 16 Ves. 307.

8. Trustee, to preserve contingent remainders, joining in a recovery with the remainder-man in tail, who had attained twenty-one, is not a breach of trust, and will not be an objection to a specific performance. *Biscoe* v. *Perkins,* 1 V. & B. 485.

9. But if before the first tenant in tail is twenty-one, he will be liable for a breach of trust, as also would a purchaser under such trustee with notice; but if after the tenant in tail is twenty-one, it is not punishable, even where the trustee would not have been directed to join. *Biscoe* v. *Perkins,* 1 V. & B. 491.

10. A tenant for life, appointed a trustee in the will, not guilty of a breach of trust in joining the remainderman in tail to bar the remainders over. *Osbrey* v. *Bury,* 1 B. & B. 53.

11. Trustee for the purchase of land died without personal assets, but after having purchased land; if the trust could have been executed during his lifetime, which upon the construction was doubtful, yet no part of the trust fund being traced, and the circumstances affording no presumption that the purchases were made in execution of the trust, they were held not liable to the trust. *Perry* v. *Phelips,* 17 Ves. 173.

See also *Denton* v. *Davies,* 18 Ves. 499.

12. Settlement of a renewable lease in trust, out of the rents and profits to pay the fines and charges of renewal, and subject thereto for husband and wife successively for life, remainder to the first son at twenty-one. The trustees not having renewed at the usual periods for renewal, are answerable as for a breach of trust, though not deriving any benefit from it; and the husband, tenant for life, being dead, the trustees were held liable, with the assets of the husband deceased, and the income of the wife, tenant for life in possession, with reference to their enjoyment, to procure a renewal for the son. A tenant purchasing the interest of the husband, with notice of the settlement, will not be charged in favor of the trustees. *Lord Montfort* v. *Lord Cadogan,* 17 Ves. 485.

13. Upon appeal, the court held the trustees primarily liable for the expenses of renewal; but the same to be repaid out of the estates of the tenants for life, with reference, not to the duration of their respective possession, but to the proportions in which they would actually have suffered a diminution of rent in case the rents had been properly applied towards the renewals; and with this variation the decree was affirmed. *Ibid,* 2 Mer. 3. 19 Ves. 635.

14. Purchase of trust property by trustees for their own benefit, set aside after a considerable lapse of time and several assignments, but, on account of the length of time, without costs. *Attorney-General* v. *Lord Dudley,* Coop. 146.

15. But a bill to set aside a purchase by a trustee for himself and his children, after a lapse of eighteen years, was dismissed upon the length of time only, his children taking an interest making no difference. *Gregory* v. *Gregory,* Coop. 207.

16. A trustee of an estate for sale, is bound to bring it to the hammer, under every possible advantage to his *cestui que* trust. He may divest himself of the character of trustee, so as to qualify himself to become a purchaser, not indeed from himself as trustee, but under a specific contract with his *cestui que* trust; but while he continues a trustee he cannot, without the express authority of his *cestui que* trust, have any thing to do with the trust property as purchaser; and it is incumbent on a trustee, in order to support a purchase, to shew that he had such authority; and in a case where the trustee stated a conversation with the attorney of his *cestui que* trust, as such authority, without showing any authority from the *cestui que* trust to the attorney, the court declared the sale not to stand, although there was no evidence of fraud or undervalue. *Downes* v. *Grazebrook,* 3 Mer. 200.

17. Estates being devised to trustees, to be sold for payment of debts, and subject thereto for the testator's infant children, the surviving trustee retains possession of one of the estates in satisfaction of debts, which he alleges himself to have paid, the testator being insolvent. On a bill for an account and conveyance of the estate by one of his children, and the representatives of another, forty-five years after the testator's death, stating that they had recently discovered the fact: special inquiries were directed to ascertain, whether they had any notice of the circumstances; whether they had in any manner released; and whether the trustee had advanced to the amount of the value of the estate. *Chalmer* v. *Bradley*, 1 J. & W. 51.

18. Application to impeach a sale to a trustee, must be made within a reasonable time. *Ibid*, 1 J. & W. 59.

19. When trust property is employed in trade without authority, the *cestuis que* trust must elect to take either the profits for the whole period, or interest for the whole period. *Heathcote* v. *Hulme*, 1 J. & W. 122.

20. Circumstances may arise to entitle them to take profits for one and interest for another part of the period; but a notice of a dissolution of partnership, published for a particular purpose, and not accompanied by a settlement of accounts, or a transfer of the property, is not sufficient. *Ibid*.

21. Whether embarking the fund in a new trade, or at a different place, would be sufficient—*Quære*. *Ibid*.

22. Interest is to be computed at five *per cent*. where trust property has been employed in trade without authority. *Ibid*.

23. Power to trustees, with consent of the wife under her hand, in a marriage settlement, and attested by two or more witnesses, to advance £1,500 to the husband, and the trustees advance the money without such consent, they cannot justify this breach of trust by the approbation of the wife subsequently given; and the assets of the trustees, who were dead, were decreed to refund the money, with costs. *Bateman* v. *Davis*, 3 Mad. 98.

24. A loss happening by the default of a trustee appointed by a testator, falls on the legatee, and the estate is discharged from it. *Hutchinson* v *Lord Massereene*, 2 B. & B. 54.

25. A trust fund, created under a marriage settlement, for the purpose of purchasing lands in fee simple, to be conveyed to the husband for life, remainder to the first and other sons, with power to the trustees to lay out the money in the mean time on security, with consent of the husband. The husband purchases a leasehold interest, and takes the assignment to himself alone; and the trustees advance the money out of the trust fund to pay for it, and take a mortgage on the estate as a security for the purchase money, and other sums advanced out of the trust fund, the security being considerably less than the money so advanced. The husband leases part of the leasehold property to the attorney who managed the purchase for him. Held by the Lords reversing a decree of the Irish Exchequer, that the first son of the marriage was entitled to follow that part of the trust fund which had thus been misapplied, and to have the benefit of the purchase discharged of the lease to the attorney, whose equity against the son, as personal representative of the father, was barred by notice of the settlement and breach of trust. *Phayre* v. *Peree*, 3 Dow, 116.

26. Where a trustee has received money as such, and the mode of putting it out of his hands is ascertained, he ought so to put it out; and if he derives profit from it, he ought to be charged with the profit or interest; but where money remained in the hands of a receiver, unappropriated, he not knowing to whom he was accountable for it till it was appropriated by act of Parliament, though he admitted that he had mixed it with his own money, and made profit of it, it was held that he ought not to be charged with interest for it during the time it remained unappropriated. *Mucklow* v. *Attorney-General*, 4 Dow, 12, 16.

27. Persons acting under a parliamentary trust, stating themselves as so acting, are not to be held personally liable; but this rests on strong principle, that as the trustees must know whether there are sufficient funds, they, when they contract with those who do not know it, act as if representing that they have funds, and shall be personally liable to provide funds to pay the contractors. Per Lord Eldon, C. *Higgins* v *Livingstone*, 4 Dow, 355.

See also as to Liability of Trustee Tit. EXECUTOR VI. (*a*) *ante*.

IX. COSTS.

1. If a trustee makes default at the hearing of a cause, but has liberty to shew cause against the decree, and under this order sets down the cause again, upon paying the costs of the day of the former hearing, he is precisely in the same situation as if he had appeared at the original hearing; and as he would then have been entitled to costs, so he is now. *Norris* v. *Norris*, 1 Cox, 183.

2. Persons nominated trustees by an instrument, which, being void, passes no trust-fund, are not allowed costs as between solicitor and client. *Mohun* v. *Mohun*, 1 Wil. 151. 1 Swan. 201.

3. Trustees are entitled to the protection and direction of the court in the exercise of their trusts, and can never be called upon to pay costs, unless they refuse to act without suit merely from caprice and obstinacy. *Taylor* v. *Glanville*, 3 Mad. 176.

USURY.

1. A. agrees to lend B. £1000, and for that purpose sells £1000 stock, which being under par, produces only £923; he afterwards agrees to lend a further sum of £1400, which being sold out in like manner, produces only £1132 : 5*s*. and takes mortgages for the two sums of £1000 and £1400, and interest at five *per cent*. in the former case, with a covenant to reduce the interest to four *per cent*, if paid within one year; and, in the latter case, with a power to the borrower to replace the stock within two years. On a bill brought by A. for a foreclosure, the whole money having been allowed in the account by the Master, held, the transaction was usurious, and that equity would relieve, though the money had been paid. *Moore* v. *Battie*, 1 Eden, 273.

2. If it be necessary to have the assistance of a court of equity to set aside an usurious contract, it must be on the terms of paying what is fairly due with legal interest. *Scott* v. *Nesbitt*, 2 Cox, 183. *Dalbiac* v. *Dalbiac*, 16 Ves. 124.

3. The court doubted the principle upon which it had been decided, that a negotiable instrument given for an usurious consideration, is bad in the hands of an innocent endorsee. *Ex parte Saunderson*. 2 Cox, 196.

4. There is no usury in taking a commission beyond legal interest for extra incidental charges, as upon agency in the remittance of bills. *Baynes* v. *Fry*, 15 Ves. 120.

5. A contract for the repayment of a debt with legal interest, or to transfer so much stock as it would have produced on the day it was payable, is void as usurious, the principal and interest being secured, with a chance of a rise of the stock; it is different therefore from a contract to replace stock absolutely where the principal is put to hazard from the chance of a fall in the price. *Barnard* v. *Young*, 17 Ves. 44.

6. Bonds, though they necessarily carry interest, being given for instalments, and made up of principal and interest, being the consideration of a purchase or assignment of real and personal estate, are not usurious. *Tarleton* v. *Backhouse*, Coop. 231.

7. Charge by a bill-broker in the country of £10 *per cent*. commission, on discounting a bill payable in London, is not usurious. *Ex parte Henson*, 1 Mad. 112.

8. If usurious interest is not contracted for, the security is not invalidated by subsequently taking such interest. *Ex parte Jennings*, 1 Mad. 331.

9. Plaintiff being indebted to the defendant in £1000, agreed to transfer, within a given time, £100 *per annum* long annuities, at the then price, and in the mean time pay the defendant the dividends, and that the debt of £1000 should constitute part of the purchase-money. The stock was not purchased at the time, and there was a rise in the price of the stocks. The agreement held not to be usurious, or within the stock-jobbing act; and motion for an injunction to restrain proceedings at law was refused. *Clark* v. *Giraud*, 1 Mad. 511.

10. Mortgagor agrees to give a second mortgage for what is due for principal and compound interest on the first mortgage. Whether the second mortgage is void, as being usurious—*Quære*. *Sackett* v. *Bassett*, 4 Mad. 58.

11. A warrant of attorney to secure

the repayment of £600, with interest from a day certain, is usurious, unless the whole of the money is actually advanced on that day; but if the agreement were, that the money being *quasi* paid to the borrower on that day, is left in the lender's hands as a banker, to be drawn out from time to time as the borrower wanted it, and the money is not ready when so applied for, it would be a breach of contract, but would not be usury. *Ex parte Bangley,* 1 Rose, 168.

12. A bill prayed repayment of money paid in consideration of an assignment of a lease, in which there was a clause, that the vendor should be at liberty to repurchase within a given time by paying a larger sum, which would amount to much more than the legal interest of the money paid for the intermediate time, or that in default of such payment, the vendor might be barred and foreclosed of such right to repurchase. This clause is not usurious, and a demurrer on that ground was therefore overruled. *Metcalf* v. *Brown,* 5 Price, 560.

13. Where a loan of money is made in consideration of a lease, and an available security is given for it, the dealing is usurious. *Wilton* v. *Browne,* 1 B. & B. 128.

14. Where the rent is advanced by way of fine or fore-gift, it is not an usurious consideration for a lease. *Ibid,* 1 B. & B. 129.

See also Tit. Landlord & Tenant II. (*c*) *ante.*

VENDOR AND PURCHASER.

I. Vendor.

(*a*) *Selling or conveying the Estate in Breach of the Contract.*

1. A vendor, defendant to a bill for specific performance, will be restrained by injunction from conveying the legal estate. *Echliff* v. *Baldwin,* 16 Ves. 267.

2. Whether after a contract for sale of an estate, the vendor selling to a third person for valuable consideration without notice, is not accountable to the first vendor for the profit of the second sale—*Quære.* *Daniels* v. *Davison,* 16 Ves. 249.

(*b*) *Lien for the Purchase-Money.*

1. Whether the vendor of an estate, who takes the bond of the vendee for the purchase money, has a lien on the lands for the purchase money remaining unpaid—*Quære.* *Blackburne* v. *Gregson.* 1 Cox, 91. S. C. 1 Bro. C. C. 420.

2. In general, the vendor has a lien for the purchase money unpaid, against the vendee, volunteers, and purchasers with notice, or having equitable interests only, claiming under him, unless the intention is clearly shown to relinquish such lien; the taking and relying upon another security may be evidence of this intention, according to the circumstances and nature of the security; but the proof is upon the purchaser; and where it appears from the circumstances, that another security was taken and relied on as to part of the consideration, the lien will prevail as to the residue.

As to marshalling the assets of the vendee by throwing the lien upon the purchased estate—*Quære*. *Mackreth* v. *Symmons*, 15 Ves. 329.

3. The lien of vendor for the purchase-money, is probably derived from the civil law, as to goods, which goes further than our law, by which, if possession, either actual or constructive, is taken by the vendee, the lien giving the right of stoppage *in transitu* is gone; but by the civil law the lien is so strong as to prevail even over actual possession of the vendee. *Ibid*, 15 Ves. 344.

4. When an estate is sold in the court of Chancery, the vendor, though he has conveyed the estate, has a lien for the purchase money. *Cowell* v. *Simpson*, 16 Ves. 278.

5. A vendor's lien on the estate for the purchase money is not discharged by taking bills of exchange; which are to be considered, not as a security, but merely as a mode of payment. *Grant* v. *Mills*, 2 V. & B. 306.

5. As to the effect of a security of a third person, upon the vendor's lien upon the estate for the purchase money—*Quære*. *Ibid*, 2 V. & B. 309.

7. A vendor has in all cases a lien upon the estate sold for his purchase money, unless there is a special agreement extinguishing that equity: and taking drafts or notes for the purchase money does not *per se* deprive the vendor of his lien. *Ex parte Peake*, 1 Mad. 346.

8. Nor is such lien waved by the vendor's taking the promissory note of the vendee as part of the purchase money, and receiving its amount by discount. *Ex parte Loaring*, 2 Rose, 79.

II. Purchaser.

(*a*) *Who may become.*

See also Tit. Trust VIII. *ante*.

1. A residuary legatee has not such an interest as to prevent his becoming himself a purchaser of premises sold under a decree in the cause. *Hooper* v. *Goodwin*, Coop. 95.

(*b*) *Estate and Interest of.*

1. Where a purchaser of a manor under a decree was ordered to pay in his purchase money on a certain day, and be let into possession of the profits from Lady-day, and fines were due for deaths and admissions before Lady-day, though on account of no court having been holden, they were not paid or assessed till after Lady-day, such fines belong to the vendor, and not to the purchaser. *Garrick* v. *Earl Camden*, 2 Cox, 231.

2. The lien of vendee having paid the purchase money prematurely, is analogous to that of vendor having prematurely conveyed the estate. *Mackreth* v. *Symmons*, 15 Ves. 345.

3. The lien is the same where either conveyance or payment was by surprise. *Ibid*, 15 Ves. 353.

4. A purchaser *pendente lite* from the defendant in a real action is bound by the judgment: so also upon a writ of mesne, under the statute Westminter 2. *Metcalfe* v. *Pulvertoft*, 2 V. & B. 205.

5. In equity, a purchaser, before conveyance, is the owner the estate, for almost every purpose as to profit and loss; but before payment of the purchase money he may be restrained from cutting timber; and as between his representatives, it is real estate. *Rawlins* v. *Burgis*, 2 V. & B. 387.

6. The goodwill of a trade which follows from, and is connected with the fact of sole ownership, as in the case of the trade of a nursery man, is distinct from the goodwill which arises from contract, as by stipulations entered into by a retiring partner not to carry on the same trade, or not within a certain distance; so upon a contract for the purchase of a retiring partner's share of the business of a nursery man, the purchaser has no right, without a stipulation, to claim any goodwill in the trade beyond what is the na-

cessary effect of his acquiring the sole ownership of the property, and that is not such as to preclude the retiring partner from carrying on the same trade, where and as he pleases. *Kennedy* v. *Lee*, 3 Mer. 452.

7. The goodwill of a retail shop means all the benefit of the trade, and not merely a benefit of which the vendor may the next day deprive the vendee; and though the sale of a good will does not imply restraint, but leaves the vendor at liberty to set up the same trade in any other situation, yet he is precluded from so setting up in the same situation. *Harrison* v. *Gardner*, 2 Mad. 219.

See also *Crutwell* v. *Lye*, 17 Ves. 335. 1 Rose, 123.

8. Where the vendee agreed with the tenant of the purchased estate, that if he had a conveyance by a given time, the tenant should quit at that period, and the tenant misconstruing the agreement, quitted before a conveyance was made, so that the land was untenanted and deteriorated; the loss held to fall upon the vendee, it being occasioned by his agreement with the tenant, entered into without the knowledge of the vendors. *Harford* v. *Purrier*, 1 Mad. 532.

(c) Liability for Misapplication of Purchase money.

1. In the case of the sale of an estate under a trust to sell, for the benefit of schedule creditors and others coming in within a limited time after the date of the deed, or disabilities removed; the purchasers are not bound to see to the application of the purchase money, if the tenor of the deed implies that the receipt of the trustees should be a discharge. *Balfour* v. *Welland*, 16 Ves. 151.

See also *Binks* v. *Lord Rokeby*, 2 Mad. 227.

2. The doctrine, as to binding a purchaser to see to the application of the purchase money by trustees, has been extended farther than any sound equitable principle will warrant. *Balfour* v. *Welland*, 16 Ves. 156.

3. Generally, a purchaser from an executor is not bound by his mis-application of the money, nor in many cases even of pledge, if the transaction is free from fraud, or any direct evidence on the face of the transaction of an intended misapplication. *M'Leod* v. *Drummond*, 17 Ves. 154.

(d) Where discharged of the Contract.

1. Formerly a purchaser was not let off upon a doubtful title; but was compelled to take it or establish his objection. *Biscoe* v. *Perkins*, 1 V. & B. 493.

2. A purchaser may be discharged on motion, upon affidavit of imprisonment for debt and insolvency. *Hodder* v. *Ruffin*, 1 V. & B. 544.

3. A person purchased, under a decree, two-sevenths of an estate in one lot, and no title could be made to one one-seventh, it was held that the purchaser was at liberty to be discharged from the whole of his purchase. *Roffey* v. *Shallcross*, 4 Mad. 227.

4. Where the estate proves to be affected by judgments, the purchaser will be discharged of his contract, unless the conusor undertake to clear them off, although the purchase is made under a decree for payment of debts, and the judgment creditors did not come in, pursuant to the advertisements for that purpose. *Barrett* v. *Blake*, 2 B. & B. 354.

See also *Wood* v. *Bernal*, 19 Ves. 221.

III. TITLE.

(a) What Title a Purchaser may require, or is bound to accept.

See also TIT. AGREEMENT, *ante.*

1. It is no objection to the title to an estate, that an extent had issued from the crown against the owner, which remained in the hands of the sheriff unexecuted, it appearing that the lords of the Treasury had, in fact, compromised the debt, though a writ of *amoveas manus* had not actually issued. *Poole* v. *Shergold*, 1 Cox, 160.

2. Under a general agreement to sell a fee simple estate, free from all incumbrances, the purchaser is entitled to covenants according to the nature of the vendor's title. *Church* v. *Brown*, 15 Ves. 263.

3. A term in a trustee to attend the inheritance, the trusts being performed, is no objection to the title, though it may be to the conveyance of the estate. *Berkeley* v. *Dauh*, 16 Ves. 380.

4 There is an implied covenant by the vendor of a freehold estate, for the title, though he is but an assignee under a commission of bankruptcy, if selling by a general description. *Deverell* v. *Lord Bolton*, 18 Ves. 512.

5. Whether the effect of advertising for sale a bare possession, is precisely the

same as a declaration that the vendor cannot produce the lessor's title—*Quære*. *Ibid*, 18 Ves. 512.

6. Where a vendor seeks to compel a specific performance of an agreement to take a lease for twenty-one years, at a rack rent, and the agreement is silent as to the production of the lessor's title, he must produce it. But whether in cases in which (as from length of possession) a strong presumption of title exists—*Quære*. *Fildes* v. *Hooker*, 2 Mer. 424.

7. This rule does not apply to a bishop's lease. *Fane* v. *Spencer*, 2 Mer. 430 (*n*). 2 Mad. 438.

8. The right to a good title does not grow out of the agreement between the parties, but is given by law; and where a vendor of a leasehold interest means to sell, without production of his lessor's title, he must expressly declare it; and if the purchaser had such declaration or notice to that effect, he will be taken to have waved his right, and this without any specific contract. *Ogilvie* v. *Foljambe*, 3 Mer. 53.

9. The leases of bishops are distinguishable from those granted by private persons, the right of a bishop to grant such leases, depending upon the statute law of the land; and where the land (comprised in a bishop's lease) had been granted by repeated successive grants, and there had been a quiet enjoyment for upwards of fifty years, it was considered sufficient *prima facie* evidence of the validity of the lease, to throw upon the other party the onus of proving that the lands did not belong to the see, the only possible objection to the title; and therefore, exceptions to the Master's report, in favor of the title of the vendor of such lease, on the ground of the non-production of the bishop's title, was overruled, although the contract was silent as to such production. *Fane* v. *Spencer*, 2 Mad. 438. 2 Mer. 430 (*n*).

10. Purchaser will not be compelled to take a doubtful title, as where it depends upon whether a deed, not delivered, but merely detained by the vendor until payment of the money, could be considered as an escrow, and, as between a judgment creditor and the assignees under the bankruptcy of the vendor, whether payment to the assignees would be a performance of the condition, and make the deed absolute from the beginning, and any conveyance from the assignees inoperative; or if not an escrow, but absolute from the commencement, whether with reference to the statute 21 James 1. c. 19. s. 9. the judgment would be operative as against the lien of assignees for the purchase money, and if not what would prevent its attaching on the estate. *Sloper* v. *Fish*, 2 V. & B. 145.

11. The rule against compelling a purchaser to take a doubtful title, is at least as old as Sir Joseph Jeckyll's time. *Ibid*, 2 V. & B. 149.

12. Landlord contracting to sell part of the demised estate, with an apportionment of a specific amount, part of the rent reserved for the whole estate, can make a good title to it without the consent of the tenant. *Walter* v. *Maunde*, 1 J. & W. 181.

13. In a sale in lots of premises, the particulars of which state them to be held under one lease, reserving rent, and that the purchaser of one lot is to be exclusively subject to the rent, the other purchasers cannot object to the title, on the ground of a clause of re-entry on non-payment contained in the lease. *Ibid*.

14. On an exception to the Master's report, that a good title could not be made, the question was, whether on a sale of one of two houses, with an apportioned rent of £40, but no apportionment having taken place, the purchaser would, by the conveyance of the vendor alone, without the concurrence of the lessee, acquire the same rights and remedies against the lessee, in respect of the apportioned rent of £40, therein to be reserved to him, as he would acquire, in case no rent were mentioned in such conveyance from the vendor, and the annual rent of £40 were legally apportioned by a jury for that part of the reversion comprised in that lot: upon this question the court directed a case to be sent for the opinion of a court of law. *Bliss* v. *Collins*, 4 Mad. 229. 1 J. & W. 426.

15. If there be a settlement of a rent charge upon an adult female before marriage, in lieu of dower, held that a purchaser from the husband of other lands than those charged, was not entitled to look into the husband's title deeds to see whether he has a good title to the lands out of which the rent charge was granted; for the wife must be considered as barred of all claims to dower, she being bound

at the time she made the contract to see there was a good title to the lands charged with the rent charge. *Simpson* v. *Gutteridge*, 1 Mad. 609.

16. It is no objection to a title that two fee farm rents, created by letters patent by James I. are not shewn to have been extinguished, it being proved that no claim had been made by the crown of the rents from the year 1706, and no proof of any previous claim; nor is it an objection to a title, that an assignment of a term was executed by one executor only, though the deed was prepared as an assignment by two executors, one executor being competent to assign. *Ibid.*

17. Assignees putting up to sale, as the particulars of sale stated, the bankrupt's interest to an estate, "as he lately held the same," and stating where the abstract might be seen: held, that vendee could not insist upon any other title than such as the bankrupt had; but upon a suggestion that the particulars were not circulated before the sale, so as to afford the bidders an opportunity of inspecting the abstract, the court offered the trustee an inquiry as to that fact. *Freme* v. *Wright*, 4 Mad. 364.

18. Purchaser not bound to accept a *prima facie* title though reported good by the deputy remembrancer. *Eyton* v. *Dicken*, 4 Price, 303.

19. Where the validity of a deed depends upon the *bona fides* of the transaction, to be collected from extrinsic circumstances, a court of equity will not compel a purchaser to accept a title under the deed, because neither the purchaser nor the court has adequate means of ascertaining those circumstances. *Hartley* v. *Smith*, Buck, 368.

(*b*) *Defective, with Compensation or Indemnity.*

See also Tit. AGREEMENT IX. *ante.*

1. Lands were settled on the husband and wife successively for life, with remainder to their children, with a power of revocation and appointment to new uses by the husband and wife jointly; proviso that if the husband should become bankrupt, &c., then the limitation to him for life should cease, and the lands should go to trustees during his life, for the benefit of his wife and children. The husband agreed for the sale of this estate, and proposed to make title to the purchaser, by executing this power of revocation. The conveyancer, on the part of the purchaser, required an indemnity against the husband's having committed any secret acts of bankruptcy, as the power of revocation would be extinguished by the forfeiture of his life interest; the court thought there was no ground for the objection, and that the mistake in opinion of the conveyancer could not save the purchaser from costs. *Maling* v. *Hill*, 1 Cox, 186.

2. A reservation of all mines and veins of salt in a conveyance of 1704, with a right of entry, (though there is no instance of any claim, and the title has been transferred in 1761, without such reservation, upon the usual covenants), will give the purchaser a right to compensation if he waves it as an objection to the title. *Seaman* v. *Vawdrey*, 16 Ves. 390.

3. Where the estate was subject to tithes, though represented as tithe free, held, that the purchaser, if he choose to take the purchase, has a right to compensation, but not to compel the vendor to purchase the tithes. *Todd* v. *Gee*, 17 Ves. 273.

4. Semble, a purchaser cannot be compelled to take an indemnity against a judgment amounting to half of the purchase-money. It would be different in the case of a small incumbrance on a considerable estate. *Wood* v. *Bernal*, 19 Ves. 221.

See also *Barrett* v. *Blake*, 2 B. & B. 354.

5. Compensation for the dry rot will be decreed where the purchaser relies upon the representations of the vendor as to the state of repairs, and did not employ a surveyor for that reason. *Grant* v. *Munt*, Coop. 173.

6. Under a contract for the assignment of a term, whether from the original lessee, or a mesne assignee, the purchaser must covenant for indemnity against payment of rent and performance of covenants, though he cannot have a covenant for the title from the assignor, as being an executor; and also by express stipulation. *Staines* v. *Morris*, 1 V. & B. 8.

7. It is generally, but not universally, true, that a purchaser may take what he can get, with compensation for what he cannot have; but whether that is ever done without an express undertaking on

his part to do what the court shall order —*Quære.* *Paton* v. *Rogers*,
1 V. & B. 351.

8. A purchaser will not be entitled to an abatement for a deficiency in quantity, where the particular describes the estate as consisting, by estimation, of "41 acres, be the same more or less." *Winch* v. *Winchester*, 1 V. & B. 375.

9. An incumbrance is, *pro tanto*, a defect of title; but a purchaser cannot claim to be indemnified against an incumbrance of which he had express notice; and it has been doubted whether a covenant against incumbrances could protect a purchaser against an incumbrance of which he had notice. *Ogilvie* v. *Foljambe*, 3 Mer. 53.

10. Where a party contracts to purchase, on the faith of the vendor having a good title, such purchaser has a right to have the title sifted to the bottom, before he can be called upon either to accept an indemnity, or compensation for a defect, or to abandon the contract. A court of equity is not to determine whether men are willing purchasers or not; but the court will inquire whether a title can be had; and if the title is defective as to part, whether the part to which no title can be made, is material; and whether the purchaser, willing or not, shall be bound to take the estate with any, and what compensation, for the defective title. *Knatchbull* v. *Grueber*,
3 Mer. 140.

11. An objection to title having been waved, an offer of compensation made by a clerk of the vendor's solicitor, without express authority, cannot be enforced. *Bramwell* v. *Brown*, 1 J. & W. 168.

12. Whether a purchaser can be compelled to take an assignment of a term as a protection against dower—*Quære.* *Male* v. *Smith*, 1 J. & W. 665.

13. Where a vendor having lost his title-deeds agrees to give a real security, he will be obliged specifically to perform his agreement, because he has all the world before him, and may procure such security. It might be different where he agrees to give a security on a particular estate, of which he is not the owner, because he may not be able to procure that particular estate. *Walker* v. *Barnes*,
3 Mad. 247.

14. If a purchaser is kept out of possession for a length of time by difficulties in the title, and the land, during such time, remains uncultivated, and otherwise deteriorated, the court will refer it to a Master, to ascertain the amount of rebatement to be made; and notwithstanding the vendor had made an offer of *interim* possession. *Foster* v. *Deacon*,
3 Mad. 394.

See also *Harford* v. *Purrier*,
1 Mad. 532.

15. If a purchaser compromises debts secured on the purchased estates, the vendor, being bound to relieve the incumbrances, ought not to be charged with more than the vendee actually pays, as that is the amount of the damage sustained by breach of the covenant. *Cane* v. *Lord Allen*, 2 Dow, 296.

(c) *Notice to a Purchaser.*

1. Covenant in a marriage settlement, that the husband shall, within one year, execute, he being then under age, does not shew such an interest in him as to put a purchaser upon inquiry. *Howorth* v. *Deem*, 1 Eden, 351.

2. Proof of constructive notice to a purchaser by one witness, is not sufficient against a positive denial of notice by the answer. *Ibid.*

3. It is sufficient to put a purchaser upon inquiry, where, in the office copy of a will, a whole line of the original has been omitted, and the sense left in such a manner, as to give reason to suppose that the original contained a limitation in tail of real estate. *Surman* v. *Barlow*,
2 Eden, 165.

4. A subject is not bound to know equity as well as law; and therefore a purchaser is not bound to take notice of a doubtful equity, arising out of the mere construction of words, which are uncertain in themselves, and the meaning of which often depends upon their locality. *Cordwell* v. *Mackrill*, 2 Eden, 347.

5. Any fundamental mistake in the particulars of an estate will entitle the purchaser to relief, if recently applied for; but such purchaser is bound to attend to all matters which are of a kind as to be open to his observation, as where the produce of wood upon the estate was represented as averaging £250 *per annum* for the last fifteen years; and such produce, in fact, was made by racking the wood beyond the course of husbandry, it is a fraud to be relieved against in equity: but where the manner of making the cal-

culation was shewn to the purchaser, and also a paper, from which it appeared the woods had been unequally cut, and his own surveyor thought the woods had been cut improperly, the maxim, *caveat emptor*, will apply. *Lowndes* v. *Lane*,
2 Cox, 363.

6. Reasonable notice is a proper question for the determination of the court or jury. *Peacock* v. *Peacock*, 16 Ves. 56.

7. The possession of a tenant is notice to the purchaser of the actual interest such tenant may have either legal or equitable, as under an agreement to purchase. *Daniels* v. *Davison*,
16 Ves. 249. 17 Ves. 433.

8. A purchaser is within the registry act, (7 Anne, c. 20,) and therefore bound by notice of a deed not registered. It is also bound by notice of a judgment not docketed. *Davis* v. *Earl of Strathmore*.
16 Ves. 419.

9. Though the purchaser of a lease has never been considered a purchaser for valuable consideration, without notice, to the extent of not being bound to know from whom the lessor derived his title, yet he is not to take notice of all the circumstances under which it is derived. Therefore such purchaser was understood to have notice that the lessors were trustees for a charity; but not that the lease itself was bad, that depending on circumstances *dehors*. *Attorney General* v. *Backhouse*, 17 Ves. 293.

10. Notice of the contents of a voluntary settlement has no effect, even in equity; therefore, notice of a covenant in a voluntary settlement, that the purchase-money should be paid to trustees to be laid out in other lands to be settled to the same uses, is immaterial. *Buckle* v. *Mitchell*, 18 Ves. 112.

11. Whether the purchaser of a copyhold must be presumed to have notice of every thing on the court rolls—*Quære*. *Hansard* v. *Hardy*, 18 Ves. 462.

12. Court rolls are title deeds of copyholds, and a purchaser, is affected with notice of their contents, so far back as a search is necessary for the security of the title. *Pearce* v. *Newlyn*, 3 Mad. 186.

13. The possession of a tenant is notice to a purchaser of the whole actual interest he has in the estate, and, therefore, of a right to the timber on the estate, although such right accrued by a title independent of and posterior to that under which he held possession. *Allen* v. *Anthony*, 1 Mer. 282.

14. Where the purchaser employed the vendor's agent, who had notice of an incumbrance, it was held that actual notice to such agent was constructive notice to the purchaser, and notwithstanding the purchase was made under the sanction of the court, and an infant was interested in it. *Toulmin* v. *Steere*,
3 Mer. 210.

See also Tit. PRINCIPAL & AGENT, *ante*.

15. A person contracting to purchase leasehold property, is held to contract with notice of the clauses of the lease. *Walter* v. *Maunde*, 1 J. & W. 181.

16. Notice to a purchaser of a lease, necessarily implies notice of all the covenants in it; and being specifically informed that the estate was in lease, he is bound to know all the contents of the leases, and cannot take upon himself the partial knowledge. *Eyre* v. *Dolphin*,
2 B. & B. 301.

17. If a purchaser have been informed, before payment of the purchase money, that there is any previous incumbrance against the vendor, which would be a lien on the land, it is such sufficient notice as to put him on inquiry: and if the lien turn out to be not of a precisely similar nature, (as if he have been informed it was a judgment, when in fact it was a mortgage), it is yet, to a certain extent, legal notice; and the court will set aside conveyances made after such notice in prejudice of the prior incumbrancer. *Taylor* v. *Baker*, 5 Price, 306.
Dan. 71.

18. A purchaser with notice is bound to the same extent and in the same manner as his vendor. *Dunbar* v. *Tredennick*,
2 B. & B. 319.

19. A purchaser with notice is liable to the same equity, stands in the place, and is bound to do what the vendor would be bound to do by a decree. *Ibid.*

20. It would be dangerous with reference to the doctrine of notice, to say that because a man signed a deed, he shall therefore be taken to have had notice of all its contents. *Lord Ranclifie* v. *Parkyns*, 6 Dow, 210.

See also *Breybroke* v. *Inskip*,
Cited, 2 Mer. 555.

21. Notice of a will, passing all the testator's real estate generally, and not by specific demonstration, is not notice of all the particular estates which the testator had to pass. *Lord Ranclifie* v. *Parkyns*, 6 Dow. 222. 225.

(d) *Waiver of, Objections to.*

1. The approbation of counsel is not a waver of all reasonable objections to the title. *Deverell* v. *Lord Bolton*, 18 Ves. 514.

2. If a purchaser, after the delivery of the abstract, on the face of which part of the estate appears to be subject to a right of sporting, not mentioned in the particulars of sale, enters into possession, he waves that objection. *Burnell* v. *Brown*, 1 J. & W. 168.

3. When possession is taken according to the terms of an agreement, it cannot be considered as an approval; but possession, with the abstract of title, for two years, without any objection taken, a correspondence, which contains on the part of the vendee rather an admission that the title was approved of, than any objection to it, alterations in the premises and reletting them, may be so considered; and equity will, under such circumstances, decree a specific performance without any reference as to title. *Margravine of Anspach* v. *Noel*. 1 Mad. 310.

IV. Conveyance and Title Deeds.

1. If a will which forms part of the vendor's title to an estate has not been proved, the purchaser is entitled, on consent of the other parties interested under the will, to have it deposited with a Master for safe custody, although the heir of the testator offers to join in the conveyance; and if the abstract of title states the will to have been proved, and thereby causes the necessity of a suit for the purpose of safe custody, the vendors will have to pay the costs. *Harrison* v. *Coppard*, 2 Cox, 318.

See also *Shore* v. *Collett*, Coop. 234.

2. In the purchase of small lots, the purchaser is entitled to attested copies of the title deeds accompanying the principal purchase, at the expense of the vendor, where there was no intimation that he could not have the deeds themselves. *Boughton* v. *Jewell*, 15 Ves. 176.

3. Where an estate is to be sold for the payment of debts generally, the purchaser is not bound to see to the application of the purchase-money; but where the debts are scheduled, he is bound to see to the application, unless exonerated from that duty by the terms of the deed, giving the power of sale; and in the case of an assignment to trustees of all a mortgagee's interest, for the benefit of schedule and other creditors, with all the same powers to the trustees, which the mortgagees had, the sale taking place under a decree, it was held that the trustees could make a good conveyance, and that the creditors were not necessary parties; that its being a question of conveyance was not a proper subject of exception to the Master's report of a good title. *Binks* v. *Lord Rokeby*, 2 Mad. 227.

4. On a bill for a specific performance, where the conveyance had been ordered to be deposited with the Master, and the purchase money paid into court, the defendant moved to have the conveyance delivered to him pending a demurrer, he consenting that the vendor should receive the purchase money; but the court refused to make such a decretal order without the consent of the plaintiff. *Cutler* v. *Broughton*, 3 Mad. 95.

5. Where the estate purchased was collaterally charged with a bond debt, and the purchaser mortgaged the estate to the vendor for so much of the purchase money as amounted to the charge, upon an undertaking that the money should not be called in till the bond was paid: held that the purchaser could not insist upon having the property reconveyed to him free from the incumbrance, before he paid the sum secured by the mortgage; and if such purchaser file a bill to have the estate reconveyed to him, and a declaration of the court as to the persons entitled to receive the money, where there are two sets of claimants, he will be considered merely as a mortgagor filing a bill to redeem, and must pay all the costs, although he have paid the money into court. *Drew* v. *Harman*, 5 Price, 319.

V. Rent and Interest.

(See also *Burton* v. *Todd*, 1 Swan. 255.)

1. If the agreement is not completed within the time specified, the purchaser will be allowed interest for such time as the purchase money shall appear to have been kept dead, for the special purpose of completing the contract. *Howland* v. *Norris*, 1 Cox, 60.

2. A purchaser under a decree of the court, is not entitled, upon an affidavit that he has had his money lying ready for some time, to be let into possession of the estate and receipt of rents for all such time so possessed. *Barker* v. *Harper*, Coop. 32.

3. A vendor is not entitled to interest on the deposit paid to the auctioneer, even

where the purchaser has rendered a suit necessary, by refusing to perform the contract, on the ground of an objection to the title, which could not be supported, and the deposit is kept locked up during the suit. *Bridges v. Robinson.* 3 Mer. 694.

4. The title appearing on the abstract not being satisfactory, and the purchaser for that reason not having taken possession, the vendor must account for the rents received, or which, without his wilful default, might have been received *Wilson* v. *Clapham*, 1 J. & W. 36.

5. Purchaser charged with five *per cent.* interest on the purchase money unpaid. *Burnell* v. *Brown*, 1 J. & W. 168.

6 Where the title not being completed, the parties agreed, that instead of paying in the purchase money, the vendee should pay an occupation rent, it was referred to the Master to ascertain such rent. *Smith* v. *Lloyd*, 1 Mad. 83. 618.

7. And the deposit money having been paid, by the conditions of sale, "as part of the purchase money," it was ordered that out of such occupation rent "an allowance should be made of interest at £4 *per cent.* on the purchase money so advanced, in the form of a deposit." *Smith* v. *Jackson*, 1 Mad. 618.

8. Though in equity, an estate agreed to be purchased, is considered as the estate of the purchaser from the time of the contract, and the purchase money from that time to belong to the vendor, yet, *quoad* possession, it is not the estate of the purchaser till the purchase money is paid; and as the vendor is entitled to interest upon his purchase money, though the purchaser has suffered it to lie dead, upon the same principle the vendor must account to the purchaser for the rent he has or might have received, unless he gives or tenders possession to the purchaser, or the purchaser has exercised acts of ownership; and where the purchaser invested the purchase money in Exchequer bills, without the assent of the vendor, it was held that they were at the risk of the purchaser, who was therefore entitled to the interest made, but accounting to the vendor for interest at £4 *per cent.* *Acland* v. *Gaisford*, 2 Mad. 28.

9. In a sale under the direction of the court, the purchaser is not entitled to the rents and profits till after the time for paying the money into the Bank, the purchase not being completed till the title is accepted, or the purchaser comes into court, and declares himself satisfied therewith, and the money is brought into court; for until then, if the title should appear defective, the purchaser may apply to be discharged of his bidding. *Mackrell* v. *Hunt*, 2 Mad. 34 (*n*).

VI. Practice.

(*a*) *Reference of Title.*

1. On reference to a Master to see whether a good title can be made, the Master proceeds on the abstract only, unless the purchaser requires the production of the deeds themselves; and if he omits to make such requisition, he cannot except to the report on the ground of the deeds not having been produced before the Master. *Poole* v. *Shergold*, 1 Cox, 160.

2. There may be a reference of title before decree, but only where the title alone is disputed; and therefore will be refused, where the purchaser resists a specific performance on other grounds, as laches on the part of the plaintiff. *Blyth* v. *Elmhirst*, 1 V. & B. 1.

3. There may be a reference of title before answer, if there is no other question, and the parties undertake to do all such acts for the purpose of executing what the court thinks right, as if the answer was in, and the cause was brought to a hearing. *Balmanno* v. *Lumley*, 1 V. & B. 224.

4. To an order of reference of title was added a direction, if the report should be against the title, for compensation; but it was refused as to indemnity. *Ibid.*

5. Reference of title before decree will be refused where the purchaser on other grounds resists a specific performance of the contract. *Paton* v. *Rogers*, 1 V. & B. 351.

6. Reference of title before decree is where the title only is in dispute; and where there was another question, as a claim of compensation, the motion to refer was refused with costs. ——— v. *Skelton*, 1 V. & B. 516.

7. And such a reference was refused, where the purchaser claimed compensation for defect of quantity; even though he submitted to complete his agreement. *Lowe* v. *Manners*, 1 Mer. 19.

8. Also where there was a question, whether the estate was tithe free, having been sold as such. *Wallinger* v. *Hilbert*, 1 Mer. 104.

9. Upon a reference to the Master, to

see if A. could make a good title; if the Master reports that A., with the concurrence of B. can make a good title, he exceeds his authority, it being a report upon the conveyance rather than the title; and the party omitting to take exceptions will not at the hearing be bound by the confirmation of the report. *Lewis* v. *Loxam*, 1 Mer. 179.

10. A bill by vendor for specific performance, and the usual decree for a reference as to title; after the Master has reported in favor of the title the defendant is entitled to an inquiry, whether a good title could have been made at the filing of the bill, with reference to costs. *Daly* v. *Osborne*, 1 Mer. 382.

11. Where the purchaser in his answer to a bill for a specific performance, had admitted the agreement, and accepted the title, and, after the cause had been set down for hearing, discovered a will 80 years old, not set forth in the abstract, but supposed to affect the title, a reference was directed to the Master by consent, to inquire whether a good title could be made, regard being had to the will only. *Const* v. *Barr*, 2 Mer. 57.

12. There can be no reference of title, except where the title only is in dispute. *Morgan* v. *Shaw*, 2 Mer. 138.

13. On a reference of title in a suit for specific performance, the Master reported that a good title could be made; but it appearing that such title was made upon evidence not in the vendor's possession at the time of the reference, it was referred back to the Master to see whether such title could have been made prior to the filing of the bill, and when plaintiff first showed to the defendant, that he could make such title. *Birch* v. *Haynes*, 2 Mer. 444.

14. Semble, although the court will not order a reference of title on motion, where a purchaser resists performance of the contract on another ground, yet it will take care that the latter is substantial. The motion was therefore granted where the only other ground insisted upon by the owner, was that the time of possession had been made of the essence of the contract, but which upon looking into it appeared not to be the case. *Boehm* v. *Wood*, 1 J. & W. 419.

15. On a reference of title on a bill for a specific performance, the reference may extend to all that regards the title, but not to other matters; it may be extended, therefore, to inquire, whether it appeared by the abstract in the pleadings mentioned, that a good title could be made *Jennings* v. *Hopton*, 1 Mad. 211.

16. After the Master's report in favor of a title was confirmed, another Master, in another proceeding, made a report by which the title was affected, it was on motion referred back to the Master, who had reported in favor of the title, to report again upon it. *Jewdwine* v. *Alcock*, 1 Mad. 597.

17. An inquiry at what time a title could be made is the subject of further directions, after the report upon the title, and cannot be combined with the reference of title. *Gibson* v. *Clarke*, 2 V. & B. 103.

18. An order for a reference to the Master as to the title, ought, if the circumstances of the case make it material, to contain a direction that if the master finds a good title can be made, then to inquire when such good title was first shewn to the purchaser; and no second order for such purpose will be granted before the Master has made his report, nor after, except on special circumstances. *Hyde* v. *Wroughton*, 3 Mad. 279.

19. In a suit for a specific performance, an order may be obtained for a reference of the title, and whether a title was shewn prior to the filing of the bill, though the latter part of the motion is not strictly regular. *Anon.* 3 Mad. 495.

20. A motion, after bill filed, and before answer, for a reference as to title, was refused, the counsel for the defendant alleging there were other matters in question besides the title. It would also be refused if the same appeared by the answer. *Matthews* v. *Dana*, 3 Mad. 470.

21. The court of Exchequer, on a bill for specific performance, will not without consent make an interlocutory order to refer a title, the validity of which is denied by the answer, and depends on facts, to the Deputy Remembrancer until the cause is brought to a hearing. *Bowyer* v. *Bright*, 3 Price, 300.

(b) Payment of Purchase Money into Court.

1. Where a purchaser of an estate has taken possession, but objects to the title, he may be required either to pay in the purchase money, or deliver up possession of the estate. *Clarke* v. *Wilson*, 15 Ves. 317.

Smith v. *Lloyd*, 1 Mad. 83.

2. And although, by his answer, he insists upon misrepresentation and want of title. *Wickham* v. *Evered*, 4 Mad. 53.

3. A purchaser in possession may be compelled before the conveyance to pay into court instalments of the purchase money due, and interest according to the contract, the subject being coal-mines, and the purchaser making profit by working them. *Buck* v. *Lodge*, 18 Ves. 450.

4. Though generally a purchaser cannot be called on for the purchase money, until he has a title; yet, where he is let into possession upon a mutual confidence of a speedy title, and the difficulty is a surprise upon both parties, he cannot, without express contract, both retain the possession and withhold the purchase-money. *Gibson* v. *Clarke*, 1 V. & B. 500.

5. One tenant in common, who has agreed to sell to the other, cannot move that the latter should pay his purchase money into court, where such purchaser has been, both before and at the time of the purchase, in possession of the whole estate, with the approbation of the other tenant in common. *Freebody* v. *Perry*, Coop. 91.

6. A purchaser in the Master's office cannot be compelled on motion to pay in his purchase money, where the estate sold is copyhold, limited for life, with remainder over, and the remainderman is abroad, not having surrendered the estate. *Noel* v. *Weston*, Coop. 138.

7. Where, by the terms of the contract, the purchaser is to take possession before a title is made, he cannot be compelled to pay the purchase money into court, on the mere fact of possession; but he may be compelled, even before answer, where he exercises acts of ownership so as to alter the nature of the property; and slighter acts of ownership are sufficient when exercised after the discovery of an objection to title. *Dixon* v. *Astley*, 1 Mer. 133. 378 (*n*). 19 Ves. 564.

8. And also where there is unconscionable delay on the part of the purchaser, and acts of ownership, as felling timber, he must pay the purchase money into court, and though the fact of possession and acts of ownership appear not upon the pleadings, but upon affidavit only. *Burroughs* v. *Oakley*, 1 Mer. 52. 376 (*n*).

9. But not where possession was had independently of the agreement, and there were laches on the part of the vendor, in completing the title. *Fox* v. *Birch*, 1 Mer. 105.

10. The court will not, before answer, order the payment of the purchase money into court by the defendant in possession, unless under special circumstances, such as unreasonable delay, or committing acts of ownership in alteration of property. In this case the defendant being in possession, independently of the agreement, such an order was refused. *Bonner* v. *Johnstone*, 1 Mer. 366.

11. A purchaser exercising acts of ownership, amounting to waste, by alteration and conversion of property, is sufficient to induce the court to order payment of purchase money into court, upon the ground that a vendor has a lien on the estate for the amount, and might have filed his bill to restrain the purchaser in possession from committing such acts of ownership. *Cutler* v. *Simons*, 2 Mer. 103.

12. Generally, a purchaser shall not be allowed to keep both the possession of the estate and the purchase money; but in a case where he was willing to give up possession, which he had taken under the agreement, and it was doubtful whether there was an agreement capable of being completed, the Lord Chancellor refused to order the purchase money into court. *Morgan* v. *Shaw*, 2 Mer. 138.

13. Defendant being in possession, and having exercised acts of ownership, may be ordered to pay the purchase money into court, and although an infant heir is a necessary party to the conveyance. *Bradshaw* v. *Bradshaw*, 2 Mer. 492.

14. A purchaser who was trustee, acting on behalf of himself and his co-trustees, and of the *cestui que* trusts, was ordered to pay the purchase money into court; the agreement having been entered into in the name of himself alone, and the time fixed for the payment having passed long before; it appearing upon affidavits, that the vendors had no notice of his acting for others, and that acts of ownership had been committed since possession given to him under the agreement; and though the answer alleged notice, and denied any acts of ownership by himself, or by any other person to his knowledge. *Crutchley* v. *Jerningham*, 2 Mer. 502.

15. Purchaser in possession, and objecting to the title on the ground of a claim to dower, was ordered to pay the purchase money into court, on the objection being removed by the widow consenting to accept an equivalent from the vendor. *Mole* v. *Smith*, 1 J. & W. 664.

16. Where the possession is not admit-

sed by the answer of the vendee, it may, for the purpose of having the purchase money paid in, be shewn by affidavit. Boothby v. Walker, 1 Mad. 197.

17. But the bare act of taking possession by consent before the title is completed, and without any agreement as to the purchase money, does not entitle the vendor to have the purchase money paid into court. *Clarke* v. *Ellwtt*, 1 Mad. 606.

18. On motion of vendor, the auctioneer was ordered to pay the deposit into court, minus his charges and expenses, and the vendee restrained by injunction from proceeding in his judgment obtained in an action against the auctioneer for the deposit. *Annesley* v. *Muggridge*, 1 Mad. 593.

19. Where the purchaser takes possession, and makes alterations in the estate, the court will order him to pay the purchase money into court, and notwithstanding that the estate by such alterations may be ameliorated. *Bramley* v. *Teal*, 3 Mad. 219.

20. But where the possession was according to the agreement, and the vendor, in order to make a good title, was obliged to obtain an act of Parliament, the court refused to order the residue of the purchase money to be paid into court, even after six years had elapsed since the agreement, and notwithstanding the purchaser had contracted to sell part of the estate, and made alterations in the rest. *Gell* v. *Watson*, 3 Mad. 225.

21. Where the sale is under a decree for the execution of a trust to pay debts, payment of the purchase money into the Bank, under the direction of the court, must be considered as payment to the trustees. *Binks* v. *Lord Rokeby*, 2 Mad. 239.

(c) *Payment of Purchase Money to Vendor.*

1. The vendor dying intestate and leaving an infant heir, the purchase money being paid into court in a suit for a specific performance, instituted after his death, will be retained till the heir attains twenty-one and conveys. *Bullock* v. *Bullock*, 1 J. & W. 603.

2. A purchaser under a decree for the payment of creditors, having approved of the title, paid the purchase money into court, and accepted a conveyance of the estate, cannot object to the payment of the purchase money to the vendor upon the ground of his having notice of an adverse claim to the estate. *Thomas* v. *Powell*, 2 Cox, 394.

(d) *Costs.*

See also Tit. AGREEMENT XIV. (*ante.*)

1. It is a general rule that the vendor, without stipulation to the contrary, must bear the expense of making out his own title. *Clowes* v. *Higginson*, 1 V. & B. 529.

2. Vendor not making a title when the bill was filed, pays the costs up to the report of a good title. *Harford* v. *Purrier*, 1 Mad. 532.

3. Where there is a fair objection to a title, a purchaser, though he fails in his objection, being justified in taking the opinion of the court upon it, ought not to pay costs. *Aislabie* v. *Rice*, 3 Mad. 256. *Staines* v. *Morris*, 1 V. & B. 14.

4. On report against the title, the vendor's bill for specific performance was dismissed with costs, on motion. *Walter* v. *Pyman*, 19 Ves. 351.

5. Where it was necessary to the title of an estate, purchased under a decree, to perpetuate the testimony of a will, the costs were allowed to the purchaser. *Mackrell* v. *Hunt*, 2 Mad. 34 (*n*).

WARD OF COURT.

1. The court of Chancery will, in some instances prevent a father from interfering in the management or education of his son, who is a ward of the court. *Creuze* v. *Hunter*, 2 Cox, 242.

2. A party eloping with, or assisting in the elopement of a ward of court, will be committed for contempt; and ignorance that she was a ward, will not be admitted as an excuse. *Nicholson* v. *Squire*, 16 Ves. 259.

3. The endeavour to marry a ward of the court, though abortive, is a contempt. *Warter* v. *Yorke*, 19 Ves. 453.

4. Parties concerned in the marriage of a male infant, ward of the court, attending by order; the clergyman, appearing exculpated, was discharged with costs out of pocket from the infant's estate; the others ordered to attend the Master on an inquiry whether the mar-

riage by false names was valid, and upon the report, a suit for nullity of marriage, at the expense of the infant's estate, was ordered; and the parties were restrained by injunction from all intercourse with the infant, personal, by correspondence, or otherwise. *Warter* v. *Yorke*, 19 Ves. 451.

5. The punishment for contempt, by marrying an infant ward of court, is by commitment, or in a flagrant case by directing a criminal prosecution for conspiracy, &c.; but it is the subject of sound discretion, and though the right of the court to interpose is not affected by length of time since the contempt committed, the exercise of it was dispensed with where no complaint was made for eight years, and the husband, whose conduct would have justified punishment on a recent application, was of equal family and fortune, and had made a considerable settlement, under which the children took vested interests; and he alleging infidelity on the part of the wife. The interests of the children were not to be affected; but the settlement was altered as between the husband and wife, by increasing the pin-money, and giving the wife some interest in her future property, &c. *Ball* v. *Coutts*, 1 V. & B. 292.

6. Where a contempt is committed by the marriage of a ward of court by a person of no property, and whose sole object is her fortune, he will not be permitted to touch that fortune, and the whole will be put in settlement; but otherwise when the husband is of equal rank and fortune, and makes an equivalent settlement. *Ibid*, 1 V. & B. 303.

7. An affidavit of a bribe offered to a police officer to assist in obtaining possession of a ward of the court, ordered to be laid before the Attorney-General. *Wade* v. *Broughton*, 3 V. & B. 172.

8. The marriage of a ward of the court under gross circumstances is punishable beyond commitment, by indictment as a conspiracy directed by the court. *Ibid.*

WASTE.

(*See also* Tit. Injunction II. *ante*.)

I. What constitutes.

1. It is not waste to cut timber where necessary for the growth of underwood. *Burgess* v. *Lamb*, 16 Ves. 179.

2. Equitable waste has not been extended beyond trees planted or growing for ornament, as in avenues or vistas, to timber merely ornamental, as an extensive wood. *Ibid*, 16 Ves. 174.

3. But it extends to trees planted for the purpose of excluding objects from view. *Day* v. *Merry*, 16 Ves. 375.

4. The doctrine of equitable waste is not to be extended. *Burgess* v. *Lamb*, 16 Ves. 185.

5. Tenant for life, entitled to timber for repairs, cannot sell the same to reimburse herself expenses incurred in repairs, such sale being waste. *Gower* v. *Eyre*, Coop. 156.

6. Semble, that the right to cut timber for the purpose of repairs, extends to selling timber and applying the produce. *Wither* v. *Dean and Chapter of Winchester*, 3 Mer. 421.

7. The court will distinguish between improvement and destruction, and if, with a view to improvement, an act is done which the remainderman should consider as tending to destruction, the court will decide upon the act complained of. *Attorney General* v. *The Duke of Marlborough*, 3 Mad. 549.

II. Right to cut Timber or commit Waste.

1. Settlement on marriage of lands of the husband to the use of husband for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the wife for life for her jointure and in bar of dower; remainder to the first and other sons of the marriage in tail male; re-

mainders to the daughters in the same manner; remainder to the heirs of the body of the husband and wife. The husband died without issue, and upon the application of his devisees for an injunction against the widow, a case was directed to know whether the widow had a right to cut timber, and, which would be a necessary consequence, to the property in it when severed, as tenant in tail, after possibility, either in possession by the effect of merger, if the estates can unite, or in remainder, if they cannot. *Williams* v. *Williams*, 15 Ves 419.

2. Tenant in tail, after possibility, &c. having been once tenant in tail in possession with the other donee, and therefore dispunishable for waste, has the power not only to commit waste, but also to convert to her own use the property wasted, and therefore will not be restrained in equity except for malicious waste. *Williams* v. *Williams*, 15 Ves. 430.

3. Bequest of residue of personal estate upon trust, to be laid out in real estates, to be settled to the same uses as estates devised to the trustees successively for life, without impeachment of waste, with various limitations in strict settlement the estates for life being without impeachment of waste, and the ultimate remainder in fee. The trustees having laid out part of the fund in an estate with a considerable quantity of timber upon it, taking such purchase to be a sound exercise of their discretion, the first tenant for life, more especially if he is one of the trustees, cannot cut the whole. *Burgess* v *Lamb*, 16 Ves. 174.

4. Land devised to be sold, the money to be laid out in other lands to be settled, and the rents and profits until sale to go to the persons entitled to the lands to be purchased. The tenant for life, without impeachment of waste, cannot cut timber on the estate to be sold. *Ibid*, 16 Ves. 180.

5. Generally, tenant for life, without impeachment of waste, may cut timber in a husband like manner independent of the effect upon the beauty of the place, except he can be checked upon the principles of equitable waste. *Ibid*, 16 Ves. 185.

6 A tenant for life, without impeachment of waste, is not obliged to cut timber merely in such a way as a tenant in fee might think the most husband-like; at law, such tenant may cut every thing; and a court of equity will only restrain him from cutting such trees as are absolutely unfit for the purposes of timber; and he is not obliged to suffer timber to grow till it attains its utmost value. *Smythe* v. *Smythe*, 1 Wil. 426.

7. Where a wife, under her marriage settlement, had become, by the death of her husband, tenant for life, with remainder to her children by her deceased husband, in such manner as she should appoint, and, in default of appointment, to all such children as tenants in common, and after the execution of several instruments, the validity of which were doubtful, she entered into agreement with her children to join in suffering a recovery, the first use of which should be to herself for life, without impeachment of waste held, that in an arrangement settling family interests, children may contract with each other to give the parent advantages, which, without such contract, the parent could not have, and that this agreement therefore was valid, and the court dissolved an injunction, restraining her from cutting timber, unless security was given for the value of all she might cut during her life. *Davies* v. *Uphill*, 1 Swan. 129.

8 Effect of lease by tenant for life, without impeachment of waste, not declaring that the lessee should not be impeachable for waste, but with a licence to fell timber. *Davis* v. *The Duke of Marlborough*, 2 Swan 144.

9. A tenant, entitled to a life interest in a term of years, unimpeachable of waste, has a right, as between himself and those in remainder, to fell timber for his own benefit, such timber to be cut in a course of a due and husband-like management of the estate. *Bridges* v. *Stephens*, 2 Swan. 150 (*n*).

10. The statute 5 Anne, c. 3, gave to the Duke of Marlborough and his successors an estate tail in the demesne of Blenheim; but which estate tail, by the provisions of the statute, is rendered incapable of being barred by fine or recovery, or of being subject to dower or coparcenary; and therefore the issue of the Duke of Marlborough have all the legal rights and incidents belonging to tenants in tail, except where such rights and incidents are specially qualified by the provisions of the statute; and as there is no qualifica-

tion as to the right of cutting timber, they are as much the owners of the timber as if they were tenants in fee simple, and do not come within the principle of equitable waste. But the act, 5 Anne, c. 4, being *in pari materia*, must be taken with the former one, to explain the intention of the legislature; and as this latter statute settles a pension upon the duke and his posterity, for the more honorable support of their dignities, in like manner as his honors, and the honor and manor of Woodstock and house of Blenheim were already limited and settled, the legislature imposed upon every possessor of these honors and dignities, the obligation to maintain the house of Blenheim for the future residence of those to whom the succession was limited; and the court is bound to interfere to prevent the destruction of the house, or of timber, which is essential to its shelter or ornament; and therefore a demurrer, insisting upon an absolute and unqualified right to cut all timber upon the estate of Blenheim was overruled. *Attorney General* v. *Duke of Marlborough*, 3 Mad. 498.

11. Tenant in tail being restrained by statute from barring the issue and those in remainder,* is not, for that reason, within the principle of equitable waste. *Ibid*, 3 Mad. 498.

12. Testator gave certain real estates to trustees, in trust for his brother for life, with remainders over; and his personal estate in trust for his sister for life, and to her children after her death; and directed that the timber or wood which should be upon his real estates, should, from time to time, be used for the repairing the houses thereupon, or otherwise for the benefit and advantage of his estate; or that the same should be sold, and the produce of such sale to be applied in the same way as his personal estate was directed to be applied. Held, that the devise to the brother carried the underwood; and that the trustees, leaving sufficient timber on the estate for repairs, might cut down such timber as was fit to be felled, or in a decaying condition, but not the underwood. *Butler* v. *Borton*, 5 Mad. 40.

III. TIMBER.

(a) *Where cut by Order of the Court.*

(See also *Hewett* v. *Hewett*, 2 Eden, 332.)

1. Freehold estates were devised in strict settlement, with a proviso, that in case any person, who by virtue of the limitation &c. should be entitled to the manors, &c. when and as they respectively should become entitled in possession, should reduce the number of deer in Shute Park to less than ten, or dispark the same, or should cut down any trees therein, the estate and interest of such person in the estates devised, should cease as if such person was dead. If it should appear upon a reference to a Master, that timber upon the estate, not ornamental nor affording shelter, was proper to be felled and sold, and that it was for the benefit of all parties interested, the court will decree it to be felled and sold accordingly, and the money to be laid out in the purchase of other estates to be settled to the same uses. *Delapole* v. *Delapole*, 17 Ves. 150.

2. In the case of an infant, tenant in tail, in possession, the court will authorise the cutting of all timber which is fit to be felled; but where there is tenant for life, impeachable of waste, with remainder over, the court will only authorise the cutting of timber where the interest of the succession requires it. *Hussey* v. *Hussey*, 5 Mad. 44.

3. An injunction had been granted to prevent the cutting of timber or other trees, standing or growing, for the shelter or ornament of Blenheim house; but on petition a reference was made to inquire, and state whether any of such timber and other trees might be cut with advantage to the present ornamental character of the gardens, &c., or because they were too thickly planted to admit the most ornamental growth, or for any other reason. *Attorney-General* v. *Duke of Marlborough*, 5 Mad. 280.

(b) *Property in Timber felled.*

1. Where B. was tenant for life, with remainder to his first and other sons in tail, remainder to O. for life, remainder to her first and other sons in tail, with other contingent remainders, with remainder to B. in fee; O. had a child, who died almost immediately; before any other contingent remainderman came in *esse*, B. cut down timber, his own remainder in fee being the next existent estate of inheritance; but afterwards O. had another child. B. shall not take advantage of his own wrong by taking the timber so cut; nor is the second child of O. entitled, until it shall be seen whether B

shall have a child; but the produce shall be paid into court by B., with interest at £4 *per cent.*, and accumulate for the benefit of such person as shall appear at the death of B. to have title to it. *Williams* v. *Duke of Bolton.* 1 Cox, 72.

2. Devise of real estates to trustees and their heirs, to the use of them and their heirs, in trust, to permit C. to receive the rents and profits for life, and after her decease to stand seised of the estates in trust, for the second and other sons of D. in tail male, remainder in trust for E. for life, without impeachment of waste, remainder to the first and other sons of E. in tail male, &c. Proviso, that in case there should not be a second son of D. at the time of the death of C., then, until such second son should be born, the said trustees should pay the rents and profits of the said estates to such persons as were next in remainder, and should be entitled to receive the same, in case no such son should be born. C. cut timber, which was sold under an order of the court, and the produce paid into the Bank. At C's. death D. had no son, and E. was dead, leaving F., his eldest son; the produce of the timber must go where the intermediate rents and profits go, and therefore it belongs to F. absolutely, and shall not abide the event of D's having a son. *Dare* v. *Hopkins*, 2 Cox. 110.

3. A tenant for life, without impeachment of waste, being dispunishable, has also the property in the trees severed. *Williams* v. *Williams*, 15 Ves. 425.

4. A tenant in tail after possibility, &c. if dispunishable for waste at law, has equally with tenant for life, without impeachment of waste by settlement, an interest and property in the timber. *Ibid*, 15 Ves. 427.

5. Whether trustees, who also take an interest, laying out the trust fund in a timbered estate, without a reasonable and discreet attention to the interests of all parties, should be considered as not buying any timber for their own benefit; what is the interest of the tenant for life in such timber; and how the excess is to be disposed of—*Quære.* *Burgess* v. *Lamb*, 16 Ves. 174.

6. Tenant for life, without impeachment of waste, other than wilful waste, is entitled to the interest of money produced by the sale of timber: semble, any claim of tenant for life to cut timber, is a question at law only. *Wickham* v. *Wickham*, Coop. 288. 19 Ves. 419

7. Settlement of estates on trustees and their heirs, during the joint lives of W. H. and his wife, without impeachment of waste, upon trust out of the rents and profits to pay all expenses and out goings, and to raise and pay a sum by way of pin-money to the wife, and subject thereto to pay the clear residue of the rents, &c. to W. H., during the lives of himself and his wife; remainder to W. H. for life, without impeachment of waste; remainder over; with power for the trustees to sell, and lay out the produce in the purchase of other lands, to the same uses. The land being sold under the power, W. H. was held entitled to the produce of timber cut down by him previous to the sale; but not to the value of timber then standing. *Wolf* v. *Hill*, 2 Swan. 149 (*n*).

8. On application of all parties, the expense of an inclosure was defrayed out of money produced by sale of decaying timber, cut by order of the court. *Osborne* v. *Osborne*, Cited 19 Ves. 423.

And see *De la Pole* v. *De la Pole*, 17 Ves. 152.

WATER COMPANY.

1. A company is established by act of parliament, for supplying the inhabitants of several districts with water, at such terms as they should mutually agree upon, and a subsequent act provides, that the company shall only demand reasonable sums: held that a court of equity has no jurisdiction upon the offer of an inhabitant to pay either a reasonable price, or the price originally agreed upon, to compel the company to continue a supply to such inhabitant beyond the term of his contract, or to restrain them from discontinuing such supply, until the decision of the question by a court of law. *Weale* v. *The West Middlesex Water Company*, 1 J. & W. 358.

2. If the supply of water by a water company was to depend upon the reasonableness of the price paid by the inhabitant, and not upon contract, a court of equity could not interfere, as there is no mutuality, the company not being able to compel a person to take water. *Ibid*, 1 J. & W. 374.

WILL OR TESTAMENTARY PAPERS.

I. Jurisdiction.

1. A will of lands lying in the colonies is not triable in Westminster Hall, and therefore a bill by the heir at law, for an issue to try the validity of a will made in England, but concerning lands in Pensylvania, was dismissed. *Pike* v. *Hoare*, 2 Eden, 182.

2. The court of Chancery has no jurisdiction to determine the validity of a will, either of real or personal estate. *Jones* v. *Jones*, 3 Mef. 161.

3. The Ecclesiastical court has jurisdiction to grant probate of a testamentary paper, where it is doubtful whether some part of the property is not freehold; and if the paper may have any effect on the estate, if it does not appear evidently to be a paper applying to freehold property only, it is the duty of the court to establish it. *Durkin* v. *Johnstone*, 1 Phil. 8 (n.) *Thorold* v. *Thorold*, 1 Phil. 9.

4. Where a canal is situate in the provinces of Canterbury and York, but the office for transacting the business of the canal is in the former province, it is sufficient if the will of a share holder be proved in the Prerogative Court of Canterbury. *Smith* v. *Stafford*, 2 Wil. 166.

II. Valid or Void.

(a) *Generally.*

1. Although a man have a mind of sufficient soundness and discretion to regulate his affairs in general, yet if such a dominion or influence be obtained over him as to prevent his exercising such discretion in the making his will, he cannot be considered as having such a disposing mind as will give effect to his will; what evidence will be sufficient to establish such a case—*Quære.* *Mountain* v. *Bennet*, 1 Cox, 353.

2. Will of a resident in a receptacle for lunatics, established upon the then state of his mind, compared with antecedent declarations. *Bootle* v. *Blundell*, 19 Ves. 508.

And see infra (c) 4. 5.

3. The circumstance that one of the residuary devisees was the attorney who drew the will, is not decisive evidence of fraud. *Paine* v. *Hall*, 18 Ves. 475.

(b) *As to real Estate.*

1. A writing, signed by the party who has power to make the trust, declaring a trust upon a will executed according to the statute, is good though such writing be not attested by three witnesses. *Bosom* v. *Statham*, 1 Eden, 513. 1 Cox, 19.

2. A will attested by one witness only, with a codicil attested by three witnesses on the same paper, referring to the will as annexed, making some alterations as to the legacies, and confirming it in all other respects; this codicil will make the will good, it amounting to a re-execution and republication of the will. *De Bathe* v. *Lord Fingal*, 16 Ves. 167.

3. Sealing not necessary to the execution of a devise, under the statute of frauds, nor is it sufficient without signing. *Wright* v. *Wakeford*, 17 Ves. 459.

4. Real estate cannot be converted into personal by will, so as to enable the testator to make a direct disposition of it

by an unattested codicil. *Hooper* v. *Goodwin*, 18 Ves. 166.

5. There is a distinction between legacies charged on the land, as an auxiliary fund, and a portion of the land, or its produce, when directed to be sold. An unattested paper has effect in the former case, but not in the latter. *Ibid*, 18 Ves. 167.

6. "I A. B. do make this my will," equivalent to signature, and if acknowledged before three witnesses, is a good execution, within the statute of frauds. *Morison* v. *Turnour*, 18 Ves. 183.

7. An unattested paper, clearly referred to in a devise of real estate, will be considered part of the will, if made previously, but not if made subsequently. *Wilkinson* v. *Adam*, 1 V. & B. 445.

8. Legacies given by an unattested paper will be included under a charge of legacies on a real estate by a will duly attested; but the produce of the sale of a real estate cannot be directly disposed of by an unattested paper. *Ibid*, 1 V. & B. 446.

9. A will of land in Scotland is analogous to a devise of copyhold estate in England; the will operates as a declaration of the use of a previous surrender in the latter case, and of a previous conveyance, according to the proper feudal form, in the former. *Brodie* v. *Barry*, 2 V. & B. 133,

10. A will signed by two witnesses only, is not effectual to pass land in the East Indies, held by a tenure in the nature of fee simple. *Gardiner* v. *Fell*, 2 Wil. 32. 1 J. & W. 22.

11. Testamentary papers attested so as to pass real estate, but made in these terms: "I leave and bequeath to all my grandchildren, and share and share alike," and "further I appoint T. H. and T. E. my trustees, for all my grandchildren and nieces," are void for uncertainty, and pass no interest in the real estate. *Mohun* v. *Mohun*, 1 Wil 151. 1 Swan. 201.

12. A will is well attested, to pass real estate, though one of the subscribing witnesses is an executor in trust under it. *Phipps* v. *Pitcher*, 1 Mad. 144.

13. A declaration by the testator in the attestation part of his will, that lands should go to a certain person, not a sufficient devise of them under the statute of frauds, not being signed by the testator, or by any person by his direction. *Moneypenny* v. *Dey*, 2 B. & B. 104.

(*b*) *As to Personal Estate.*

1. Where the Ecclesiastical court had granted probate of several papers, the court of Chancery felt bound to consider them all in full force; though, if the question had been open to the court to decide, there would have been great doubt whether the last paper did not in fact revoke all the others. *Foy* v. *Foy*, 1 Cox, 164. But see *Jackson* v. *Jackson*, 2 Cox, 35.

2. Where a codicil is proved in the spiritual court, the court of Chancery is bound to receive it as a testamentary paper; but having done so the court is to construe it: and where the paper so proved was an acknowledgment of what the executors and others who signed the paper understood to be the will of the testator, it did not operate as a codicil to the will, though it was proved in th ecclesiastical court as a testamentary paper. *Gawler* v. *Standerwick*, 2 Cox, 15.

3. Testatrix made her will, disposing of real and personal estate, and signed and sealed it, and a clause of attestation in the common form was subjoined, but to which there was no subscription of witnesses; and the will was found at her death wrapped in an envelope on which was written, "I signed and sealed my will to have it ready to be witnessed the first opportunity I could get proper persons." This writing appearing to be incomplete, as if something more had been intended, is not a good will even as to the personal property. Parol evidence will be admitted as to the circumstances of the papers found, and to explain the intentions of the testatrix. *Walker* v. *Walker*, 1 Mer. 503.

4. Although there was evidence of lunacy of the testatrix till within four days of the execution of the will, the court, upon proof of a lucid interval, pronounced for its validity. *White* v. *Driver*, 1 Phil. 84.

5. A will by a lunatic, in her own handwriting, fairly written, and the contents of which were consistent with her affections at the time, and afterwards recognized and delivered by her, was established as written in a lucid interval. *Cartwright* v. *Cartwright*, 1 Phil. 90. 122.

6. A paper in the form of a deed of gift, beginning with, "I hereby give after

my death," but with neither executor nor residuary legatee named in it, was admitted to probate as a testamentary paper. *Thorold* v. *Thorold*, 1 Phil. 1.

7. A Scotch settlement in the form of a contract, but to take place on the death of one of the contracting parties, was admitted to probate. *Hog* v. *Lashley*, 1 Phil. 11 (*n*).

8. Paper in form of a deed of gift of all the deceased's estates to take place after death; administration was granted with the deed annexed. *Shergold* v. *Shergold*, 1 Phil. 10 (*n*).
Markwick v. *Taylor*, 1 Phil. 10 (*n*).

9. A deed of gift, not to take effect at the death of the writer, but on another contingency, the death of the wife's mother, or the sale of a certain estate, was held to operate as a will. *Corp* v. *Corp*, 1 Phil. 11 (*n*).

10. An unfinished and unexecuted paper, established as a will, in preference to a will of prior date, but formally executed, upon clear proof of its dispositions being consistent with the declared intention, and of its being prepared for execution, and the continuance of intention to execute being brought down till such execution was prevented by sudden death. *Scott* v. *Rhodes*, 1 Phil. 12.

11. An allegation, propounding four papers as containing together the will of the deceased, admitted to proof, although one of the papers appeared to be instructions merely, from which another of them was executed. *Sandford* v. *Vaughan*, 1 Phil. 39.

12. But at the hearing, the paper of instructions was rejected, and the three other papers established as the will, upon satisfactory evidence that they were executed by the deceased, with an intention of giving them a testamentary effect, and that he was a competent agent. *Ibid*, 1 Phil. 128.

13. An allegation, propounding an imperfect and unexecuted paper, which had been prepared some months before the death of the deceased, and which he had had opportunity to execute, but had not done so, nor referred to it during his last illness, rejected. *Ibid*, 1 Phil. 48.

14. Where the deceased sent for his attorney, for the purpose of preparing a will, and, from his weak state, interrogatories were put to him which he answered, and the interrogatories and answers were put to paper in his presence, and signed by the attorney and other witnesses; an allegation propounding the interrogatories and answers, as the will of the deceased, was admitted to proof. *Green* v. *Skipworth*, 1 Phil. 53.

15. To admit instructions for a will to probate, the court must be satisfied of the final intention of the deceased, and that he was prevented by the act of God alone from perfecting his will; and where the instructions were few and unfinished, not conformable to any former dispositions, nor supported by recent declarations, probate was refused. *Devereux* v. *Bullock*, 1 Phil. 60.

16. A will destroyed in the lifetime of the testator, but without his knowledge, substantiated and admitted to proof. *Trevelyan* v. *Trevelyan*, 1 Phil. 149.

17. Where the first part of the will was in the testator's hand-writing and the principal point in its contents had been often recognized by him, but the latter part, in the hand-writing of the executor, and contained a legacy in his favor; and such executor had been the chief agent in the execution of the will; in the absence of proof of instruction, or reading over, the first part of the will was established, and the latter part held not to be entitled to probate. *Billinghurst* v. *Vickers*, 1 Phil. 187.

18. Where capacity in the testator, at the time of the execution of the will is doubtful, there must be proof of instructions or reading over to establish it. *Ibid*, 1 Phil. 193.

19. Will by feme covert under a power executed exclusively in favor of the husband, in his presence, and supported by the testimony of one witness only, a friend of the husband, and under circumstances of great suspicion, set aside, and an earlier will in favor of the wife's relations established, there being also evidence of frequent and ineffectual attempts of the husband to get the latter will altered in his favor. *Moss* v. *Brander*, 1 Phil. 254.

20. Unfinished notes for a will, held not to be entitled to probate. *Moore* v. *De la Torre*, 1 Phil. 375.

21. Where the testator has left a regularly executed will, and a paper begun as a new will, which he has been prevented by the act of God from completing, the two may be taken together as the will of the deceased, and operation *pro tanto* given to the latter paper; but the proof of the final intention must be clear: and where

the unfinished paper contained no appointment of executors, disposition of the residue, date, or conclusion, and there was no proof of final intention, held that it could not control a will regularly executed a short time previously. *Carstairs* v. *Pottle*, 2 Phil. 30.

22. Where instructions for a will are finished, they are not revoked by an unfinished paper except *pro tanto;* and where there were propounded two papers, as a will and codicil, and also the beginning of a new will, but which new will contained no revocatory clause or disposition of the residue, the three papers wer established together as containing the will of the deceased. *Harley* v. *Bagshaw*, 2 Phil. 48.

23. A codicil signed and executed but three days after the execution of a perfect will, refused to be admitted to probate, in the absence of evidence that the deceased was aware of the nature and extent of the alteration; the effect of the codicil being to interfere with the annuity given by the will to the widow, and to leave the eldest son destitute. *Brounker* v. *Brounker*, 2 Phil. 57.

24. A testamentary paper in the handwriting of the deceased, and complete as to disposition, but containing no appointment of executor, and neither subscribed nor executed, admitted to probate upon evidence of final intention. *Read* v. *Phillips*, 2 Phil. 122.

25. Alterations in pencil, in the handwriting of the deceased, on a regularly executed and attested will, admitted to probate under circumstances showing deliberation and final intention. *Dickenson* v. *Dickenson*, 2 Phil. 173.

26. The presumption of law against a will, having an attestation clause unwitnessed, repelled by circumstances. *Harris* v. *Bedford*, 2 Phil. 177.

27. Probate of a will refused in favor of an intestacy, where the will was inconsistent with the circumstances and affections of the deceased, and upon proof, by the only witness, that it was not written with a testamentary intention. *Nichols* v. *Nichols*, 2 Phil. 180.

28. Instructions established as a will, where the intention to die testate clearly appeared, and the instructions were deliberately given by the deceased, approved of by him, and the final execution of which was prevented by the act of God. *Huntington* v. *Huntington*, 2 Phil. 213.

29. An extract of a letter, written just previous to a sea voyage, propounded as a codicil, but rejected, the testator having returned from the voyage, and lived years after, without having made any reference to, or recognition of, the letter, and having subsequently made a memorandum inconsistent with it. *Passmore* v. *Passmore*, 1 Phil. 216.

30. In a question of probate between two wills, the *animus revocandi* must be clearly established, or the last dated will uncancelled must remain in force; and where the republication of the will was sustained by equivocal acts only of the deceased, the last dated will was established. *Stride* v. *Cooper*, 1 Phil. 334.

31. An informal paper, entitled "Heads of a Will," but with formal corrections, dated and subscribed, with proof of recognition, established as a will. *Bone* v. *Spear*, 1 Phil. 345.

32. Instructions for a will were taken from the deceased, and a will prepared, but not executed, the execution being prevented by the delirium and death of the deceased. Upon clear proof of testamentary intention, the instructions were established, but a clause, which was inserted after the decease, was erased. *Wood* v. *Wood*, 1 Phil. 357.

33. A paper, in the hand-writing of the deceased, found in an envelope, addressed to the executors, and endorsed by the deceased, "this is my will," was established as a will, although there was a clause of attestation, but no witnesses, the court holding that informality to be supplied by the deceased putting it into an envelope, addressing and endorsing it, and other circumstances. *Richardson* v. *Clancy*, 2 Phil. 228 (*n*).

(*d*) *Nuncupative.*

1. The statute of frauds, respecting nuncupative wills, must be taken strictly, and therefore a *rogatio testium* is necessary; and where the deceased repeated his will twice before witnesses, and acquiesced in the propriety of sending for one of them, it was held not such a *rogatio testium* as would satisfy the statute. *Parsons* v. *Miller*, 2 Phil. 194.

2. And where the deceased summoned her children, and the daughter of the person in whose house she lodged, and repeated the will, but without calling upon them to bear witness, probate was refused for want of a sufficient *rogatio testium*. *Bennett* v. *Jackson*, 2 Phil. 190.

III. Recalling Probate.

1. Probate was granted of a will and four codicils, one of which was loosely worded, written in pencil, and neither signed nor dated; the probate of such codicil was called in and revoked, after having been in possession of the executor upwards of three years. *Rymes* v. *Clarkson*, 1 Phil. 22.

2. The court having granted probate of the will of a person living, but supposed dead, upon motion, the probate, which, upon discovery of the error, had been left in the registry of the court, was revoked, as granted in error; and, upon the personal appearance of the supposed deceased, the court, upon his petition, decreed the original will and probate, after being cancelled, to be delivered up. *In the goods of Napier*, 1 Phil. 83.

3. Next of kin held to be barred from calling in a probate, from the circumstances of their having been conusant of a prior suit, in which the validity of the same will had been contested by other parties. *Newell* v. *Weeks*, 2 Phil. 224.

4. There is no precise limitation of time within which a party will be admitted to recal probate: but, after a long time, such party must be proved to have been in a situation, which rendered it impossible or difficult to have proceeded earlier, as, being absent from the country, a minor, or labouring under imbecility, but, after a delay of nine years, and the party, in his answer to a suit in Chancery to establish the will and an account, had admitted the will and probate, and had acted under the decree, and received interest for five years, an application to controvert probate was refused. *Hoffman* v. *Norris*, 2 Phil. 230 (*n*).

IV. Revocation.

(*a*) Cancellation.

1. Residuary bequest was held revoked, by striking through with a pencil all the disposing part, leaving only the general description of the residue, with notes in pencil in the margin, indicating alteration, and a different disposition of certain articles. *Mence* v. *Mence*, 18 Ves. 348.

2. The testator made a codicil, revoking a part of his will respecting one son, and giving him one shilling only: also interlined his will to the same effect. He afterwards cancelled the codicil, but died, leaving the interlineation standing in his will. This was nevertheless held a perfect cancellation, both of the codicil and interlineation. *Utterson* v. *Utterson*, 3 V. & B. 122. Coop. 60.

3. By cancelling a will in his own possession, a testator cancels a duplicate in the custody of another person. *Rickards* v. *Mumford*, 2 Phil. 23.

4. A will cut from its margin, and through the attestation clause, and found in a box of the deceased to which no other person had access, with an unfinished paper, containing a different disposition, held to be revoked. *Moore* v. *De la Torre*, 1 Phil. 375.
Moore v. *Moore*, 1 Phil. 406.

5. Where a party signs the draft of a will, and afterwards executes a will from such draft, a revocation of the will revokes the draft also. *Moore* v. *De la Torre*, 1 Phil. 400.

(*b*) Deed, or Will, or Codicil, subsequently executed.

1. Testator having bequeathed his personal estate to his wife, with a contingent disposition to any child she might be *enseint* with, by an instrument executed in the East-Indies during his last illness, empowers A. & B. to invest any gold dust, &c. which he had in bottomry, &c. as they should think most advantageous, and deliver the same over to his wife, or her assigns, she running all risk: held, that this instrument, though it had been proved in the ecclesiastical court, was merely an act *inter vivos*, and not a revocation of the will. *Pigott* v. *J'Anson*, 1 Eden, 469.

2. Testator devises real and personal estate to certain uses, and afterwards, by deed, conveys it to the same uses, until marriage, and then to new uses, providing for his intended wife, and the issue of the marriage. After the execution of the deed, and before marriage, by codicil, attested by three witnesses, and directed to be annexed to his will, he imposes a forfeiture in case of his wife being disturbed, and then marries. Held, that the settlement revoked the will, which is republished by the codicil, and that the codicil was not revoked by the new uses springing on the marriage, nor by the

marriage, that being contemplated by the will as republished. *Jackson* v. *Hurlock*, 2 Eden, 263.

3. A deed, though obtained by fraud, was nevertheless held to be a revocation of a prior will. *Hawes* v. *Wyatt*, 2 Cox, 263.

But this decree was reversed on appeal to the Lord Chancellor. 3 Bro. C. C. 156.

4. An annuity held to be revoked and another substituted by a codicil, notwithstanding a misdescription; no other annuity or instrument appearing to which it could refer. *Benyon* v. *Benyon*, 17 Ves. 34.

5. A revocation of a devise, contained in a will by a subsequent codicil, must be by express words of revocation or inconsistency of devise; therefore a will, devising estates for life, without impeachment of waste, is not revoked by a codicil, directing the trustees to let until tenant for life married; such leases to be under restrictions, and, among others, not to be unimpeachable of waste. *Lushington* v. *Boldero*, Coop. 216.

6. Testator, by will, gave his plate, linen, china, pictures, live and dead stock, and all the residue of his goods, chattels, and personal estate to A.; and, by a codicil, revokes the bequest "of the residue," and gives "the residue of his personal estate" to B. This revokes the gift of the general residue only, and not that of the articles enumerated. *Clarke* v. *Butler*, 1 Mer. 304.

7. By a will, duly executed, testator directs his real estates to be sold; and bequeaths his residuary personal estate, and the produce of his real estate, after payment of his debts, among his children. By a codicil, not duly executed, he revoked such residuary bequest; but the court held that the will was still in force, the personal estate only being affected by the codicil. *Gallini* v. *Noble*, 3 Mer. 691.

8. A codicil not to be presumed a revocation unless it distinctly appears. *Griffiths* v. *Grieve*, 1 J. & W. 31.

9. Power given by will and codicil, to sell to certain persons, at a fixed price, revoked by a subsequent codicil, devising the same premises to trustees, to be sold for the payment of debts, and, subject thereto, upon the trusts of that will. *Bridger* v *Rice*, 1 J. & W. 74.

10. Whether a power in a will to sell several estates to certain persons, at a fixed price, is entirely revoked by a codicil, devising one of the estates to different uses—*Quære*. *Ibid.*

11. The testator, by will, appointed his three brothers executors, with a legacy to each in that character. By a codicil he revoked the appointment of one brother, Robert, and substituted his (testator's) wife in his stead. By a second codicil he revokes the appointment of his two brothers, "Robert," (whose appointment was revoked by the first codicil), "and Caryer," and substitutes a friend in their stead, expressing his intention to be, that the remaining brother should continue executor, and that the friend "should be joined with him only." Held, that the appointment of the wife as executrix was not revoked by the latter codicil. *Sherard* v. *Sherard*, 2 Phil. 251.

(c) *Alteration of Property by Conveyance, Transfer, or Contract.*

1. Feme covert, under a power, disposes by will of stock then vested in trustees, survives her husband, and takes a transfer of the stock into her own name. This does not operate as a revocation of the will, or ademption of the legacy. *Dingwell* v. *Askew*, 1 Cox, 427.

2. A devise of freehold and copyhold estate is revoked by a conveyance of the freehold to trustees and their heirs to secure a jointure, and, subject to a term for that purpose, to the devisor and his heirs, with a covenant to surrender the copyhold to the same uses. *Vawser* v. *Jeffrey*, 16 Ves. 519.

3. A mortgage in fee, after a devise, is a revocation *pro tanto* only. *Tucker* v. *Thurstan*, 17 Ves. 133.

4. A binding and valid contract for the sale of lands devised, is, in equity, as much a revocation of the will as a conveyance of the land would be at law: and where the contract was valid at the testator's death, though afterwards abandoned by the vendee, who, by decree, recovered back the part purchase money paid, the contract was nevertheless held a revocation. *Bennett* v. *Earl Tankerville*, 19 Ves. 170.

5. Devise of the equitable fee, under a contract to purchase, is revoked by the conveyance being afterwards made to a trustee and his heirs, to such uses as the devisor should appoint by deed with two witnesses, or will, with remainder to

him for life, to the trustee for the life of the devisor in trust for him, and to bar dower; and the ultimate remainder to the devisor in fee. *Rawlins* v. *Burgis*, 2 V. & B. 382.

6. A devise is not revoked by merely taking the legal estate. *Ibid*, 2 V. & B. 385.

7. Where a devisor, at the date of his will, is seized in fee, and afterwards makes a feoffment to such uses as he shall appoint, with remainder to himself in fee: such feoffment will be a revocation of the will. *Ibid*, 2 V. & B. 386.

8. But there is a distinction where partition is the sole object. *Ibid.*

9. An alteration of estate has had the effect of a revocation of a will, independent of intention. *Ibid*, 2 V. & B. 386.

10. A contract to sell a devised estate has the effect of revoking the devise. *Ibid*, 2 V. & B. 387.

11. If the owner of an unqualified equitable fee devises it, and afterwards the unqualified legal fee is conveyed to him, the will is not thereby revoked, because such conveyance was incident to the equitable fee devised; but if, after the will, he takes a qualified conveyance of the legal fee, for the purpose of preventing dower, it is a revocation of the will, it being a change in the quality of the estate, and not incident to the unqualified equitable fee. *Ward* v. *Moore*, 4 Mad. 368.

(*d*) *Subsequent Marriage, or birth of Children.*

1. Whether generally marriage revokes a will of real estate—*Quære. Jackson* v. *Hurlock*, 2 Eden, 273.

2. Testator, a widower, having a son and two daughters, by will gave all his real and personal estates in trust, subject to debts, for those children, and in case of their deaths then over: marriage and the birth of a daughter was held by the ecclesiastical court, a revocation of the will as to the personal estate, but it was not a revocation of the devise of the real estate. *Sheath* v. *York*, 1 V. & B. 390.

3. Marriage and birth of a child is an implied revocation of a will of personal property; and even a devise of land may be revoked by implication from a total change in the situation of the family; as, the devisee having no children at the date of the will, by his marriage, and the birth of an heir; upon an implied condition that the will should not operate in that event. *Ibid*, 1 V. & B. 397.

4. Marriage alone is not a revocation of a will, nor marriage with the birth of a child, if the will provides for children. *Wilkinson* v. *Adam*, 1 V. & B. 465.

5. A will by a married man having children, is revoked by the subsequent birth of other children left unprovided for, aided by circumstances concurring clearly to show that it was not the intention of the deceased that the will should operate. *Johnston* v. *Johnston*, 1 Phil. 447.

6. Marriage and the birth of a child, a presumptive revocation of a will made by a widower, and in favor of children of a former marriage. *Hollway* v. *Clarke*, 1 Phil. 339.

V. Republication.

1. Testator, having devised real and personal estate, by marriage settlement, conveyed it to the same uses till marriage, and then to new uses; by codicil attested by three witnesses, and executed after the settlement, and which contained a direction for it to be annexed to his will, the testator imposes a forfeiture in case of his intended wife being disturbed; and afterwards married; the will being revoked by the settlement was held to be republished by the codicil. *Jackson* v. *Hurlock*, 2 Eden, 263.

2. The appointment of a guardian by a will, not executed according to the statute of frauds, made good by a codicil written on the same sheet of paper, and referring to the will, so as to be considered a republication. *De Bathe* v. *Lord Fingal*, 16 Ves. 167.

3. A testator devised all his freehold and copyhold manors, &c., and real estate whatever, upon certain trusts; and gave and bequeathed to the trustees thereof, a sum of £35,000 to lay out in the purchase of lands, to be settled upon the same trusts. He afterwards contracts for the purchase of several estates, and by a codicil specifying some of the estates which he had so contracted to purchase, he devises them to the same trustees, upon the trusts of his will, and directs that the purchase monies shall be taken as part of the £35,000, and ratified and confirmed his will in all other respects. Held that the codicil amounted to republication of the will, so as to pass not only

the estates therein specified, but all the estates contracted to be purchased between the dates of the will and codicil. *Hulme* v. *Heygate*, 1 Mer. 285.

4. The testator, by his will, charges all his real and personal estate with payment of debts, and makes his son residuary legatee; he afterwards purchases copyhold estates, which are duly surrendered to the use of his will, and by codicil devises those copyholds to his son in fee. The codicil held a republication of the will, so as to subject those copyholds to the payment of debts. *Rowley* v. *Eyton*, 2 Mer. 128.

VI. Revival.

1. Where a will is revoked by marriage and birth of a child, the subsequent death of the child does not alter the presumption so as to revive the will. *Emerson* v. *Boville*, 1 Phil. 342.

2. Where a will had been executed from another of nearly similar import, but which was made for a temporary purpose, held that the revocation of the former will did not revive the latter, although the consequence of such decision was an intestacy. *Moore* v. *De la Torre*, 1 Phil. 375.
Moore v. *Moore*, 1 Phil. 406.

VII. Construction of

(a) General Rules.

1. A mistake in a will and codicil as to the amount of a fund out of which younger children are to be provided for, may be rectified on the evident intention of the testator. *Brackenbury* v. *Brackenbury*, 2 Eden, 275.

2. A court of equity will not supply words in a will, unless there be a palpable *error scribentis*. *Molesworth* v. *Molesworth*, 1 Cox, 75.

3. If the meaning of a will is ascertained, no reasoning from supposed cases will induce the court to make a different construction; but can only lead to a conclusion that the testator did not see all the consequences: but the absurdities, improbabilities, and inconsistencies which may arise out of cases, falling within one construction or another, are attended to, with a view of ascertaining the meaning. *Leigh* v. *Leigh*, 15 Ves. 103.

4. Rule of construction upon the effect of general words in a will, as applying to rents and profits undisposed of, reversions, &c. is to consider, as intended, what falls within the usual sense; unless there is something like declaration plain to the contrary. *Church* v. *Mundy*, 15 Ves. 406.

5. An express bequest or power cannot be controlled by the reason assigned; which, though it may aid the construction of doubtful words, cannot warrant the rejection of words that are clear. *Cole* v. *Wade*, 16 Ves. 46.

6. Of two inconsistent limitations in a will, the latter prevails. *Wykham* v. *Wykham*, 18 Ves. 421.

7. A general disposition by will is not restrained by a subsequent defective specification. *Chalmers* v. *Storil*, 2 V. & B. 222.

8. Construction of a will in favor of creditors is favored, when it does no violence to, nor strain the words. *Noel* v. *Weston*, 2 V. & B. 269.

9. Clear words in the operative part of a clause will not be controlled by ambiguous words in the introductory part. *Earl of Orford* v. *Churchill*, 3 V. & B. 67.

10. A will must be construed without any regard to the instructions given for preparing it.
Murray v. *Jones*, *Fawcett* v. *Jones*, } 2 V. & B. 318.

11. The sense of an ambiguous will must be collected from the words and the context, not from the punctuation. *Sanford* v. *Raikes*, 1 Mer. 651.

12. When the testator has a right to order a particular thing to be done, and says, in a testamentary disposition, that it is to be done, he must be taken as speaking imperatively, and not by way of recital merely. *Ibid.*

13. In the construction of a will, it is to be presumed that the testator was acquainted with the rules of law. *Langham* v. *Sanford*, 2 Mer. 22.

14. To authorize the rejection of words in a will, there must be an absolute impossibility of construing the will, those words being retained. The mere improbability that a testator could have meant what he has expressed, neither amounts to a cause for rejection, nor renders the devise void for uncertainty. *Chambers* v. *Brailsford*, 18 Ves. 368. 2 Mer. 25.

15. Inconvenient consequences, not in the contemplation of the testator at the time of making his will, cannot control

a bequest where the words used are clear. *Smith* v. *Streatfield*, 1 Mer. 361. *Defflis* v. *Goldschmidt*, 1 Mer. 419. 19 Ves. 568.

16. To authorize a departure from the words of a will, it is not enough to doubt whether they were used in the sense they properly bear; but the court ought to be quite satisfied they were used in a different sense, and to be able distinctly to say in what sense they were meant to be used. *Attorney General* v. *Grote*, 3 Mer. 321.

17. For the purpose of collecting the intention, every part of the will must be considered. *Gitten* v. *Steele*, 1 Swan. 28.

18. Distinction between wills and marriage articles: all the parties to the latter are considered purchasers to effectuate the intention; none of the parties mentioned in the former are so, as the intention of the testator is alone to be considered. *Stratford* v. *Powell*, 1 B. & B. 25.

19. There is no certain rule in cases arising on the construction of a will; they must always be construed according to the particular words, the circumstances, and views of the testator. *Crone* v. *Odell*, 1 B. & B. 460.

20. A will cannot be construed by adverting to a single clause; every thing bearing on the subject must be taken together. *Ibid.* 1 B. & B, 466, 480.

21. The particular intent, clashing with the general, in a will, must give way. *Ibid*, 1 B & B. 470.

22. Rule of construction: That the words used by a testator shall be interpreted according to their legal effect and operation, unless it clearly appear that he intended to use them in a different sense. *Winslow* v. *Tighe*, 2 B. & B. 204.

23. The recital of a gift in a will, as antecedently made, may amount to a gift, if there is nothing in the will to which such recital can refer. *Smith* v. *Fitzgerald*, 3 V. & B. 8.

(*b*) *Particular Words in.*

1. The same words may be differently construed, as applied to different descriptions of property, governed by different rules. *Elton* v. *Eason*, 19 Ves. 77.

2. Words of apparent condition in a will may be controlled by the context. *Murray* v. *Jones*, *Fawcett* v. *Jones*, 2 V. & B, 320.

3. Words importing contingency, applied to an inevitable event, as death, are to be construed to refer to the occurrence of the event under particular circumstances, as death at a given period, in the life of the testator, or of the tenant for life. *Galland* v. *Leonard*, 1 Swan. 164. 1 Wil. 129.

4. Words "trustees of inheritance" in a will, held to mean "trustees to inherit testator's estates for the execution of his will." *Trent* v. *Trent*, 1 Dow. 102.

5. In construing the words of a will, the intention of the testator, and not the technical import, is to be attended to. *Odell* v. *Crone*, 3 Dow. 69.

6. The words "in case any of my said children shall die," in a will, may be construed "when they shall die." *Ibid*, 73.

7. The word "effects," in a will, equivalent to "property" or "worldly substance." *Campbell* v. *Prescott*, 15 Ves. 507.

8. "Other effects," in general, mean effects *ejusdem generis*. *Hotham* v. *Sutton*, 15 Ves. 326.

9. Effect of the word "estate," in a will, as importing the absolute property. *Nicholls* v. *Butcher*, 18 Ves. 195.

10. The general expression "my estate," in a will, does not necessarily extend to the wife's dower. *Chalmers* v. *Storil*, 2 V. & B. 225.

11. Different construction of the word "surplus," from that which it commonly bears, may be inferred from expressions in the will. *Page* v. *Leapingwell*, 18 Ves. 466.

12. The words "child," "son," "issue," &c., *prima facie*, mean legitimate child, son, issue, &c. *Wilkinson* v. *Adam*, 1 V. & B. 462.

13. "Issue," an ambiguous term, sometimes confined to children, sometimes comprehending all descendants. *Earl of Orford* v. *Churchill*, 3 V. & B. 67.

14. General word "things," in a will, following particulars enumerated, to be confined to things *ejusdem generis* with those previously mentioned *Stuart* v. *Marquis of Bute*, 1 Dow, 73.

15. The word "survivors" is sometimes construed "others." *Barlow* v. *Salter*, 17 Ves. 482.

16. The word "family" is sometimes construed "heir," sometimes "next of kin": so also the word "relations." *Wright* v. *Atkyns*, 19 Ves. 299. Coop. 111.

VIII. PRACTICE.

1. Incapacity of the testator is matter upon which the Ecclesiastical court has the sole jurisdiction; and where the Ecclesiastical court has decreed against a will, as having been obtained by fraud, the court of Chancery will not order such will to be delivered up; for, being declared a nullity by the proper court, it can never be made use of. *Jones* v. *Frost*, 3 Mad. 1.

But see as to the practice of the Ecclesiastical court. 1 Phil. 83.

2. An order to the Registrar of the Ecclesiastical court to delive. a will to the solicitor or agent of the plaintiff, that it may be produced on the hearing of the cause, must be generally directed, "to the Registrar of the court," and the security for the return of the will must be approved of by the Master. *Qualey* v. *Qualey*. 4 Mad. 213.

3. Disputed wills ought to be lodged in the registry of the court for safe custody. *Cunningham* v. *Seymour*, 2 Phil. 250.

4. An allegation in support of a will, pleading affection to the party benefitted, testamentary declarations and capacity, was rejected in the court below, because not offered till after publication, but was admitted in the court of appeal. *Addams* v. *Kneebone*, 2 Phil. 124.

WITNESS.

(*See also* Tit. BANKRUPTCY VIII. *ante*.)

I. COMPETENCY.

(*a*) *Waver of objections to.*

1. At law, objection to the competence of a witness waved by pursuing his cross-examination after his interest appears, which formerly could be inquired into only on the *voir dire*; now, if interest comes out at any period the evidence is rejected. *Moorhouse* v. *De Passou*, 19 Ves. 434. Coop. 301. 19 Ves. 433.

2. Cross-examining a witness in equity, is no waver of an objection, on the grounds of interest, to the competency of such witness. *Moorhouse* v. *De Passou*, Coop. 300.

3. The plaintiff having examined a witness on the merits, and it appearing by his answer to a subsequent interrogatory, that he was interested: held that the objection to his evidence may be taken at any time previously to the depositions being read. *Perigal* v. *Nicholson* Wigh. 63.

See also *Murray* v. *Shadwell*, 2 V. & B. 401.

——— *Lee* v. *Atkinson*, 2 Cox. 413.

(*b*) *Who are competent or incompetent.*

1. Wife's evidence cannot be admitted against her husband. *Barron* v. *Grillard*, 3 V. & B. 166.

2. In equity, an executor in trust, a defendant and a mere formal party, is an incompetent witness for a co-defendant in a suit respecting the assets, he being liable to actions. *Bellew* v. *Russel*, 1 B. & B. 96.

3. But such executor is a competent witness at law. *Ibid*, 1 B. & B. 100.

4. A remainder-man is an incompetent witness to prove payment of a legacy charged on the estate. *Aldridge* v. *Lord Wallscourt*, 1 B. & B. 312.

5. An executor in trust, is an incompetent witness in equity respecting the assets, being interested to increase the fund. *Mulvany* v. *Dillon*, 1 B. & B. 400.

6. A witness to a will may give evidence against its probate, but such evidence against the effect of his own act must be received with great caution. *Nichols* v. *Nichols*, 2 Phil. 186. And see *Bootle* v. *Blundell*, 19 Ves. 504. —— —— *Howard* v. *Braithwaite*, 1 V. & B. 202.

7. In a cause of nullity of marriage, in the Ecclesiastical court, promoted by the father of a minor, the evidence of the wife of that father is admissible. *Buckeridge* v. *Gooch*, 2 Phil. 131.

(*c*) *Examination of Parties to the Suit.*

(*See also* (*a*) *I. supra.*)

1. Where the original bill was filed by three partners, who afterwards became bankrupt, and the assignees under the commission were desirous of examining one of the bankrupts as a witness, it was ordered that they should be at liberty to amend the bill by striking out the name of the bankrupt, as a plaintiff, and then to examine him as a witness, *de bene esse*. *Ewer* v. *Atkinson*, 2 Cox, 393.

2. An order to examine a defendant as a witness, saving just exceptions, is an order of course, and cannot be discharged upon a suggestion that the defendant by his answer appears to have an interest. The objection must be reserved until the hearing, when the deposition is offered to be read in evidence. *Lee* v. *Atkinson*, 2 Cox, 413.

3. An order may be obtained on motion by the defendant, for the examination of the plaintiff, saving just exceptions, the plaintiff consenting to be examined. *Walker* v. *Wingfield*, 15 Ves. 178.

4. Order by one defendant to examine another, is not of course after, as it is before, a decree. Where such an order was obtained, after a decree, to ascertain which trustee actually received money, all having signed the receipt, the court would not discharge it after two years standing, but required the parties to be examined without delay. *Franklyn* v. *Colquhoun*, 16 Ves. 218.

5. Order to examine a party, saving just exceptions, is of course on the suggestion of no interest, but will be refused where an interest appears. *Anonymous*, 18 Ves. 517.

6. An order may be obtained by a defendant to examine a co-defendant, on the allegation of no interest in the matter to be examined to; that being the true construction of the general form, that he is not interested, or not in the matters in question in the cause; and any objection to his evidence must be taken at the hearing. *Murray* v. *Shadwell*, 2 V. & B. 401.

7. The reason for permitting a defendant to be examined for a co-defendant, is that the plaintiff might unite distinct claims, with the view of depriving the parties of each others evidence. *Ibid*, 2 V. & B. 405.

8. The reason for requiring in the examination of one defendant by another defendant, a general allegation of no interest, or none in the matters in question in the cause, is, that though he may have no interest in the subject of examination directly, he may have an interest in the result, and such interest may be the effect of that examination. *Ibid*, 2 V. & B. 405.

9. The examination of defendants, executors, to interrogatories exhibited by the plaintiff, a co-executor, under the usual decree to account, &c. taken by commission, and returned to the Six Clerk's Office, being for the benefit of all parties, the other defendants, creditors and legatees, are entitled to the benefit of it, and to take copies. *Dyott* v. *Anderton*, 3 V. & B. 176.

10. If a plaintiff do not file his answer to interrogatories, the course is to make an order on him to shew cause why they should not be taken *pro confessis*. *Sir Watkin Lewes* v. *Morgan*, 5 Price, 458.

(*d*) *Effect of examining Parties.*

1. Plaintiff, by examining a defendant as a witness, precludes himself from obtaining any relief by decree against him; and

if, from the nature of the case, that defendant would be primarily liable to plaintiff, and another defendant only in a secondary degree, the plaintiff has lost his remedy altogether. *Thompson* v. *Harrison.* 1 Cox, 344.

2. A. files his bill against B. and C., and then dismisses his bill as to B., and examines him as a witness: it seems, that if the equity of the case should turn out to be, that A. ought to have relief as against C., and C. as against B., as A. has, by his own act, precluded C. from having his relief against B., A. shall be considered as having undertaken to stand with respect to C. in B.'s place for this purpose. *Bernal* v. *Marquis Donegal,* 3 Dow, 151.

3. When plaintiff examines a defendant as a witness, he can have no decree against him. *Ibid,* 3 Dow, 150.

4. By the order directing a party to be examined as a witness on the trial of an issue, no objection is waved except that which arises from his being a party in the cause. *Rogerson* v. *Whittington,* 1 Swan. 39.

5. Plaintiff examining a defendant as a witness, pays his costs. *Harvey* v. *Tebbutt.* 1 J. & W. 197.

II. Examination of.

(*a*) *Viva Voce.*

1. Court of Chancery has power to examine *viva voce.* *Turner* v. *Burleigh,* 17 Ves. 354.

(*See also* (*d*) 3. *infra.*)

(*b*) *By the Examiner.*

1. The examiners of the Court of Exchequer have no authority to examine witnesses at a greater distance from London than ten miles, unless by consent, and such consent must be express. They may examine witnesses brought up to town from any part of the kingdom: but whether a subpœna lies to bring the witnesses to London—*Quære.* *Ivatt* v. *Ward,* 2 Price, 81.

2. On an affidavit of the incapacity of a witness to attend the examiner, the court will, on motion, direct the examiner to attend upon the witness for his examination. *Anon.* 4 Mad. 463.

(*c*) *By Commission.*

1. Form of a separate examination of a married woman taken by commission. *Tasburg's Case,* 1 V. & B. 507.

(*d*) *Before the Master.*

1. Witnesses examined in the cause shall not be again examined before the Master without leave of the court. *Vaughan* v. *Lloyd,* 1 Cox, 312.

2. On a reference to a Master in bankruptcy, with liberty for him to examine parties on interrogatories, if he should think fit, it seems that if the Master should decline to examine any party when required, he should state the ground on which he so declined. *Ex parte Charter,* 2 Cox, 168.

If a Master, having examined witnesses upon interrogatories, under the usual order upon a reference, is not satisfied with their examination, he is at liberty, under the same order, to examine them *viva voce.* *Ex parte Saunderson,* 2 Cox, 196.

4. Where a plaintiff permitted a defendant to examine witnesses before a master, without a previous state of facts, he was held to have waved the objection. *Willan* v. *Willan,* 19 Ves. 590.

5. Under a decree directing inquiries, the Master cannot, without an order, examine a witness who has been examined in chief in the cause. *Ibid,* 19 Ves. 592. Coop. 292.

6. Depositions before the Master not to be known by the parties until the whole examination is concluded. *Ibid,* 19 Ves. 593.

7. On a reference under a decree, directing the parties to be examined on interrogatories, the Master made use of affidavits, the deponents being in America. The court, on motion, directed him not to proceed on the affidavits, with liberty, under the circumstances, to apply to the court, if, by death or otherwise, it became impossible to obtain, under a commission, the evidence of those who had made the affidavits. *Tillotson* v. *Hargrave,* 3 Mad. 494.

Where the reference is by order upon a charity petition, See *Ex parte Greenhouse,* 1 Wil. 18. 1 Swan. 60.

(*e*) *De bene esse.*

(*And see* Div. I. (*b*) 1. *ante.*)

(——— III. (*a*) 14. *post.*)

1. An order may be obtained for the examination of a witness *de bene esse,* upon the sole ground of his being the only person who has knowledge of a ma-

terial fact, although he is neither aged nor infirm. *Pearson* v. *Ward*, 1 Cox, 177. 2 Dick. 648. *Brydges* v. *Hatch*, 1 Cox, 423.

2. But the affidavit in support of the application should state the particular points to which his evidence is meant to apply. *Pearson* v. *Ward*, 1 Cox, 177.

3. Examination *de bene esse*, allowed in the usual cases of a single witness, the age of seventy, or dangerous illness, will not be extended to a prisoner charged with a capital felony. *Anon.* 19 Ves. 321.

4. When witnesses have been examined *de bene esse*, with a view to a trial at law, the examination of another witness will not be permitted without strong circumstances. *Palmer* v. *Lord Aylesbury*, 15 Ves. 299.

5. After a commission had been sent abroad for the examination of witnesses, a witness, before the commission had reached its destination, returned to England. A motion to examine such witness *de bene esse* was refused, and held that the bill must be amended. *Atkins* v. *Palmer*, 5 Mad. 19.

(f) *Pro interesse suo.*

1. An order to examine *pro interesse suo*, is only made to ascertain priority of incumbrancers, or when an interest is claimed in estates in the possession of a receiver or of sequestrators. *Dunn* v. *Farrell.* 1 B. & B. 124.

2. It is not the practice when tenants have been dispossessed, by an injunction, of lands, held by lease from the defendant, prior to the institution of the suit to which they were not parties, to permit them to be examined *pro interesse suo.* *Ibid*, 1 B. & B. 122.

3. An order, directing such examination, was set aside, and the plaintiff directed to proceed by ejectment to recover the lands. *Ibid.*

(g) *To Credit.*

1. After publication passed, the court will grant an order for examination by general interrogatories as to the credit of a witness in the cause, and as to such particular facts only as are not material to the issue; but in this case publication having passed five months, the order was granted, upon the terms of not delaying the hearing of the cause. The court does not previously consider whether the subject of the examination is material to the issue: but in that case will suppress the depositions. *White* v. *Fussell*, 19 Ves. 127.

2. Examination to credit, after publication passed, where the witnesses are in the country, by commission, on articles exhibited with one of the Six Clerks. *Ibid.*

3. An application for an examination to credit of a witness in the cause, is always regarded with great jealousy, and confined to facts, affecting credit and character only, and those not material to what is in issue. *Ibid*, 1 V. & B. 153.

4. An order to examine witnesses in support of articles, exhibited to discredit a witness, may be obtained, on notice and the Six Clerks' certificate, and without affidavit. *Watmore* v. *Dickinson*, 2 V. & B. 267.

5. An examination to credit is limited to the general question, whether the witness is to be believed upon his oath. *Anon.* 3 V. & B. 93.

6. An exceptive allegation must not merely shew slight variations in the testimony of witnesses, but must shew that they have wilfully sworn falsely, it must overturn their credit. *Verelst* v. *Verelst*, 2 Phil. 145.

7. A party cannot lie by and contradict in exception that which he might have contradicted, before publication, in plea. *Ibid.*

III. COMMISSION TO EXAMINE.

(*And see* Tit. PRACTICE, *ante*.)

(a) *Application for, where granted.*

1. A commission for the examination of witnesses to falsify an examination of a party before a Master, cannot be had without the usual certificate from the Master of the necessity of such a commission. *Bearcroft* v. *Berkeley*, 2 Cox, 108.

2. The practice of the Court of Exchequer is not to grant a commission to examine witnesses abroad until after answer: as in the cases on policies of insurance, where the bill prays equitable relief, viz. to deliver them up for fraud, &c. though the suit never goes beyond the motion to dissolve the injunction, as an action will try the question. *Noble* v. *Garland*, 19 Ves. 375.

3. Commission to examine witnesses abroad, executed and returned; the defendant, who had not interrogatories pre-

pared, not having had the opportunity of cross-examining, a new commission was granted for that purpose, the defendant stating whom he wished and undertook to cross-examine; but the plaintiff's depositions not suppressed. *Campbell* v. *Scougal*, 19 Ves. 552.

4. There are instances, after commission executed, of a new commission granted or refused to a defendant not having interrogatories prepared, it being a subject of discretion, to be granted with very deliberate attention to the circumstances, not suppressing the depositions taken; but, if necessary, and a reasonable account given why the defendant's case was not brought forward under the first commission, allowing him a new one for cross-examination, and the direct examination of his own witnesses. *Ibid*, 19 Ves. 556.

5. A commission for the examination of witnesses abroad may issue before answer, where the suit is merely for a discovery and commission. *Noble* v. *Garland*, Coop. 222. 19 Ves. 372.

6. But the court refused to issue a commission to examine witnesses abroad when applied for before the time for answering had expired, as the practice would not warrant it. *Cheminant* v. *De La Cour*, 1 Mad. 208.

7. A commission abroad to examine witnesses cannot be obtained, unless the defendant is in contempt, or has answered. *King* v. *Allen*, 4 Mad. 247.

8. Where the plaintiff had sued out a commission to examine witnesses under which the defendant had cross-examined, but not examined in chief; the defendant, who was entitled to examine in chief under the plaintiff's commission, may sue out another commission in the same suit for the examination of his own witnesses. *Sheward* v. *Sheward*, 2 V. & B. 116.

9. A commission to examine witnesses abroad, pending an injunction against an action, is usually made returnable without delay; and an order for such commission may be obtained without paying the money into court. *Cock* v. *Donovan*, 3 V. & B. 76.

10. After examination of witnesses, and before publication, the court will allow a commission to defendant to examine witnesses as to the fact, whether the witnesses already examined were interested, upon affidavits, that the defendant, his solicitor, and agent, are ignorant of the depositions, and defendant paying the expenses of the motion and the commission. *Vaughan* v. *Worrall*, 2 Mad. 322.

11. A commission may be obtained for the examination of witnesses abroad in aid of an action for a libel. *Thorpe* v. *Macauley*, 5 Mad. 218.

12. Notwithstanding the jurisdiction assumed by the courts of common law to grant commissions for the examination of witnesses, it is always competent for a party to file a bill for a commission to examine witnesses. *Ex parte Coles*, Buck, 298 (*n*).

13. The court enlarged publication, and granted a new commission to examine the defendant's witnesses, upon affidavit that the evidence of the new witnesses was material, and the defendant paying the plaintiff's costs and the expenses of his attendance on the new commission, if he should confine himself to cross-examination under it. *Dingle* v. *Rowe*, Wigh. 99.

14. The court will grant a commission to examine a witness *de bene esse* while in this country, on a bill filed, and affidavit that he is under the necessity of going abroad before the trial come on. *Delius* v. *Rougemont*, 1 Price, 449.

(*b*) *Affidavit in support of.*

1. The affidavit of the solicitor for a defendant will be received in support of a motion for a commission to examine witnesses residing abroad; and it will be sufficient if he swear that he is informed of, and believes the statements in the bill, if he also add that his belief is founded on documents in his possession; and that from the nature of the defence involving the question of what country the ship, the subject of the suit, belongs to, he considers the commission necessary. *Laragoity* v. *Attorney General*, 2 Price, 172.

2. The affidavit of an insurance broker, the agent of underwriters sued on a policy, will not be received in support of an application by them for a commission to examine witnesses abroad. *Bonham* v. *Leigh*, 5 Price, 444.

3. The party himself, or his solicitor, should make the necessary affidavit in all such cases, and it should contain very satisfactory statements. *Ibid.*

4. In the affidavit used on applying for a commission to examine witnesses

abroad, it is not necessary to state that the applicant would have a good defence, if he could procure the testimony of the witnesses proposed to be examined by him, or to shew that there are necessary facts within their knowledge, required by the party to be proved on his defence. *Woodhead* v. *Boyd*, 6 Price, 101.

(*c*) *Costs.*

1. Costs of discovery refused, a commission having gone out; and defendant taking the benefit of it cannot have all the costs. *Noble* v. *Garland*. 19 Ves. 376.

2. Where a commission is sued out by the defendants for examination to credit, and is not executed till after the hearing, the defendants must pay the costs. *White* v. *Fussell*, 1 V. & B. 151.

IV. Commissioners.

(*a*) *Power and Duty.*

1. Where one of the commissioners in a commission to examine witnesses refuses to qualify, he cannot be present at the examination, but another must be substituted. *Shaw* v. *Lindsey*, 15 Ves. 380.

2. Commissioners for examination of witnesses are to act impartially, though to a certain extent they have under their particular care the interest of the party appointing them. *Campbell* v. *Scougal*, 19 Ves. 553.

3. A solicitor's clerk is within the policy which excludes solicitors from taking part in the execution of a commission for the examination of witnesses; and therefore depositions were suppressed, where it appeared that a clerk to the solicitors of the defendants acted as clerk to the commissioners. *Cooke* v. *Wilson*, 4 Mad. 380.

4. Where the commissioners, under a commission from the Ecclesiastical court, administered the oath in the presence of two witnesses, instead of a notary public, the commission was held to be insufficiently executed, although no notary public was resident within ten miles. *Jones* v. *Jones*, 2 Phil. 241.

V. Further, or Re-examination.

(*See also* Div. II. (*e*) 3, *ante.*)

1. It is a matter of great delicacy to alter a deposition after publication, and nothing will justify it but the strongest conviction of mistake; the slightest ground for supposing an indictment for perjury could be maintained, which could not be in a case of mere mistake, is sufficient reason for not altering it; therefore, in case of a witness having sworn to the service of a subpœna in November instead of October, the court, upon clear proof of the mistake, ordered the deposition to be amended and resworn. *Rowley* v. *Ridley*, 1 Cox, 281. S. C. 2 Dick. 677.

2. The re-examination of a witness is not of course, but at the discretion of the court, on special application. *Purcell* v. *M'Namara*, 17 Ves. 434.

3. An order was obtained on motion, for the examination of a defendant upon interrogatories, who had been examined and cross-examined; but the order was restrained to such of the points in the cause, to which the witness had been examined, as the Master should think reasonable, and the Master to settle the interrogatories. *Ibid.*

4. The object of taking evidence in secret is to prevent attempts to support defective evidence already given; but further inquiry, when necessary, is not refused. *Walker* v. *Wingfield*, 18 Ves. 443.

5. After publication passed and prior to a decree, no farther examination is allowed without leave of the court, which is not obtained without great difficulty, and generally confined to some particular facts. *Willan* v. *Willan*, Coop. 292. 19 Ves 592.

6. After examination under decree before the Master, concluded and made known, further examination not permitted, without an order on surprise clearly established. *Ibid*, 19 Ves. 590 Coop. 291.

7. The Master, armed by decree expressly with power of examining the parties as he shall think fit, can reexamine a party whom he has before examined. *Ibid*, 19 Ves. 593. Coop. 293.

8. A witness will not be allowed to be re-examined before publication passed in the cause; nor be allowed to explain or correct his former evidence, after he has left the presence of the commissioners. *Lord Abergavenny* v. *Powell*, 1 Mer. 130.

9. In a suit to perpetuate testimony, motion for a further examination of wit-

nesses, as to facts lately discovered, refused on the ground that a demurrer to a supplemental bill for the same purpose had been allowed. *Knight* v. *Knight*, 1 J. & W. 165.

10. A witness, after his examination on the part of the plaintiff, having seen in the possession of the defendant a written paper signed by himself, which was inconsistent with his testimony; a motion on the part of the plaintiff to re-examine the witness, and for a production of the written paper on his re-examination was refused. *Bolt* v. *Birch*, 5 Mad. 66.

11. If the re-examination of a witness is ever permitted in the Ecclesiastical court, it is only with extreme jealousy; an application to re-examine, upon the ground of ill health and failure of memory at the time of examination, was refused, where the witness had been fully and carefully examined, and the deposition read over to him on the night on which it was taken, and again on the following day, without objection. *Reeves* v. *Reeves*, 2 Phil. 117.

12. The court gave leave to the relators in an information, to examine witnesses to prove that the original will of the testator named in the cause could not be found, and to prove an entry of such will in the registry book of the spiritual court; although the cause stood at the head of the paper for hearing, and the defendant did not consent. *Attorney General* v. *Thurnall*, 2 Cox, 2.

VI. Cross-examination.

1. There may be cross-examination as to the execution of deeds; in this case the order was made in the alternative, either that the examiner in whose hands the deeds were, should cross-examine; or that they should be delivered to the examiner for the other party, for that purpose. *Turner* v. *Burleigh*, 17 Ves. 354.

VII. Protection of.

(*a*) *Answering to his own prejudice.*

1. Witnesses are not compelled to answer interrogatories, which have a direct tendency to subject them to penalties, &c. or which have such a connection with them as to form a step towards it. *Paxton* v. *Douglas*, 16 Ves. 239.

2. The question should not be made upon exception to the Master's certificate, that he had allowed the interrogatories, but after the witness has answered to the certificate that the examination is or is not sufficient. *Ibid*, 16 Ves. 242.

3. The old practice was for the court to inform a witness that he was not bound to answer, but now he is left to his own discretion. *Ibid.*

4. There is protection generally in every stage of the proceedings in a court of Equity, against answering any question, or any one of a series of questions, having a direct tendency to criminate the party, or subject him to penalty, &c., or forming one step towards it. *Ibid*, 19 Ves. 225.

(*b*) *Arrest and Discharge.*

(*See* Tit. Bankruptcy VIII. *e.* p. 53 *ante.*)

1. A witness, as a person going to make an affidavit before a Master, is privileged from arrest. *List's Case*, 2 V. & B. 374.

2. The application to discharge a privileged person from arrest, must be made to the court, of which the proceeding is a contempt. *Ibid.*

3. A witness actually in attendance on the commissioners of bankruptcy, or arbitrators upon an arbitration, under a reference by rule of court, is protected from arrest. *Ex parte Temple*, 2 V. & B. 395. 2 Rose, 23.

VIII. Interrogatories.

(*See also* Tit. Practice, *ante.*)

1. As to the modern practice in country causes to supply interrogatories from time to time, until the supply of witnesses is exhausted—*Quære.* *Campbell* v. *Scougall*, 19 Ves. 554.

2. It was formerly the practice to prepare all the interrogatories, both for cross-examination and original examination of defendant's witnesses, before commission opened. *Ibid*, 19 Ves. 555.

3. Interrogatories for the examination of a party settled by the Master. *Willan* v. *Willan*, 19 Ves. 593, 598.

IX. Depositions.

(*See also* Tit. Practice, *ante.*)

(*a*) *Where admitted in Equity.*

1. The depositions of a defendant, examined without service of the order for liberty so to do, cannot be read; being a

surprise on the other party. *Mulvany* v. *Dillon*, 1 B. & B. 413.

2. Depositions in an old cause admitted, although neither bill, answer, nor decree could be found. *Byam* v. *Booth*, 2 Price, 234.

3. The court will not make an order on motion that a plaintiff in a cross cause, (who has not examined witnesses on his part in the original cause, after having obtained an order to enlarge publication), shall be at liberty to read depositions taken in his behalf in the cross cause, after publication of the depositions taken on the behalf of the plaintiff on the hearing of the original cause, on an application to put the cross cause into the short paper for that purpose, supported by affidavit of total ignorance on the part of all parties interested, and their attornies, of the depositions published. *Ridley* v. *Obee*, 3 Price, 26.

4. Nor will they depart from their general rule in that respect, however satisfactory in point of fact the affidavit in support of such a motion may be. *Ibid.*

5. Depositions in a cross cause, taken after publication of those filed in the principal cause, not admissible in evidence, on the hearing of the principal cause. *Taylor* v. *Obee*, 3 Price, 83.

6. The deposition of a witness, who died before he had been repeated or examined on the interrogatories of the adverse party, was admitted. *Hill* v. *Bulkeley*, 1 Phil. 280.

(*b*) *Where read at Law.*

1. The deposition of a witness above eighty years of age, and who is unable to attend in person, may be read on the trial of an issue, but application for leave to read such deposition should be made to the judge at the trial, not to the court which directs the issue. *Jones* v. *Jones*, 1 Cox, 184.

2. Depositions will be ordered to be read on the trial of an issue, if the witness should be then dead, or in such a state of health as to be unable to attend; without such an order the whole record must be read to make the depositions evidence at law. *Palmer* v. *Lord Aylesbury*, 15 Ves. 299.

3. Depositions taken *de bene esse*, will not be published, on the ground that the witness, from a bodily injury, is incapable of attending the trial at law; but upon the affidavit of a surgeon as to the probability of his attendance, an order may be obtained for an officer to attend at the trial, with the original depositions to be tendered, if the incapability of the witness to attend should be proved. *Andrews* v. *Palmer*, 1 V. & B. 21.

4. Order was obtained, after a decree, to read on a trial, directed at law, the depositions of witnesses, who were proved by affidavits, from age and infirmity, incapable of attending without great danger of death, with liberty to examine them on interrogatories in the mean time, and the depositions of such other persons as should be proved at the trial to be dead, or unable to attend; such order, whether to be made in equity, or left to the judge at law, depending upon sound discretion. *Corbett* v. *Corbett*, 1 V. & B. 335.

5. Where depositions are taken in a cause between the same parties, and proof is given at the trial that the witnesses are unable to attend, the depositions may be read without an order, the party producing the bill, answer, and all proceedings; but in a bill ancillary to a suit in equity, an order may be obtained, directing the court of law to receive the depositions, without any other proof than that it is the deposition. *Ibid*, 1 V. & B. 336.

6. When the depositions of a witness examined *de bene esse*, (to the taking of which irregularity might have been effectually objected before the hearing of the cause,) have been read at the hearing, it is of course, if any issue is directed, to order them to be read upon the trial; upon which, otherwise, they could not be evidence, being depositions taken before issue joined; and therefore a motion to discharge such an order for irregularity, on the ground that one of the commissioners was law-agent of the plaintiff in a suit in Scotland, relating to the same matters, was refused; not being made till after the depositions were published, and had been read at the hearing. *Gordon* v. *Gordon*, 1 Wil. 155. Swan. 166.

7. Semble, if the interval between publishing the depositions and the hearing of the cause is short, the court, upon motion, will grant time to examine whether the depositions published have been regularly taken. *Ibid*, 1 Wil. 159. 1 Swan. 171.

(*c*) *Suppression of.*

1. Depositions of an agent to the plaintiff, and which are brought before the commissioners ready prepared, will be suppressed before publication, if such facts are known to the court; and whether such knowledge comes by means of the commissioners, or otherwise, the court must act upon it. *Shaw* v. *Lindsey*, 15 Ves. 380.

2. Notwithstanding the depositions were suppressed, they would be opened in a case of necessity, as if the witness could not be examined again. *Ibid.*

3. When a witness, during her examination, uses full minutes in writing, originally her own, but put into method by her attorney, her depositions will be suppressed. *Ibid.*

4. Depositions taken on the part of the plaintiffs were suppressed as against some of the defendants, on the ground of no notice until after publication; but upon evidence that the omission arose from a mistake of the clerk of the plaintiff's solicitor, in giving at the Examiner's Office the name of the clerk in court for others of the defendants, as the name of the clerk in court for all the defendants, in consequence of which the plaintiff's witnesses were produced only at the seat of the clerk in court so named; and upon the Examiner's certificate that the name of that clerk in court only was delivered to him; the Lord Chancellor gave to the defendants the option, either of permitting the plaintiff to re-examine the same witnesses, or of allowing the depositions to stand, with liberty for the defendants to cross-examine those witnesses, and to examine others. *Cholmondeley* v. *Clinton*, 2 Mer. 81.

5. The Court of Chancery has an undoubted right to rectify a mere slip in any of its proceedings. *Ibid*, 2 Mer. 85.

6. Where there was a reference, under a decree, to enquire respecting lasting improvements done to the estate by the defendant, and the plaintiff permitted defendant to examine witnesses without bringing in a previous state of facts; the court refused to suppress the depositions so irregularly taken, but held that the plaintiff not making the objection at the time of examination had waved it. *Willan* v. *Willan*, 19 Ves. 595.

(*d*) *Witnesses abroad, how taken and returned.*

1. It is an order of course respecting depositions, which have been taken in India, where no proper stamps can be had, that such of them as were taken on paper may be engrossed on parchment, and duly stamped; and such of them as were taken on parchment may be duly stamped. *Chitty* v. *East-India Company*, 2 Cox, 190.

2. Where the ship was lost in which depositions, taken under a commission executed in Lisbon, were sent to England, the court ordered the commissioners to transmit the drafts of the depositions, and to certify the circumstances of the return of the commission, but would not make any order for the reading the drafts on the hearing of the cause, until after the commissioners had made their return and certificate. *Burn* v. *Burn*, 2 Cox, 426.

WRIT.

(*See* Tit PRACTICE, *ante.*)

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